## INTRODUCTION

This issue of our Newsletter covers a number of different topics that are important for trade unions and their members.

As always, please feel free to contact us with any questions you may have in relation to any of the topics covered in this Newsletter.

## INSIDE THIS ISSUE:



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# SOCIAL MEDIA AND PRIVACY IN THE WORKPLACE UPDATE

Denis Ellickson & Meg Atkinson

In recent years, it has become clear that the traditional idea that employees are "on duty" while at work and "off duty" when they punch out is changing with advances in technology and, more specifically, the increasing use of social media and networking internet sites. As employees are posting work-related comments and content on online forums including Facebook, blogs, Twitter and other implements, employers are drawn into those forums and have taken managerial actions including discipline in response to employees' "off duty" behaviours. There is now a body of arbitral case law that demonstrates not only that employers have been able to access and rely on employees' social media postings in arbitration, but those off-the-clock postings have formed a just basis for discipline.

In our view, there are at least two ways trade unions can address this and help members avoid adverse consequences: through prevention and by providing informed assistance and advice to members who experience disciplinary consequences relating to social media. This article will provide some ideas in both of these areas.

## *Prevention*

Members need to understand that whatever they digitize through email or social media communication – including photos, videos, comments – can be traced, spread, and can ultimately land up in the hands of their employer. This is true regardless of the intended recipient or audience. Once an inappropriate and arguably work-related posting comes to the attention of the employer, the damage is often done and there are few ways to fix the situation. Therefore, avoiding the circumstance in the first place is very important. Employers will typically be able to take disciplinary action for employees' social media postings in the following circumstances:

1) where it harms the company's reputation or product;

2) where it renders the employee unable to satisfactorily perform his or her duties;

3) where it leads the employee's colleagues to refuse to work with him or her, or be reluctant or unable to do so;

4) where it is in breach of the *Criminal Code* thus rendering continued employment with the company injurious to the reputation of the company; or

5) where it hinders the company's ability to manage its works and its workers.[1]

Ultimately, the question of whether an employee's off-duty conduct can constitute grounds for discipline is objective: the adjudicator must ask whether a reasonable and fair-minded person would find that the off-duty conduct had "a real and material connection to the workplace."[2] The key tips for union members are therefore:

- avoid making postings on social media sites that relate to the employer's business, clients, other employees and management;
- carefully maintain strict privacy settings on social media to limit the audience; and
- never reduce anything to writing that you are not prepared to see broadcast far and wide or to land in the hands of your employer.

Off-duty posts on social media sites that are insubordinate to managers,[3] injurious to the employer's business operation,[4] in violation of workplace policies and agreements,[5] or racist[6] are some examples of content that have been found to have formed a just foundation for disciplinary action.

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[1] *Re Millhaven Works and Oil, Chemical & Atomic Workers Int'l Union, Loc. 9-670* (1967) [1967] OLAA No. 4, 1(A) Union-Management Arbitration Cases 328.

[2] *Ottawa-Carleton District School Board v. Ontario Secondary School Teachers' Federation, District 25 (Plant Support Staff) (Cobb Grievance)*, [2006] OLAA No. 597 at para. 17 (Goodfellow).

[3] See for example *Chatham-Kent (Municipality) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 127 (Clarke Grievance)*, [2007] OLAA No. 135 at para. 25 (Williamson) (*Chatham-Kent*) and *Alberta v. Alberta Union of Public Employees (Re R)*, [2008] AGAA No. 20 (Ponak), upon judicial review, the outcome was varied in *Alberta v. Alberta Union of Public Employees (R Grievance)*, [2011] AGAA No. 58 (Ponak)(*Alberta*).

[4] See for example *Chatham-Kent, ibid*; and *Alberta, ibid*; and *Lougheed Imports Ltd. (c.o.b. West Coast Mazda) (Re)*, [2010] BCLRBD No. 190 at para 98 (Matacheskie)[*West Coast Mazda*].

[5] See for example *Chatham-Kent, ibid.*; *Saskatchewan (Ministry of Corrections, Public Safety and Policing) and SGEU (Hawryluk) (Re)* (2009), 106 CLAS 157 (Denysiuk)(*Saskatchewan*); *Ontario Public Service Employees Union v. Ontario (Ministry of Community and Social Services) (Aboutaeib Grievance)*, [2011] OGSBA No. 167 (Johnston)(*Ontario*); *Wasaya Airways LP v. Air Line Pilots Association, International (Wyndels Grievance)*, [2010] CLAD No. 297 (Marcotte)(*Wasaya Airwarys*); *Credit Valley Hospital v. CUPE Local 3252 (Braithwaite Grievance)*, [2012] OLAA No. 29 (Levinson); and *EV Logistics v. Retail Wholesale Union, Local 580*, [2008] BCCAAA No. 22 (Liang).

[6] *Saskatchewan, ibid.* and *Wasaya Airways, ibid.*.

### *Employee's Response and Mitigation*

Where the employer catches wind of inappropriate behaviour online and takes disciplinary action, the employee's response will be critically important in any arbitrator's review of the appropriateness of the discipline. Each case will depend on its own circumstances but where the posting is admittedly inappropriate, members are advised to:

- take actions online to minimize the harm and/or dissemination of the posting;
- apologize to people affected by the social media posting; and
- demonstrate remorse and regret.

Overall, employment is a relationship of trust and employees must demonstrate that they are trustworthy and that indiscretions of a similar nature are unlikely to reoccur in the future.

### *Privacy Interests*

Although many of the reported cases relating to social media uphold employers' disciplinary responses, we are of the view that social media related cases will eventually collide with the separate growing body of jurisprudence and regulation which protect employees' privacy, both on and off duty. For example, the Supreme Court of Canada confirmed in *R. v. Cole*[7] that employees are entitled to expect a reasonable degree of privacy in the workplace, and the reasonableness of an employees' expectation of privacy will depend on the "totality of the circumstances" test. In addition, employees' privacy interests are also guarded by the Ontario Court of Appeal's determination in *Jones v. Tsige*,[8] in which an employee's common law privacy rights were found to have been violated in the workplace. In our view, these cases may be relied on to act as hurdles impeding employers from accessing and relying on employee's off duty and private affairs. Employers ought to be wary of an exaggerated understanding of their entitlement to access information about their employees' off-duty conduct for fear of infringing on an employee's privacy rights.

While there is no doubt that, in the age of social media, employees must be vigilant to avoid publicly posting inappropriate information through social media, employers must

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[7] 2012 SCC 53.
[8] 2012 ONCA 32.

also be held to their duties to employees when using social media as a basis for disciplining employees. An employee's right to lead a free, private, independent life outside work should not be forgotten, and the lawyers at CaleyWray look forward to continue to protect these values.

## CONSTRUCTION SITE AND/OR PRE-ACCESS ALCOHOL AND DRUG TESTING: THE LATEST WORD

Michael A. Church

This article summarizes a very recent comprehensive arbitration award issued by an Ontario appointed sole arbitrator in connection with an employer's attempt to require its employees to comply with alcohol and drug testing. It will be of particular interest to those trade unions who represent members working in the construction industry in the province of Ontario. The essential facts as found by Arbitrator, George Surdykowski, are as follows.

In December 2004 the Mechanical Contractors Association (Sarnia) ("MCAS") advised UA Local 663 (the "UA") that effective January 1, 2003 MCAS member contractors would obey a direction from Suncor that contractors providing goods or services to it in Canada comply with Suncor's "Contractor Alcohol and Drug Standard" ("CADS"). The requirements were, *inter alia*, that contractors respect Suncor's universal mandatory pre-access alcohol and drug testing requirements for all new employees of said contractors.

The UA grieved the decision by MCAS and its Sarnia area employer members to implement mandatory pre-access alcohol and drug testing in respect of the Suncor jobsites. The UA argued that the Suncor CADS violated certain provisions of the UA provincial ICI sector collective agreement, and the *Ontario Human Rights Code,* among other arguments.

The Sarnia Construction Association ("SCA") intervened in the grievance and essentially agreed to "carry the ball" on behalf of itself, the MCAS and their various members. The SCA argued that the pre-access alcohol and drug testing was justified, reasonable and did not violate either the collective agreement or the *Code*. The SCA also argued that the Suncor CADS was consistent with all applicable laws, would enhance safety on the worksites and would allow its members to maintain their favourable competitive position with the site owners in the Sarnia area relative to non-union contractors.

On August 20, 2013, Arbitrator Surdykowski issued a very extensive award which dealt in detail with all of the issues surrounding the grievance and many other issues[9]. This approximately 80 page award should be reviewed by any representatives of unions interested in this area. The award also largely relied upon the Supreme Court of Canada's recent decision in *Irving Pulp and Paper Limited*, 2013 SCC 34, and the cases cited therein.

Arbitrator Surdykowski allowed the grievance. He found that the MCAS's purported action would violate not only the collective agreement but the *Ontario Human Rights Code*. Arbitrator Surdykowski issued the following declarations and order which the SCA recently forwarded to all of its contractor members:

- That the pre-access alcohol and drug ("A&D") testing implemented in response to Suncor's requirement contravenes the provincial collective agreement between the Mechanical Contractors Association of Ontario and Ontario Pipe Trades Council. This decision is binding on members of the MCAS and SCA;

- That pre-access A&D testing as contemplated here violates the *Ontario Human Rights Code*; and

- That all MCAS and SCA member employers cease and desist from conducting pre-access A&D testing.

We understand that the MCAS and SCA are currently deciding to whether or not they will file an application for judicial review. In the meantime, they have advised their members to comply with the Arbitrator's decision.

The MCAS/SCA also advised their members that the Arbitrator had stated that there must be a demonstrated substance abuse problem at the work site before an employer may implement a pre-access A&D program. This is a significant fact which must be proven by an employer in similar circumstances, is rarely present.

The above noted award is in our view the latest word on this subject in the province of Ontario. It is an excellent result which favours the rights of unions and their members in similar circumstances.

It remains to be seen how the owner/clients will react. Stay tuned for our next newsletter wherein we will advise of any new developments.

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[9] Mechanical Contractors Association Sarnia v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 663, 2013 CanLII 54951 (ON LA)

# SURREPTITIOUS SURVEILLANCE IN WSIB CLAIMS

Ken Stuebing[10]

They say a picture speaks a thousand words; here are few snapshots' worth of practical suggestions for effectively managing surveillance evidence gathered in WSIB Claims.

A review of recent prosecutions by the Workplace Safety and Insurance Board's Regulatory Services Division highlights the role and relevance of video surveillance in prosecutions under Part XII of the *Workplace Safety and Insurance Act*. Oftentimes video evidence is the chief if not sole basis for accusations that an injured worker has committed an offence by, for instance, failing to report a material change in circumstances. It is therefore crucial to consider the challenges posed by video evidence, its admissibility/weight, as well as broader forms of electronic evidence-gathering beyond surreptitious video surveillance, especially self-generated: social media as self-surveillance (see the related article in this issue).

One of the key attributes of surreptitious surveillance conducted on a compensation claimant is the obliviousness of the subject being recorded. As loathsome as a worker may find the practice of video surveillance upon discovering that he/she has been caught on tape, the normal course of this surveillance is not unlawful. Upon stepping out of our private domicile, to drive to a store or even to perform maintenance outside of our home, we no longer have a reasonable expectation of privacy, and become fair game for surreptitious surveillance.

While secret taping itself may not be unlawful, there are invariably rules governing the admissibility of such recordings in a legal proceeding. In the workers compensation context, the party seeking to rely on surveillance evidence—usually the WSIB or accident employer—bears the onus of establishing admissibility in accordance with *Operational Policy Manual* ("*OPM*") Document No. 11-01-08. This Policy defines the threshold for the WSIB (and WSIAT) to accept audio/visual recordings as evidence: the recordings must provide new or more complete information than is already in the claim file; must be relevant and pertain to the WSIB's duty to hear, examine, and decide issues under the *WSIA*; and must be authenticated.

Generally speaking, so long as the evidence is not redundant and has been authenticated with a signed statement from the "author" in accordance with *OPM* Document No. 11-01-08—subject to your right to cross-question the recorder – then you are down to arguing relevance. The WSIAT has previously held, in respect of admissibility disputes, that *prima facie* relevant audio/visual evidence is admissible, subject to discretion to exclude where the probative value is outweighed by its

[10] A longer version of this paper, entitled "Smile for the Camera" is available at www.caleywray.com.

prejudicial effect.[11] To prevent an audio/video recording's admission as evidence, a worker and his/her representative must identify a specific prejudicial effect that might flow from considering the audio/visual evidence – e.g., the evidence depicts highly embarrassing conduct with little to no connection to the worker's functions or even the worker's overall credibility.

If surveillance is deemed admissible, the worker's representative may still draw guidance from *OPM* Document No. 11-01-08 to challenge the weight accorded to such. *OPM* Document No. 11-01-08 acknowledges the "dramatic impact on the viewer" of surveillance evidence and warns that "recordings may be selective, i.e., information relevant to the issue in dispute, such as when a worker rests or experiences pain, may not be recorded." Upon receiving disclosure of surveillance evidence, the worker (with his/her representative) should carefully review the footage (not just the summary reports) to gather the full context in which the recordings were gathered. The representative should seek in particular to ascertain crucial details such as:

- How frequently did the worker perform the activities featured on film? Was this a one-off exercise?
- Had the worker consumed medication prior to the activities in question?
- Was the worker performing activities authorized by his/her physician?
- What was the duration of the activities featured in the surveillance evidence?
- Were there breaks between the activities filmed? If so, how lengthy and how frequent?
- How was the worker's condition following the performance of activities filmed? Did the activities aggravate his/her compensable condition? How was the worker's recuperation from such?

In short, it is crucial to hone in on the activities not featured on film, and the broader context of the activities captured on film that may balance the impact of the video recordings. In this regard, one should draw guidance from Justice Cavarzan's comments in *Lalonde v. London Life*, [2001] O.J. No. 6088 as follows:

[11] See for instance *Decision No. 1104/07* and *Decision No. 2020/121*

> The difficulty with video surveillance is that it is incapable of recording the periods of time when Lalonde was out of sight recuperating, and the days when he was unable to leave his residence. As he testified, he has good days, bad days and horrible days. The videotape evidence shows portions of 17 days of a four-year period since May 14, 1997.

While the threshold established by *OPM* Document No. 11-01-08 tends to favour admissibility of such evidence, it is worth noting that in the wake of the Ontario Court of Appeal's landmark decision in *Jones v. Tsige,* [2012] O.J. No. 148 (C.A.), a worker may not, in extreme circumstances, be without legal recourse if he/she feels that his/her privacy rights have been violated through the acquisition of such evidence. Depending on the particular facts, a civil action against a party who violates an employee's privacy right may be an available avenue to address bad faith video surveillance provided the threshold in *Jones* is met.

In this regard, it is worth noting that, in a recent judicial review decision arising from the labour arbitration context, *GTAA v PSAC*, (2011) ONSC 487, the Ontario Divisional Court upheld Arbitrator Owen Shime's jurisdiction to award tort damages—including damages for mental distress and punitive damages—against an employer for bad faith use of video surveillance as a basis for terminating a long service employee. The grievor in that matter had been cooperating in early return to work following a workplace injury to her knee. The employer elected to subject the worker to video surveillance, which showed her walking in and out of stores on errands. In spite of this surveillance evidence falling far short of cogent evidence of misconduct/malingering, she was terminated for dishonesty and breach of trust. The Arbitrator condemned the employer's conduct "in both its investigation and also its ultimate determination [which] was not only unreasonable but also in bad faith" and ordered in excess of $500,000 in total damages. While the reviewing Court found that the quantum of mental distress and punitive damages was insufficiently explained, the Court upheld the Arbitrator's fundamental jurisdiction to award such damages.

The Court's affirmation of various heads of tort damages for the bad faith actions that include surveillance confirms unionized employees' ability to access meaningful redress for arbitrary/bad faith surveillance and disciplinary action in relation to such.

In all matters in which surveillance evidence is admitted, it is worthwhile to consider the caveat in *OPM* Document No. 11-01-08 that "Evidence from audio/visual recordings is considered in conjunction with all other evidence". Workplace parties may become particularly obsessed with the razzle-dazzle factor of video evidence, to the detriment of failing to consider its probative value in conjunction with all other evidence. No video surveillance will ever stand on its own without a worker having an opportunity to explain or distinguish the evidence in the course of testimony evidence. Unless surveillance evidence tendered is capable of speaking conclusively for itself, it will be just one factor among many to weigh; not the whole picture.

## CONSTRUCTION INDUSTRY DAMAGES: THE AVERY CONSTRUCTION CASE

Douglas J. Wray

There are features of construction industry collective agreements and the construction industry generally that give rise to some special remedial considerations when a breach of the collective agreement occurs.

Starting with the 1973 arbitration decision in Blouin Drywall, 4 L.A.C. (2d) 254, arbitrators developed a basis for awarding damages for a breach of the union hiring clause. If a company hires non-union workers to perform work covered by the collective agreement, a trade union can claim damages on its own behalf and on behalf of its unemployed members calculated as the number of hours performed by non-union workers multiplied by the total hourly package under the collective agreement. In order to obtain such a damages award, a union has to prove non-union workers performed work covered by the collective agreement and that the union had unemployed members who were available and qualified to perform the work in question. The arbitrator's award in the Blouin Drywall case was ultimately upheld by the Ontario Court of Appeal: 57 D.L.R. (3d) 199.

The potential for this kind of damages award has proven to be a significant deterrent to any contractor seeking to avoid hiring union members.

The basic damages principle established by Blouin Drywall was then expanded to cover the situation where a union contractor violated the subcontracting clause of a collective agreement by subcontracting work covered by the collective agreement to a non-union subcontractor. A trade union can claim Blouin Drywall damages against the general contractor in these circumstances – based on the hours of work performed by the non-union subcontractor – provided that the union can establish it had available and qualified out of work members.

An exception to this general damages principle was recognized by the Ontario Labour Relations Board sitting as arbitrator in the construction industry when the contractor assigned work to the members of another trade union or subcontracted work to a company bound to a collective agreement with another trade union and the grievance got deferred pending the filing and disposition of a jurisdictional dispute. If the Board later upholds the work assignment in the jurisdictional dispute, the grieving union is not entitled to claim damages. But what if the Board concludes in the jurisdictional dispute that the work assignment was wrong?

Starting in the 1994 decision in Sayers & Associates Limited, (1994) OLRD No. 3213 and the 1995 decision in Robertson Yates Corporation Limited, [1995] OLRB Rep. February 158, the Board has held that even if it is determined in a jurisdictional dispute that the

contractor's work assignment was wrong, the grieving union will not be entitled to damages unless the assignment was arbitrary or otherwise unreasonable.

The result is that trade unions rarely succeed in claiming damages even if they win a jurisdictional dispute.

One exception was the Bondfield Construction Co. case, [2007] OLRB Rep. May/June 411. In that case, the employer was bound to two collective agreements – with the Painters and the Bricklayers. The employer assigned the work in dispute to members of the Painters. The Board held that the assignment was incorrect and the Bricklayers pursued their grievance claiming damages. The Board held that damages were an appropriate remedy. The Board relied on the decision it had reached 15 years earlier and held there were no material factual differences.

That brings us to the recent decisions involving Avery Construction Limited ("Avery").

Avery performed work in connection with the Sault Ste. Marie Municipal Landfill Gas Management System Construction Installation.

Avery was bound to the Operating Engineers' ("OE") ICI sector collective agreement and also to the OE Civil Agreement (covering road building/sewer watermain construction). Avery employed OE members on the project and paid them in accordance with the OE Civil Agreement. Similarly, Avery was bound to the Labourers' ICI sector collective agreement and also to the Labourers' Civil Agreement. Avery employed Labourers' members and paid them pursuant to the Labourers' Civil Agreement. Both trade unions grieved, claiming the work fell within the ICI sector of the construction industry and that Avery should have applied their respective ICI sector collective agreements.

Avery responded by filing a sector determination under Section 166 of the *Labour Relations Act.* The grievance arbitrations were adjourned pending disposition of the sector application. The Board ultimately held that the work on the project fell within the ICI sector: see [2012] OLRB Rep. January/February 1.

The two trade unions then pursued their grievances. The unions requested that Avery be required to pay damages based on the different monetary and other terms and conditions as between the ICI sector and civil collective agreements.

In response, Avery asserted its decision to apply the Civil Agreements was "reasonable" and that based on the jurisdictional dispute cases, it should not have to pay damages. In its decision reported at [2012] OLRB Rep. November/December 943, the Board assumed that Avery had been reasonable in concluding that the work in question was in the sewer and watermain sector and in fact had tendered for the work on that basis. However, the Board held that the "reasonableness" defence applied in jurisdictional disputes did not apply to incorrect sector determinations, at least in a situation where

members of the same union are involved and the only issue was which collective agreement applied.

In a further decision released on August 30, 2013 – 2013 CanLII 56611 – the Board rejected the company's reconsideration request.

There is one important caveat to the Avery case. In Avery, the sector determination affected which of two collective agreements with the same trade union applied; that is, the ICI sector or the civil collective agreement. However, the sector determination did not change which trade union members did the work.

In its November 27, 2012 decision, [2012] OLRB Rep. November/December 943, the Board stated:

> "35. Avery argues that a sector determination may have the effect of changing which union gets to do the work with the result that an employer is faced with competing irreconcilable claims from different unions in the same way as a jurisdictional dispute.
>
> 36. Whatever the merits of that argument, a matter I do not decide, it is not this case. In this case Avery was not faced with irreconcilable claims: it was faced with two (or more) potentially applicable collective agreements with each of the OE and the Labourers. The same workers were going to do the work irrespective of which collective agreements applied. Avery took a calculated risk that lower cost collective agreements applied. It was wrong."

The Board will, no doubt, be required in some future or other case to decide if the "reasonableness" defence is open to an employer when it applies the wrong sector collective agreement and that results in members of a different trade union performing the work.

In the meantime, based on the Avery decision, employers are more likely to file a jurisdictional dispute rather than a sector application in response to grievances.

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