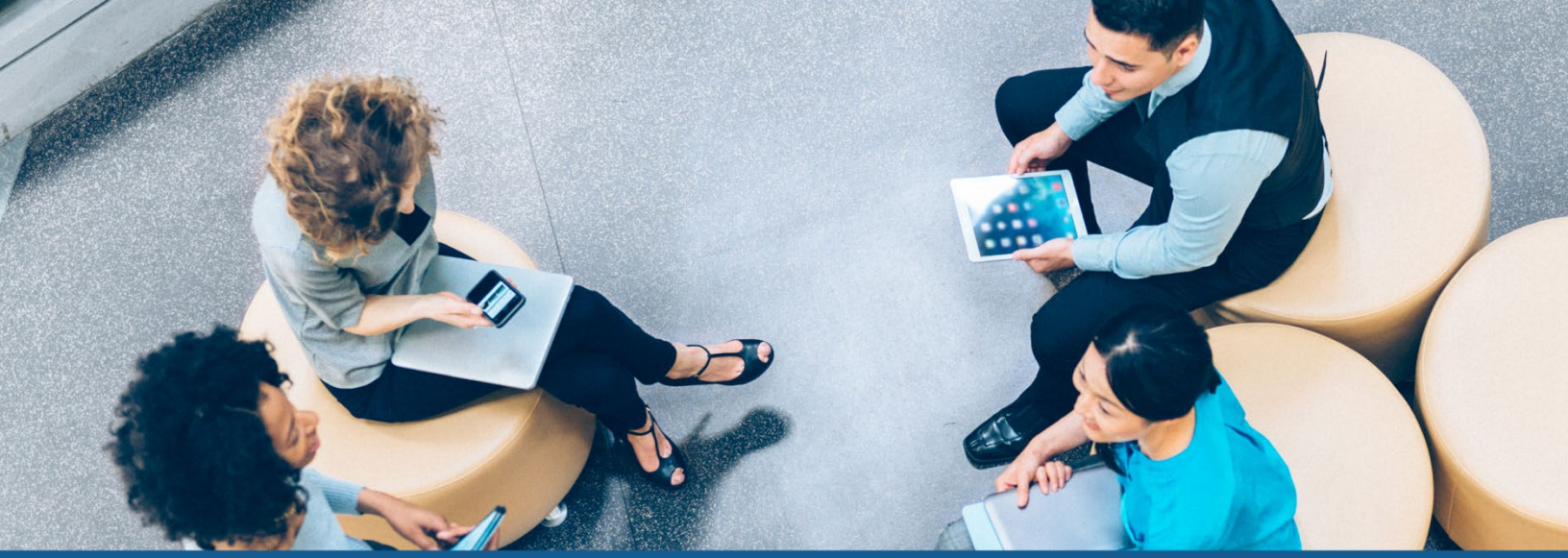

What's New in HR Law

Court of Appeal Upholds Employees' Right to Privacy

July 19, 2022 | By Natalie Garvin

Bottom Line

On June 21, 2022, the Court of Appeal for Ontario (the "ONCA") issued a decision that reinforces an employee's right to privacy in the workplace, specifically for teachers employed by a public school board to whom the *Charter of Rights and Freedoms* (the "*Charter*") applies.

This decision, *Elementary Teachers Federation of Ontario v York Region District School Board*, 2022 ONCA 476, overturns an earlier decision by the Ontario Divisional Court that upheld an arbitrator's finding that a school board's search and seizure of its classroom laptops was reasonable.

Background

Two teachers (the "Grievors") employed by the York Region District School Board (the "Board") received written reprimands for maintaining an online log that listed information about their colleagues. The log was created out of the Grievors' concerns about preferential treatment among staff and was stored online on a personal Google drive. The Board discovered the log when the Principal entered a classroom after school hours and accessed a classroom laptop that belonged to one of the Grievors. Upon discovering that the log was open on the laptop's screen, the Principal used his cellphone to take screenshots of the approximately 100 entries in the log. Both of the Grievors' classroom laptops were then seized and searched as part of the Board's investigation into the Grievors' alleged misconduct.

The Arbitral and Divisional Court Decisions

The Elementary Teachers' Federation of Ontario (the "Union") filed a grievance asserting, *inter alia*, that the Board violated the Grievors' rights to privacy by accessing digital information without reasonable cause.

At arbitration, Arbitrator Gail Misra held that the Board's right to manage its operations — namely, to maintain order and discipline in the school in accordance with section 265 of the *Education Act* — outweighed the Grievors' personal privacy interests. The Grievors' expectation of privacy was diminished because the online log was left open on a classroom laptop that was provided by the Board and could be accessed by any teacher or the Principal. For a detailed summary of the arbitrator's decision, see here.

Arbitrator Misra's decision was upheld by the Divisional Court on judicial review. The Divisional Court held that the Board did not exercise unfettered discretion in searching the Grievors' classroom laptops but, rather, had reasonable cause to perform the search based on concerns raised by co-workers about the Grievors' online log. For a detailed summary of the Divisional Court of Ontario's judicial review decision, see here.

The Court of Appeal's Decision

On appeal, the ONCA considered whether public school teachers are protected under section 8 of the *Charter* from unreasonable search and seizure conducted by their employers.

The ONCA began its analysis by confirming that section 8 of the *Charter* applies to the actions of public school boards and their principals. The Divisional Court had erred in concluding that employees do not have section 8 rights in a workplace environment.

The ONCA then considered whether the Grievors had a reasonable expectation of privacy with respect to their log, having regard to the totality of circumstances and relevant legal factors in the case. The ONCA held that:

- The **subject matter of the search** was the Grievors' personal messages to each other, which were stored "in the Cloud" and were not saved or stored on the Board's laptop or server.

- The Grievors had a **direct interest in the subject matter** because their individual contributions to the log had led to them being disciplined.

- The Grievors had a **subjective expectation of privacy in the subject matter** because they had taken steps to protect the privacy of their communications. In particular, the document was password-protected at all times and reserved for the Grievors' personal use.

- Such **subjective expectation of privacy was objectively reasonable** and deserving of protection, as the log was an electronic record of the Grievors' private conversations (similar to those had over phone, email, and text message or similar in nature to diary entries) and there was a high *potential* for personal information being revealed in these conversations. This reasonable expectation of privacy was not diminished by the Grievors' use of Board-issued computers to access to the log or inadvertent failure to close the document after using it. The Grievors were entitled to record their private thoughts with the expectation that those thoughts would remain private.

Moreover, the ONCA took particular issue with Arbitrator Misra's finding that the log was left in "plain sight" and that the Grievors had only a diminished expectation of privacy as a result. In the ONCA's view, even if he found the log by happenstance, the principal had no legitimate purpose in reading the private conversations in the log or taking screenshots of the log. It was inappropriate for him to "mine" the Grievors' private thoughts to address employment-related concerns.

In the result, the appeal was allowed and the original arbitral decision was quashed.

Check the Box

This decision reinforces an employee's right to privacy in the workplace, especially in respect of public sector employees who may be entitled to the *Charter* protections in their employment relationship. This case is particularly interesting as the Grievors were found to have an expectation of privacy in relation to communications made using technology owned by their employer and that was accessible to others.

The following are key takeaways for employers:

1) Employers are encouraged to develop and enforce strong policies that address the use of, and expectations surrounding, employer-owned technology;
2) Employers should proceed with caution in investigating information discovered in happenstance and that has the potential to include personal information (which includes an employee's thoughts and opinions); and
3) Generally, employers should conduct searches of employer-issued devices only when there is a reasonable basis for doing so, and any such search should not involve accessing employee personal email accounts and files saved "in the Cloud".

Need More Information?

For more information regarding workplace privacy or related litigation, please contact Natalie Garvin at ngarvin@filion.on.ca or your regular lawyer at the firm.