



What's New in HR Law

Search and Seizure of Workplace Computers did not Breach Employees' Privacy Rights

November 6, 2018

BOTTOM LINE

Searching an employee's workplace computer may not breach the employee's privacy rights in cases where there is a "diminished expectation of privacy," provided the employer has a good reason to conduct the search and the search is performed in a reasonable manner.

The Facts: A School Board searched the workplace laptops of two teachers

Management at York Region District School Board (the "Board") heard rumours that two teachers employed by the Board (the "Employees") were maintaining an online log on which they were posting untrue and inappropriate information about their co-workers. Based on reports by the Employees' co-workers, the Board had good reason to believe that the Employees were specifically using classroom laptops to maintain the online log.

On December 16, 2014, the Principal at the Employees' school entered the classroom of one of the Employees to return an educational manual; he noticed that the Employee's work laptop was on. He turned the laptop screen on and saw an open file called "Log Google Docs." Suspecting that this was the online log that had been reported to the Board, the Principal used his cellphone to take pictures.

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

Based on the evidence the Principal captured on his cellphone, the Board subsequently seized and searched both Employees' classroom laptops. The Board also conducted an investigation, and ultimately issued written reprimands to the Employees.

Union claimed that the Board had breached the collective agreement

The Elementary Teachers' Federation of Ontario (the "Union") filed a grievance alleging that the Board had breached the collective agreement. The Union asserted that by accessing digital information without reasonable cause, the Board had violated the Employees' rights to privacy. Further the Board had used the captured information as the basis of an investigation that led to discipline.

The Union did not dispute, however, that the Employees' classroom laptops were Board property and therefore subject to the Board's Appropriate Use of Technology Policy and Procedure. Both Employees had signed a declaration stating that they had reviewed all Board policies, including the Board's Appropriate Use of Technology policy.

Arbitrator's Decision: circumstances created a diminished expectation of privacy

Arbitrator Gail Misra concluded that the Board had not breached the Employees' privacy rights by searching and seizing the Employees' classroom laptops. The Arbitrator confirmed that an employee's personal privacy interests must be balanced against the employer's right to manage its operations. In this case, the Arbitrator held that the balancing favoured the employer.

Arbitrator Misra noted that while workplace "use of technology" policies and practices do not fully remove an employee's right to privacy with respect to digital information stored on workplace electronics, they can substantially diminish an employee's expectation of privacy.

The Arbitrator found that the expectation of privacy was diminished in this case because:

1. The online log was on a laptop meant for classroom use, and it could be accessed by students, any teacher in the classroom, and the Principal. As the classroom laptops were not exclusively for the use of the Employees, it was not reasonable for the Employees to expect to have complete privacy with regards to information stored on them.
2. The online log was left open and unattended on the laptop; therefore, any expectation of privacy was diminished to the point that the Employees' rights were not breached by the Board's search.

The Arbitrator found that the Board had reason to believe they would locate the online log on the Employees' laptops and that the laptops had been used in contravention of Board policy. Therefore, the Board's search was not unreasonable in the circumstances, and the Board had not breached the Employees' reasonable expectation of privacy

Check the Box

Ultimately, determining whether a search of an employee's workplace electronics breaches an employee's privacy must be assessed on a case by case basis. Workplace policies, practices, and

the context in which an employee's personal information is placed on a computer all contribute to determining whether the employee has a diminished expectation of privacy.

This decision demonstrates the importance of having a clear Workplace Technology Use policy that is reviewed and signed by all employees. When establishing Workplace Technology Use policies and practices, employers should:

- Ensure the policy clearly states that the employee's workplace electronics can be monitored by the employer;
- Establish a right of access by management to all workplace electronics;
- Discourage employees from storing biographical or financial information on workplace electronics, or using workplace electronics for personal matters;
- Conduct search and seizures of an employee's workplace electronics only in circumstances where there is clear evidence that the employee is using the device inappropriately.

Date: August 7, 2018

Forum: Ontario grievance arbitration

Citation: *York Region District School Board v Elementary Teachers' Federation of Ontario*, [2018] OLAA No 273.

Need more information?

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