Perspective patronale en droit de l'emploi et relations de travail
Labour and Employment Law for Employers

Emond Harnden

RECENT DEVELOPMENTS IN PRIVACY LAW

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INTRODUCTION

- Employees expect privacy – Not just at home
  - Privacy online
  - Privacy at work
- Privacy at work
  - Background/security screening
  - Medical information and examinations
  - Monitoring and surveillance of employees

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Sources of Employee Privacy Rights

- Depending on employer, sources may vary
  - Arbitrators can interpret and apply legislation, common law
  - Implied collective agreement right to privacy
  - Privacy Commissioner jurisdiction overlaps with arbitrators
- Common Law
  - Charter "reasonable expectation of privacy"
  - Civil claim for breach

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Sources of Employee Privacy Rights

- Legislated:
  - Federal: *PIPEDA*, *Privacy Act*
  - Ontario:
    - *PHIPA* (*Personal Health Information Protection Act*)
    - *FIPPA* (*Freedom of Information and Protection of Privacy Act*)
    - *MFIPPA* (*Municipal*…)
    - Others: *WSIB*, *OHSA*…

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BACKGROUND SCREENING

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Background Screening

- Pre-employment screening
  - Reference checks
  - Employment history checks
  - Criminal record checks
  - Credit checks
  - Internet/social media background checks

Background Screening

- Do I need consent?
  - BC and Alberta PIPA – collection without consent – "reasonable for the purpose of determining suitability"
  - PIPEDA/Privacy Act – consent and notice required?
  - FIPPA/MFIPPA – likely not applicable
    - Many employment-related records excluded
- Consent remains a good practice
  - Calling references – implied
  - All other checks – express is better

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Background Screening

- Even with consent – <u>be reasonable</u>
  - In extent and manner of collection
  - Reasonableness is determined in all the circumstances
  - Position and duties – $$$? Security? Vulnerable clients?
  - Do you need a criminal record check?
  - Credit check?
  - Medical information?
  - Watch for human rights issues

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Background Screening

- Reference checks
  - Plan your questions
  - Seek only what you need to know
  - Be prepared to explain why
  - Confidentiality – ask referees if required
  - Record information received
    - Where reasonable for evaluative purposes

Background Screening

- Internet and other background checks
  - Caution – Human rights risks
  - Privacy risks?
  - BC IPC – “Social Media Background Search Guidelines”
    - October 2011
    - Risks arise even when collecting publicly available information
    - Advocates for awareness of risks
    - “Privacy Impact Assessment”

Background Screening

- Internet and other background checks
  - Ontario IPC – different approach
  - March 2012
  - Education materials for employees and individuals
  - Not guidelines for businesses
  - Warns individuals that postings may be permanent, public

Background Screening

- Internet and other background checks
  - Ontario IPC flags concerning emerging trend
  - Some employers asking for Facebook etc. passwords
  - Or asking applicant to log in to permit review of postings
  - Appears to be more common in the US
  - Short answer: Don't do it
    - Risk of terms of service violation
    - Highly intrusive – no longer viewing "publicly available" info
    - Harder to justify reasonableness, necessity
    - May provoke complaint if applicant refuses, is rejected

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Background Screening

- Common law risks now increased
- *Jones v. Tsige,* 2012 ONCA 32
  - Ontario Court of Appeal - Civil claim for invasion of privacy
  - **FACTS**
    - Jones and Tsige were bank employees
    - Tsige was dating Jones' ex-husband
    - Over 4 years, Tsige accessed Jones' banking info 174 times
    - Jones sued for invasion of privacy
    - Lower court dismissed the claim – no such claim in Ontario

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Background Screening

- Common Law – *Jones v. Tsige,* 2012 ONCA 32
  - Court of Appeal created new claim: "Intrusion upon Seclusion"
  - Requirements:
    - Intentional or reckless conduct
    - Which invades, without lawful justification, plaintiff's private affairs
    - Reasonable person would perceive as highly offensive, causing distress, humiliation or anguish
  - Suggested damages if no financial harm "should be modest"
    - Range: Up to $20,000

Background Screening

- Common Law – *Jones v. Tsige,* 2012 ONCA 32
  - Could this be applied to improper background screening?
    - Possibly! Direct OR indirect application
    - Urging HRTO or Court to consider privacy
  - Other applications:
    - Surveillance?
    - Improper collection of medical information?
    - Other unauthorized, reckless, offensive, distressing collections…

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Background Screening – Best Practice

- Consider seeking advice to design policy, practices
- Establish broader privacy framework
- Define objectives, scope of search
- Ask: Is it necessary? How much?
- Stick to publicly-available information
- Consider getting consent
- Document findings, conclusions
- Assume individual will learn what you have reviewed

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MEDICAL INFORMATION

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Medical Information

- When do you need medical information?
  - Pre-employment?
  - Managing absenteeism?
  - Qualifying for disability benefits/sick leave?
  - Return to work/accommodation?
- Ask:
  - Do I really need the information?
  - What do I need it for?
  - How much do I really need?

Medical Information – Pre-Employment

- When? (Ontario H.R.C.)
  - Prohibited during applicant screening
  - Limited right during interview – able to perform essential duties?
  - Pre-employment medical examination/clearance only after a conditional offer of employment is made
- Employee privacy/duty to accommodate

Medical Information – Absenteeism

- Look to collective agreement/policy
  - Absent limits, employer permitted to require certificate for each absence
- Information should:
  - Confirm absence
  - Confirm due to illness/injury
  - Estimate length of absence

Medical Information – Benefits

- To qualify, employee must prove disability
  - Benefits provider entitled to information
  - Employer may not be entitled to as much
  - Extent of entitlement depends on circumstances

Medical Information – Benefits

- Generally employer is <u>at first</u> entitled to:
  - Certification of absence
  - Broad statement re nature of illness
  - Confirmation employee is following treatment plan
  - Expected return to work date
  - Limitations and restrictions on employee

Medical Information – Benefits

- Generally employer is not entitled to:
  - Diagnosis
  - Details of treatment plan
  - General medical history
  - Prognosis (but in certain circumstances…)
- In cases of suspected abuse, entitlements may differ
  - Case-by-case
  - Onus on employer to justify need on reasonable grounds
  - Suspicion is not enough

Medical Information – Return to Work

- Purpose of asking in accommodation process is different from purpose in qualifying for benefits
  - Distinction is important
- Medical certificate permitted?
  - Employer must protect safety of returning employee and coworkers – *Occupational Health and Safety Act*
  - General rule:
    - Medical certificate stating fit to RTW only where “reasonable and probable grounds” to doubt

Medical Information – Return to Work

- Medical information for accommodation?
  - Not only permitted – required
  - Employees have a duty to cooperate
  - Employer not required to take request at face value
  - Employer entitled to more detailed information:
    - Medical confirmation of necessary accommodation
    - Prognosis, not diagnosis
    - Medical limitations

Medical Information – Return to Work

- Medical information for accommodation?
  - Case law: employees' retain privacy rights
  - Free to refuse to provide information
  - Employers should not discipline for refusal
  - BUT – refusal has consequences

- If employee does not provide medical information, duty to accommodate may be at an end

Medical Information – IME

- When can an employer request an IME?
  - Check collective agreement first
  - In general, not during return to work without reasonable grounds
  - In rare cases only
  - Generally, only where necessary to ensure:
    - Employee fit to perform work safely
    - Reasonable grounds to question capacity

Medical Information – Best Practices

- Confirm what you really need and why
- Check the collective agreement/policies
- Avoid “blanket” requirements for information
- Avoid blanket future consents to disclosure
- Ask for “nature of illness” not “diagnosis”
- Do not discipline for refusal to provide

- Thorny area – seek legal advice!

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SURVEILLANCE AND MONITORING

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Video and Computer Surveillance

- Similar approaches
- Key theme: Balancing interests
  - Employee interest in privacy
  - Versus employer interest in efficiency, security, etc.
- Key distinction – Overt vs. Covert
  - Overt needs justification
  - But covert will be harder to justify

Video and Computer Surveillance

- *R v. Cole,* 2012 SCC 53 (October 19, 2012)
  - Not an employment case
  - Teacher discovered nude photos of underage student while monitoring the student's email use
  - Saved copy of photos to his laptop – owned by school board
  - Located by school board technician in course of maintenance
  - Copied to disc, Board seized laptop, turned over to police
  - Police searched without warrant

Video and Computer Surveillance

- *R v. Cole,* 2012 SCC 53
  - Issue: Did teacher have reasonable expectation of privacy?
  - SCC held yes even on Board's laptop
  - But limited by policies in place
    - Policies can limit but not extinguish employee expectation
    - At least where personal use of IT resources is permitted
  - As between Cole and Board, searches were reasonable

Video and Computer Surveillance

- *R v. Cole* – Lessons:
  - Clear that employees have reasonable expectation of privacy
    - Even on employer-owned assets
    - Even in workplace
  - Arbitration decisions to the contrary are no longer reliable
  - Can be extended to video surveillance?
  - Need policies to limit – more on that later

Video and Computer Surveillance

- Covert surveillance
  - "Routine" continuous surveillance usually not permitted
  - i.e. hidden cameras, keystroke monitoring
  - BUT – targeted covert surveillance?
  - Case law suggests may be permitted where:
    - Reasonable suspicion
    - Monitoring will be effective to meet need
    - No other effective less intrusive means
    - Collection as limited as possible
      - i.e. placement of camera, nature of monitoring program
- Off-duty surveillance should meet same test

Video and Computer Surveillance

- Overt surveillance
  - More easily justified
  - Still not always permitted
  - Test in arbitration decisions:
    - Contextual balancing of interests
    - Similar to test for covert – less demanding
    - Essential question of "proportionality"
  - Watch for evolution in light of SCC decision in *Cole*

Video and Computer Surveillance

- What will justify overt surveillance/monitoring?
  - Security – strong justification
  - Safety of persons, property
  - Documented history of theft, etc.
- What will <u>not</u> justify overt surveillance?
  - Routine performance management
  - Attendance management (usually)

Surveillance – Online Misbehaviour

- "Surveillance" means watching online actions too
- "Off-duty" conduct can be grounds for discipline
  - Whether in the real world or on social media
  - Conduct which is linked to employer's interest and harms reputation or interferes with employment
- Depends on the facts of each case
  - Growing body of case law regarding social media
  - Tension between expectation of privacy in "venting" and employer's reputation

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Surveillance – Online Misbehaviour

- *Canada Post Corp*. (2012) (Ponak)
  - Grievor posted threats, harassment on Facebook
  - Examples:
    - "Up and drinking again. I'm playing with my [first name of superintendent D] Voo Doo Doll. DIE BITCH DIE. If I wasn't drunk I would take her outside and run her over."
    - "Hell called. They want the Devil back. Sorry, she's busy enforcing productivity @ [Midtown]"
    - "It was a long night, 10 hrs in the mail mines. The Hag showed at 6 and the swoop through, I've never seen her without the UGLY coat. C'mon voo doo doll work your magic"

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Surveillance – Online Misbehaviour

- *Canada Post Corp*. (2012) (Ponak)
  - Grievor testified thought private
  - Psychological evidence of abuse, possible alcohol problem
  - Arbitrator: postings were “mean, nasty, and highly personal”
  - “Unprecedented” in comparison to other reported cases
  - Fact that she thought private irrelevant
    - Postings were “reckless”
    - Friends were coworkers – even if private, brought postings into workplace

Importance of Policies

- Surveillance/monitoring depends on policies
- Implement privacy policy framework
- IT policies:
  - Define acceptable personal use
  - Put employees on notice of monitoring or review for, i.e. security, maintenance, audits, other operational needs
  - Confirm that correspondence is not private
    - Employee is free to use personal device, network for privacy
  - Explain password is for tracking and security purposes

Importance of Policies

- Video/other surveillance policies:
  - Explain purposes
  - Explain manner of surveillance, uses for information
  - Be clear that surveillance will not be used for routine performance management
- Facebook/social media policies?
  - Address “private” misconception
- Update, disseminate, educate, train on policies
  - Consistency is important

Questions?