Video surveillance: Invasion of privacy or reasonable response to misconduct?

Date : January 1, 1999

Employers seeking to pre-empt, detect or verify wrongdoing by employees may resort to the use of video surveillance. Such employers should bear in mind, however, that even where the surveillance has produced reliable, relevant evidence of misconduct, that evidence may be ruled inadmissible in subsequent proceedings. Unionized employers should also be aware that installation of a general video surveillance system may be ruled a violation of the collective agreement.

In this article, *FOCUS* will examine what the law has to say about video surveillance in the workplace and the pitfalls associated with its use.

ADMISSIBILITY OF VIDEOTAPED EVIDENCE

As a legal issue, video surveillance is most often raised in the context of the use of videotaped evidence to support discipline imposed on an employee, often for abuse of sick leave. The surveillance may occur within or outside the workplace, and may be carried out by company personnel or hired investigators. In virtually all cases, the surveillance is clandestine.

The issue is whether the videotape obtained is admissible as evidence at arbitration or in wrongful dismissal proceedings. It will come as little surprise to unionized employers that most arbitrators apply a test that balances the interests of the parties. The balancing exercise is based on the view that employees' right to privacy is fundamental and basic, but not absolute.

Unionized workplaces

Majority view of arbitrators: video surveillance a last resort

While the prevailing approach among arbitrators to the admissibility of videotaped evidence has its roots in earlier cases involving issues such as employee searches and compelled drug tests, it in fact dates from two British Columbia cases decided in the early '90s. These cases articulated a test that balanced employees' interest in protecting their right to privacy against the right of employers to investigate suspected misconduct.

The B.C. arbitrators' test for determining whether to admit videotaped evidence was eventually distilled down to two questions:

1. Was it reasonable, in all the circumstances, to request a surveillance?
2. Was the surveillance conducted in a reasonable manner?

Many arbitrators hold that, in order to answer these questions properly, it is usually necessary to assess all the evidence, including the videotapes, before making a determination about admissibility.

The B.C. approach has been adopted by arbitrators across Canada. The problem is knowing what result to expect from a particular set of facts. In determining whether the decision to place the grievor under surveillance was reasonable, arbitrators will look at some of the following factors:

- whether other alternatives were considered before the surveillance was ordered, such as confronting the grievor about the alleged misconduct or, where abuse of sick leave is suspected, offering the employee modified work;
- whether there were reasonable grounds for suspecting fraudulent conduct by the grievor (making confronting the grievor of little value);
- the grievor's seniority;
- the grievor's disciplinary record, if any, particularly if it involves dishonesty;
- whether the grievor was co-operative in supplying medical information about his or her absenteeism.

The cases have less to say about the second branch of the test, the reasonableness of the surveillance itself. The fact that a company hires an outside investigator will not, in itself, make surveillance unreasonable. However, in one case where investigators posed as customers, insisted that the grievor provide hang-gliding lessons and, with his permission, videotaped one of his flights, the arbitrator ruled that the employer had acted unreasonably. The arbitrator held that, once the employer had evidence that the grievor had agreed to supply the lessons, it should have confronted him with his abuse of sick leave rather than resorting to such intrusive measures.

Minority view of arbitrators: relevant evidence should be admitted

Despite the growing arbitral consensus that the admission of surreptitiously videotaped evidence requires a balancing exercise subject to the two-part test described above, at least one prominent arbitrator has taken a position at odds with this approach. In *Re Kimberly-Clarke Inc. and IWA-Canada, Local 1-92-4*, a 1996 decision, Arbitrator Bendel expressed the view that, while arbitrators do have the power to exclude evidence that would be admissible in court, they should be extremely reluctant to do so. Pointing out that the common law traditionally did not bar the admission of even illegally acquired relevant evidence, the arbitrator held that relevant and reliable evidence should be admitted.

Non-unionized workplaces

The decision in *Kimberly-Clarke* is more in line with the view taken by courts on the admissibility of videotaped evidence in non-unionized contexts than with arbitral case law. The judicial approach is reflected in the 1997 decision of the British Columbia Supreme Court in *Richardson v. Davis Wire Industries Ltd.*, which we reported in the January 1998 issue of *FOCUS* (See "Videotaped evidence and employee privacy rights" on our Publications page.) This was a wrongful dismissal action involving a production foreman with 20 years of service who was terminated after having been caught sleeping on the job and lying about it.

The employer investigated reports that Richardson was sleeping by having him placed under surreptitious video surveillance. No attempt was made to confront him with the allegations before installing the video camera.

At trial, Richardson's lawyer sought to bar the admission into evidence of the videotape, on the grounds that the surveillance was an invasion of privacy both generally and under the province's *Privacy Act*, a statute which allows a person who suffers a wilful invasion of privacy to sue in court. Richardson's counsel urged the court to apply the same tests as those used by arbitrators to determine whether the evidence was admissible.

The judge disagreed, holding that evidence which is relevant and is not excluded by any other rule of evidence should be admitted. In this case, the tapes were clearly relevant.

Turning to the arguments based on privacy, the judge stated that Richardson could have had no reasonable expectation of privacy, given that he was sleeping on company time, on company property, in circumstances where he could expect to be contacted if he were needed. Further, the judge held, even if Richardson had a reasonable expectation of privacy, the *Privacy Act* provided only for a right to sue. It did not prohibit the admission of evidence gathered contrary to the Act.

The judge did go on to express regret that the employer had chosen the route of clandestine surveillance rather than confronting Richardson about the allegations. She stated that using this method to catch an employee engaged in wrongdoing which, by itself, did not warrant summary dismissal jeopardizes the trust that is a key element of the employment relationship.

GENERAL SURVEILLANCE

Apart from the issue of the admissibility of video surveillance evidence, arbitrators have had to consider whether video surveillance is an acceptable management tool. Here again, in the absence of a clear answer in the collective agreement, the main approach has been to balance the interests of the parties.

With general surveillance, the concern is not as much about the surreptitious nature of the

surveillance as its pervasiveness and intrusiveness. This can be seen in following extract from *Re Puretex Knitting Co. Ltd. and Canadian Textile and Chemical Union* (May 29, 1979), one of the leading Canadian cases: "The full-time use of closed-circuit television systems for constant observation of the work performance and conduct of employees in an industrial setting would be widely regarded, I believe, as seriously offensive in human terms. ... [I]t is difficult to conceive of circumstances in which considerations of efficiency would justify such an affront to human dignity, although even so, perhaps it is not impossible to do so."

The arbitrator went on to observe that even constant surveillance may be acceptable to deal with a massive and intractable security problem, provided assurances are given that it will not be used for other purposes such as monitoring work performance.

Taking the view that workplace monitoring of employees is inherently objectionable, the arbitrator noted that the degree to which it is objectionable depends on a variety of factors:

"[T]he degree of objection [depends] on the way the cameras are deployed and the purpose for which they are used and [ranges] from unacceptable in the case of constant surveillance of conduct and work performance to probably non-objectionable in the case of short-term individual application for training purposes."

In Our View

Employers are advised to look on video surveillance as a last resort and, if it is used, to make it as unintrusive as possible under the circumstances. The problem is not only a legal one: even employers not bound by collective agreements should consider the effect on employee morale of a surveillance system that is out of proportion to justifiable need.

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