YOUNG ANDERSON
BARRISTERS & SOLICITORS

September 23, 2022

BULLETIN

ONTARIO COURT OF APPEAL FINDS THAT AN EMPLOYER ACCESSING EMPLOYEES' PRIVATE CONVERSATION OPEN ON WORK DEVICE IS A BREACH OF THE EMPLOYEES' PRIVACY RIGHTS

In the recent decision *Elementary Teachers Federation of Ontario v. York Region District School Board*, 2022 ONCA 476, the Court of Appeal for Ontario (the "ONCA") found that two teachers' right to privacy had been breached when the school's principal read and documented the teachers personal log of concerns about the school, which had been left open on a school laptop. In reaching its decision, the ONCA outlined how to determine where a reasonable expectation of privacy exists, and how that expectation applies in an employment context.

The Background:

Two Grade 2 teachers (the "Grievors") had concerns over perceived preferential treatment received by another Grade 2 teacher, and the potential for this to impact their own performance reviews. One of the Grievors contacted the union for advice, and was advised to keep notes about her concerns. The Grievor began keeping a log of her concerns on her personal Gmail account, and authorized the second Grievor to access it. School administration was made aware of the possibility of this log, and had IT search the school's online files, hard drives, and google drives for files shared between the Grievors, which turned up nothing. Later, the school principal found the Grievors' log open on a work laptop after school. The principal photographed the entire log – consisting of approximately 100 entries – with his phone. The school Board issued letters of discipline to the Grievors in relation to the log, and placed written reprimands on their file for three years. The union grieved this discipline, and sought damages against the school Board for breach of the Greivors' privacy rights.

The Arbitrator held that the Grievor's reasonable expectation of privacy had not been breached, finding that the Grievors had a diminished expectation of privacy concerning information accessible on their work laptops, and that the principal's duty to ensure a safe school environment authorized reasonable searches and seizures without prior judicial authorization. The Arbitrator's decision was upheld by the Ontario Divisional Court, which further noted that "unlike in a criminal context, in a workplace environment, an employee does not have a s. 8 [of the *Charter of Rights and Freedoms*] right to be secure against unreasonable search and seizure". The union appealed the Divisional Court decision to the ONCA.

The Decision:

The ONCA allowed the appeal, finding that the Grievors' reasonable expectation of privacy had been violated, and that the school Board's actions constituted an unreasonable search under section 8 of the *Charter*. The Divisional Court erred in asserting that section 8 rights are relegated to a criminal context, and could not apply to employees in a workplace environment. The ONCA outlined the application of the *Charter* to school Board, noting that while there is some uncertainty as to how far the *Charter* applies over school Board activity, it was "enough to say that s. 8 applies to the actions of the principal and the school board" in this instance.

The ONCA notes that whether a reasonable expectation of privacy exists in a given circumstance must be determined in light of the "totality of the circumstances", and in consideration of the following:

1. the subject matter of the search;
2. whether the claimant had a direct interest in the subject matter;
3. whether the claimant had a subjective expectation of privacy in the subject matter; and
4. if so, whether that expectation was objectively reasonable.

The subject matter of the search was the Grievors' personal messages, which were stored in the cloud, not on school Board devices. The Grievors clearly had a direct interest in the information, as they both contributed to this personal log, which was used as grounds to discipline them. The Grievors also had a subjective expectation of privacy to the contents of their personal message. The ONCA disagreed with the prior finding that leaving the log open on a work laptop resulted in a diminished expectation of privacy. Leaving the log open was at most a momentary careless oversight – the Grievors generally took great care to ensure their conversation was, and would remain, private. The Grievors' expectation of privacy was objectively reasonable, as it was an electronic record of their private conversation.

The ONCA noted that whether personal information was revealed through access to the log was immaterial, as it is the *potential* for personal information to be revealed that is relevant to assessing the expectation of privacy. There was great potential for personal information to be revealed through access to private conversation between the Grievors. The ONCA further held that nothing in the facts justified this search and seizure of the Grievors' log. While the Arbitrator had found that the principal was justified in reading and documenting the log in consideration of the need to ensure a safe school environment, the ONCA noted that:

> "This was not a case in which the principal stumbled across a dangerous situation that required urgent action. He had not discovered anything dangerous at all. What he had discovered was the private conversations of the grievors. It was a record of thoughts he was not entitled to know."

The ONCA found that the Arbitrator had unduly focused on the "judgmental" nature of the log. The Grievors, however, were entitled to be judgmental of the school in their private conversations, and doing so did not lessen their reasonable expectation to privacy.

James Barth