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Workplace Law E-ssentials

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Double Trouble

By Norman Grosman

Perhaps this is understandable, given that the consequences of a just cause termination are so serious. In the event an employer can establish just cause for termination, the former employee is neither entitled to any notice of termination, nor any compensation in lieu of notice. This is why just cause is often referred to as the "capital punishment" of employment law.



Until recently, the law, following the lead of the Supreme Court of Canada, endorsed a contextual approach to the determination of whether or not just cause existed in any given circumstances. First, an employer would be required to discharge the onus of establishing what kind of misconduct or misbehaviour was present. Second, the degree of transgression would then be viewed in the total context of the individual's employment, in order to determine whether the punishment truly fit the crime. Only in relatively severe circumstances of misconduct or misbehaviour were employers able to establish, at common law, just cause for termination. Other types of transgressions were meant to attract lesser forms of discipline.

Recently, however, the Ontario Superior Court appears to have raised the bar a notch higher for these same employers. The court ruled that even in circumstances where an employer has discharged the onus, at common law, of establishing just cause for termination, a second, perhaps even more challenging analysis must occur in the narrower context of whether or not the employee is entitled to their statutory entitlement to notice and/or severance pay, under the *Employment Standards Act*. Because the court concluded that the former employee's misconduct was not "wilful", the standard under the *Employment Standards Act* was not met by the employer, and, as a result, the employee was entitled to nearly \$25,000.00 representing eight weeks pay in lieu of notice and severance pay under the *Employment Standards Act*.

Employers are understandably shaken by this recent, novel approach to the standard of just cause for termination. This new, apparent double standard has left most employers wondering in what circumstances can just cause for termination truly be established, for all purposes.

"Wilful misconduct or disobedience" is the ultimate standard, and incredibly difficult to establish since it requires evidence of intent on the part of the departed employee. As a result of this recent decision employers may in the near future experience an up-tick in employment litigation, even in circumstances where the former employee has clearly misconducted themselves in the relationship. In effect, the employee will dare their former employer "to prove my misconduct was wilful, or pay up".

Lawyer Profile - Norman Grosman

Norm Grosman, is the Firm's Managing Partner and for over 29 years has provided advice and representation in employment matters to corporations and executives, including wrongful dismissal, hiring, contracts, human rights and employment litigation.

He is the author of *Federal Employment Law in Canada* and *A Practical Guide to the Law of Hiring in Ontario* and writes exclusively on Employment Law for *Workopolis.com*. He is also an Assistant Editor of the *Canadian Cases on Employment Law* and was a regular columnist in the *Toronto Star* on current employment law issues. He is often quoted as an expert on Employment Law matters in national publications, including the *Globe and Mail* and *National Post*. He has been interviewed on CBC Radio several times.

In a recent survey of 550 employment lawyers across Canada, conducted by Canadian Legal Lexpert Directory, Norm ranked in the top category of "Most Frequently Recommended" employment lawyers in Ontario. He was also honoured by his peers having been voted to "Best Lawyers in Canada" status in

Importance of Written Workplace IT Policies

By Sheryl Johnson

The truth behind this idiom is clearly demonstrated in the Ontario Court of Appeal's recent precedent setting decision *R. v. Cole*. While the primary issues in this case are constitutional in nature and address protection against unreasonable search and seizure under section 8 of the Charter, a key underlying message is that employers must ensure that their written employment policies are implemented and enforced in their daily practices. If they are not, the policies cannot be relied upon and their protections are ineffectual.

In *R. v. Cole*, the accused Mr. Cole, was a high school teacher charged with possession of child pornography. Mr. Cole taught computer science and was part of a sitting technology committee responsible for supervising students' laptops. In the course of performing his supervisory duties, Mr. Cole downloaded nude pictures from a student's email and saved them to a school-issued laptop that he was permitted to personally use. As part of a routine monitoring of the school's network, the school's information technician remotely accessed Mr. Cole's laptop, discovered Mr. Cole's actions and reported them to the school's principal. This resulted in the principal seizing and searching Mr. Cole's laptop and copying of the images onto a disc. This evidence was turned over to the school board who in turn conducted an investigation into Mr. Cole's actions. The school board copied the photographs, and Mr. Cole's temporary Internet files onto a disc, and reported Mr. Cole to the police. The school board provided the disc and laptop to the police. Based on an assumption that the school, who advised the police that it owned the laptop and information on it, consented to its search, the police did not obtain a warrant to search Mr. Cole's laptop.

The Court of Appeal reviewed the reasonableness of the conduct of the technician, principal, school board and police. It was found that Mr. Cole did not have any personal privacy interest in the student's photographs and therefore the technician's search did not engage Mr. Cole's section 8 rights, there was an implied right to access, and the technician was acting inside the scope of his duties. In short, Mr. Cole had no expectation of privacy with regard to the technician's actions.

While the Court held that section 8 applied to the principal and the school board's searches of Mr. Cole's laptop, such searches were found to be reasonable, implied by law and did not engage Mr. Cole's section 8 rights. In this regard, the principal and the school board had the overriding obligation to act quickly to ensure the health and safety their students under the *Education Act*. Once the information was disclosed to them, they had no choice, but to take appropriate action. Their delivery of the disc containing photographs was not an unreasonable search or seizure. The Court determined that a school official should not be held to the same stringent standard as police when conducting searches.

The copying of the laptop's hard drive as well as the disc containing Mr. Cole's temporary Internet files without a warrant was found to be an unreasonable seizure by the police. Given the lack of urgency or exigent circumstances once the police had the laptop in their possession it could have easily obtained a warrant. The search was found to be intrusive. Mr. Cole had a privacy interest in his personal Internet browsing history and what it revealed about his personal predilections and choices. The police could not "piggy-back" on the reasonableness of the technician, or school



2008 - 2011, and was selected by Lexpert in 2009 - 2011 as one of the top 500 lawyers in Canada.

Based upon his extensive experience acting for both employers and employees, Norm began mediating employment disputes in 2002 and has successfully resolved a number of difficult and complex employment matters which were both litigious and non-litigious.

Norm recently returned from a holiday in Italy visiting one of his three sons, and has turned his focus back to the practice of law (for the time being).

Lawyer Profile - Sheryl Johnson

Sheryl L. Johnson has over a decade of experience providing strategic advice and perspective on all aspects of the employment relationship, including recommending and assisting in implementing effective measures to expediently manage and proactively address workplace issues, to reduce exposure to and limit liabilities arising out of workplace disputes. Ms. Johnson is experienced and knowledgeable in conducting workplace investigations on behalf of employers and is frequently called upon to prepare and implement employment contracts, employee handbooks, workplace policies and procedures, as well as workplace training. Sheryl received her Honours B.A. in Labour Studies from McMaster University and her Bachelor of Law from Osgoode Hall Law School.

board's conduct, and the school board could not consent to the search of an employee's work laptop in which they had permitted personal use.

The Court unanimously declared that in the absence of a clearly worded employer policy Mr. Cole had a reasonable expectation of privacy vis-à-vis the police in the personal use of his work laptop and that this expectation was only modified to the extent that Mr. Cole knew that the school's technician could access the laptop while maintaining the integrity of the school's information network.

While the school board is a technology policy stated that use of its technology *must generally be used only for business activities* ("the Policy"), teachers were historically given possession and exclusive use of laptops. Moreover, the teachers were permitted to create passwords, take them home, used for personal use, and load private or personal materials. The school board was not walking the talk when it came to implementing and enforcing the Policy. From a criminal law perspective, this resulted in Mr. Cole's objective reasonable expectation of privacy in the personal use of his laptop.

Further, while the Policy stated there was to be no inappropriate content on school board computers and teachers as users were advised that all data and messages generated on or handled by the school board's equipment was considered to be the property of the school, it did not provide for the search of the computers, address monitoring or policing of teachers' use of their laptops, or address the issue of privacy except as it related to email. In the case of e-mail, it emphasized that the attempts to request user permission will be made first before accessing emails.

Fundamentally, there are general steps that employers can take to effectively restrict employees' privacy expectations with regard to workplace technology. First, employers must implement an express, unambiguous technology policy to permit the monitoring, searching and surveillance of employees' use of technology. Employers must enforce, routinely monitor and review employee usage, and advise employees that the computers and their contents are company owned, and not to be used for non-work related activities.

What's On Our Schedule?

Natalie MacDonald will be presenting in a webinar on the topic of workplace bullying and the topic of her book, *Extraordinary Damages in Canadian Employment Law* for Carswell.

On July 20, 2011, Jeff Hopkins and Mark Fletcher will be speaking to small business owners about the employment relationship, "Start to Finish", organized by Dixon Hall, Employment Services.

On August 4, 2011, Norman Grosman will be speaking at the Annual American Bar Association Conference on the topic, Calculating Damages in Employment Law Cases

On October 21, 2011, Sheryl Johnson is speaking at the Lorman Employment Standards Act Conference in Toronto.

On November 2, 2011, Natalie MacDonald, will be teaching at The Osgoode Certificate in HR Law for HR Professionals - Module 5, Terminating the Employment Relationship: Minimizing Your Legal Exposure.

On September 20, 2012, Natalie MacDonald will be co-chairing the Law Society of Upper Canada's Conference: New Lawyer Practice Series - Employment Law.

Hot Off The Press!

See Natalie MacDonald's new text entitled, *Extraordinary Damages in Canadian Employment Law*.

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<http://www.carswell.com/descdocid=6563>

Previous Survey Results

What is the most essential thing that retains an employee?

Fair Performance Evaluation / Manager Recognition: 8%

Rewards (Bonuses): 8%

Compensation (Salary): 17%

Positive Work Culture: 50%

Job Satisfaction: 17%

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