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## **A 'wholly mistaken assumption': arbitrator rules video surveillance evidence must be admitted**

Can video surveillance evidence gathered by employers to support workplace discipline or discharge be admitted into evidence at arbitration? Most Canadian arbitrators have held that the answer should be determined using a test involving two questions:

- Was it reasonable, in all the circumstances, to request surveillance?
- Was the surveillance conducted in a reasonable manner?

Implicit in this approach is a balancing of employees' interest in protecting their right to privacy against the right of employers to investigate suspected misconduct (see "Video surveillance: Invasion of privacy or reasonable response to misconduct?" on our Publications page). In a recent award, an Ontario arbitrator has forcefully stated the minority position of arbitrators with respect to admitting such evidence, which is that relevant and reliable evidence should be admitted, whether or not an employee's privacy rights have been breached by the surveillance.

The award, *General Electric Canada v. Communications, Energy and Paperworkers of Canada, Local 544* (M. Bendel – January 11, 2007), concerned the discharge grievance of an employee terminated for fraudulent use of sick leave. The grievor, an employee with 27 years' seniority, had been off work because she injured her back. After 10 days, the employer offered her modified duties, but the grievor declined, saying that she could not drive because of the medications she was taking and the pain and drowsiness she was experiencing.

However some two days after she took sick leave, the employer ordered that she be covertly videotaped. On six occasions over several weeks, the employer gathered video evidence showing her driving, walking, shopping and taking out garbage. One sequence showed her inside her house, ironing clothes while dressed in a night gown.

The union objected to the admission of the video evidence and pointed to the predominant view of arbitrators that such evidence should generally be excluded based on a balancing of the parties' interests. The union pointed also to the inequality of resources between the employer and the grievor; the invasion of the grievor's privacy at her home; and the early decision of the employer to order the surveillance before having approached the grievor's physician or discussing the issue of modified duties with her. The employer countered that, because the evidence was relevant and admissible in court, it should also be admitted at arbitration.

### **ARBITRATOR: NO DISCRETION TO EXCLUDE RELEVANT EVIDENCE**

The arbitrator held that because a court would have no discretion to refuse to admit relevant evidence, neither could an arbitrator. In so ruling, the arbitrator was quite aware that he was not following the majority view of Canadian arbitrators that they do have this discretion.

In support of this view, the arbitrator cited a 1993 decision of the Supreme Court of Canada in *Université du Québec à Trois-Rivières v. Larocque*. In that case the arbitrator did not allow the admission of evidence of the grievors' unsatisfactory performance because it would have changed the grounds on which discipline had been imposed. The Court held that the arbitrator's exclusion of the evidence was a breach of natural justice, meaning that one of the parties had been denied a fair hearing.

The arbitrator also pointed to two other judicial decisions in which courts in New Brunswick and Ontario quashed tribunal decisions on the ground that failure to admit relevant evidence constituted a breach of natural justice. In the arbitrator's view, these decisions demonstrate that the principle of allowing each side a full hearing trumps labour relations considerations, including employee privacy, which are cited by many arbitrators as justifying the exclusion of video surveillance evidence:

"It follows that the discussions in many of the arbitral awards, on the existence of a right to privacy (or an expectation of privacy) in various jurisdictions, on the parameters of such an interest, on the actionability of invasions of privacy, and on the reasonableness of resorting to videotape surveillance of an employee suspected of sick leave abuse, are quite beside the point. Interesting though these debates may be, I express no views on them. They proceed on the wholly mistaken assumption that there exists a discretion to exclude evidence that is tainted by an invasion of privacy."

In the result, the arbitrator dismissed the union's objection to the admission of video surveillance evidence.

### **In Our View**

It should be noted that the arbitrator in this case has stated this view of the admissibility of video surveillance evidence before, so it is not clear that this award presages a general move by other arbitrators toward this position. Further on the facts of this case, there is a good chance that many other arbitrators might have ruled differently and excluded the evidence. This is because there was evidence that the decision to conduct surveillance was not reasonable since it was taken before other alternatives were explored, and before the grievor was offered modified duties. Therefore at the time the surveillance decision was made there were limited grounds for believing that the grievor's claim was fraudulent. As well her seniority and relatively clean disciplinary record may have worked against the employer.

For further information, please contact [Paul Lalonde](#) at (613) 940-2759.

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