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# Reasonableness in the Context of Workplace Privacy

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Good afternoon, ladies and gentlemen. Thank you for inviting me to speak to you at this very interesting conference. What I propose to talk about this afternoon is reasonableness in the context of workplace privacy.

## ***Why Do We Care About Workplace Privacy***

- It fundamentally impacts on the dignity and autonomy of the employee.

In a paper entitled *Workplace Privacy: The Need for a Safety-Net*, (November 1993) former Commissioner Tom Wright said:

Central to the issues of workplace privacy for employees are feelings related to dignity, trust, respect, autonomy and individuality. When invasions of privacy occur, employees often feel that self-worth, morale and the overall quality of working life are eroded.

- It is recognized that work is a large part of our sense of identity; we spend most of our adult life at work.
- Technology alters the old balance - it is now cheap, invasive and pervasive, with a capability far beyond anything an employer could use in the old days. More than 73 percent of companies now monitor their employees' Internet use, according to a study last year by the American Management Association. This raises serious concerns among employees.

*(Negotiating the Workplace Privacy Minefield, Robin A. Wofford and John Wynne Workforce.com, June 18, 2001.)*

It must be recognized that the workplace raises privacy issues for employees that are at the serious end of the privacy invasion spectrum - they include requests for employee medical information or that an employee undergo a medical examination; psychological testing; drug and alcohol testing; biometric identification, video and computer surveillance on and off-site, and searches of employees, lockers and clothing.

### ***Privacy - Not an Absolute Right***

Privacy is not an absolute right, and in the workplace, is balanced against the employer's legitimate need to maintain a safe, efficient and productive workplace. That is not to say that the employee's privacy rights must give way completely to the concerns of the employer - the employer should seek to ensure that its policies and practices as far as possible give effect to both the employer's needs and the employee's privacy.

The employer is obliged to collect certain types of personal information in order to fulfill its statutory obligations under the *Income Tax Act* or the *Employment Standards Act*. Therefore, in the employment context, an employee must be prepared to surrender control over some aspects of his or her private information.

It is clear that an employer may, and in many cases, must conduct an investigation into certain incidents, whether theft or where there are indications that the *Human Rights Code* might have been breached. As the Supreme Court of Canada has recognized, investigations are inherently privacy invasive. Therefore, they must be conducted reasonably.

### ***Reasonableness as a Privacy Element is Recognized at Law - PIPEDA and Labour Jurisprudence***

#### **PIPEDA**

For federally regulated undertakings, employee records are treated in the same way as other personal information under **The Personal Information Protection and Electronic Documents Act** (PIPEDA), about which you have heard this morning. The standard of the reasonable person in relation to the collection, use and disclosure of personal information is firmly incorporated into the fabric of PIPEDA.

It is most notably a significant element of the purpose of the statute

3. The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

This wording shows that when an organization must decide whether and how to collect, use or disclose personal information, a fact based analysis is required - is the proposed activity appropriate in the circumstances, and would an objective outsider who is the "reasonable person" agree that it is appropriate.

The reasonable person standard is a limitation on the purposes for which an organization may collect, use or disclose personal information:

5(3) An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.

There are further requirements for considerations of reasonableness in section 7 where an organization seeks to derogate from the knowledge and consent requirements in collecting, using and disclosing personal information.

The Federal Privacy Commissioner has indicated recently that in his view, while the "reasonable person" standard will be challenging to interpret, it is the key to the statute, which establishes not just fair information practices, but a right of privacy in the workplace. He said that the law makes him the proxy for the reasonable person.

*(A New Act, a New Era, George Radwanski, Privacy Commissioner of Canada, University of Toronto and Lancaster House Conference on Workplace Privacy, Toronto, April 6, 2001.)*

While unionized workers have been able to raise issues of privacy in the workplace under the grievance procedure, PIPEDA establishes a forum for the first time where unorganized employees of federal undertakings may seek resolution of those issues.

## **Arbitral Jurisprudence**

Collective agreements rarely explicitly address issues of privacy. Therefore, management practice impinging on employee privacy would normally fall under residual management rights. Labour arbitration jurisprudence has long recognized restrictions on the exercise of management rights where they

may impact on worker privacy. Once again, privacy is not an absolute, but is to be balanced with the employer needs. Again, a fact based analysis is required.

We take it as a starting point for this analysis that individuals do have privacy rights which are not absolute but which must be weighed against other interests which may intrude upon privacy. This principle has long been accepted by arbitrators in Ontario and elsewhere, and is reflected in numerous decisions where the privacy rights of employees have been balanced against the legitimate competing interests of employers. (p.10)

*Toronto Transit Commission v. Amalgamated Transit Union, Local 113*, Interim Award, OLRB, Arbitrator Chapman, May 17, 1999

The case law generally holds that management rights must be exercised reasonably.

For example, the extent of medical information that an employer is entitled to know in order to deal with employee attendance or incapacity will often depend on the wording of the collective agreement. The case law indicates that the employer's right to be satisfied regarding the employee's state of health must be exercised reasonably, with consideration of the employee's right to privacy.

In regard to onsite video surveillance, an arbitrator held that while the employer could, in accordance with the collective agreement, install onsite cameras, it would constitute "an unreasonable exercise of management rights to activate them during working hours without clear and convincing evidence as to why any internal security problems could not be adequately handled by its existing supervisory arrangements."

*(Lensworth Metal Products Ltd. v. United Steelworkers of America, Local 3950* Labour Arbitration News, July/August 2000, Armstrong.)

In regard to the drug or alcohol testing of unorganized employees, the Ontario Court of Appeal has held in *Entrop* that the employer may legitimately take steps to deter and detect alcohol impairment among its employees in safety sensitive positions, and alcohol testing is a reasonable requirement. However, the court also held that requiring the employee to disclose past alcohol problems, no matter how far back in time was not reasonable. The mandatory disclosure was itself too broad, lengthy and intrusive and was humiliating for the employee.

So again, the employer must seek to meet its legitimate objectives in a reasonable manner, so that the policy does not go further than necessary in intruding on the employee's private self.

*(Entrop v. Imperial Oil Ltd. 50 O.R.(3d) 18 (2000) Ont. C.A.)*

## ***What Is the Reasonable Person Test? How Can It Be Applied?***

There are cultural shifts in the perception of what is reasonable. What is perceived as acceptable human resources practice changes over time, in line with (or sometimes a little behind) value shifts in the broader community.

Privacy as an issue has recently come to the fore in policy and legislative agendas - it was bound to flow over into the workplace and affect how various management practices are perceived. The shift in the perception of the importance of privacy is evidenced by the introduction of legislation in various jurisdictions such as Canada, Europe and the US, directly addressing issues of workplace privacy, including notification of employees of workplace monitoring. As noted earlier, workplace privacy issues are also being addressed in the case law. The question is how it will impact on the consideration of whether a policy is reasonable in its reach or implementation.

There is clearly no general agreement yet as to what constitutes a reasonable practice - what seems only common sense to one person is another person's intolerable burden. Activities and practices on the margins of general practice will generally be more contentious.

Let me give you some examples of management practices which may be viewed differently over time:

### **Old Style Practice**

#### **Employee Application Forms**

Some of you may remember reports from about 18 months ago in the *Globe and Mail* and the *National Post* regarding the employment application form then in use by the United Nations. Applicants were required to answer every question on the form. The form had a special section of questions for female applicants. The questions included: "Are your periods regular"; "Are they painful?"; "Do you have to go to bed when they come - If so, for how long?" "Date of your last period"; "Do you take contraceptive pills? How many years have you been doing so?"; "Have you ever been treated for a gynaecological complaint ; if so, which?".

There was no similar set of questions for male applicants. Canadian commentators generally reacted with surprise and disapproval to the questions in the form.

*(UN Curious about Menstrual Cycles, Globe and Mail, October 7/99; UN Queries Job Applicants on Menstruation, National Post, Oct.7/99.)*

## **Assessing the Spouse; Inviting the Boss**

Another old style practice that still exists in some companies is that of assessing the [unpaid] spouse as well as the employment applicant - the object being to assess whether the couple will be a suitable team who will fit into the corporate culture. The assessment may entail entertaining the boss to dinner in the employee's home. An employee may be reluctant to question this invasive practice, and so it is an area where management could consider showing restraint.

## **Current Style Practice**

### **Psychological Testing**

Many companies require employment applicants to undergo pre-employment psychological testing. Companies conduct these tests out of fear of "wrongful hiring" or simply to get the best "fit". However, psychological testing is inherently very privacy invasive - you are seeking to invade the person's private thoughts, values and feelings. Some psychological pre-employment tests go very far along the privacy invasion spectrum. Last year Rent-a-Car Inc. paid \$2 million in damages to job applicants who were asked questions about their sex lives and religious views in a 504 question psychological test. The test included questions about bodily functions, unusual sexual habits or sexual orientation.

*(Texas Appliance Co. Settles Suit over Sex Questions, Dow Jones Newswires, July 8, 2000.)*

If your company is using psychological testing, perhaps you should ask yourselves why. Are the tests being used instead of trusting your professional judgement in assessing candidates through more conventional knowledge and skills assessment methods? Is all of the information being collected actually relevant to the position for which you are recruiting; could you be using more up to date, more tailored models? What are you doing with the information which has been collected? It is very sensitive information and should be disposed of in a secure manner.

### **New and Future Styles**

You may find that you have different responses to the following examples of management practices some of which may be suggested in the future and some of which are in use now:

## **Employee Tracking - Part I**

At Arial Systems' office in Vernon Hills near Chicago, employees wear a name badge which is also a tracking device. The tracking device is a sensor connected to an infrared detector system installed throughout the building and lets the system know the location of the employee throughout the building at all times. If a manager needs to find someone, they are instantly locatable. The CEO remarked that the purpose of the system is to route communications, not track people. "The first time you need somebody and find them, your concerns about being tracked are out the window. "People who need time out to complete a task can put themselves in "do not disturb" mode.

## **Employee Tracking - Part II**

Companies and organizations that are concerned about security are implementing procedures whereby employees must submit a biometric in order to be admitted to the workplace, to a secured area or to their computer. The biometric identification method could be a finger scan, a retinal measurement, a hand geometry measurement or facial scan. Such methods are becoming more widespread as the technology becomes more sophisticated, more available and cheaper.

The implementation decisions made by the organization will impact on whether the practice is more or less privacy invasive - for example, should the company maintain the biometric on a database that is linked to the personnel file of the employee, or should the employee maintain the biometric on a card which is presented at the same time as the finger, so that the system can confirm a match. Is it reasonable to implement a system that is more invasive, when there are less invasive alternatives?

## **Employee Tracking - Part III**

Professor Kevin Warwick of Reading University experimented with the implantation in his arm of a computer chip. The chip was programmed to respond to systems in the university building where he worked, so that as he approached the doors would open automatically and call out a cheerful greeting. When asked about practical applications for his human chip implant, Professor Warwick suggested that it could be used in the workplace for employee tracking purposes, to check on washroom breaks, attendance etc. - he suggested that employees might agree if the salary's were right!

*Interview with Professor Kevin Warwick on Computer Chip Implants, Beyond 2000, November 18, 1999.*

## DNA Collection

Employers who are concerned about the recruitment, training and promotion of long-term, stable employees may wish to request DNA samples prior to hiring. DNA reveals a great deal about a person, and may be a valuable predictor of future health. Is this a sufficient reason to require an employee to undergo such testing and to produce the results to the employer?

Because of the extent and quality of the information that it can reveal about the employee, DNA information is recognized to be of inherent sensitivity. Accordingly, an employer who is anxious to attract high quality employees, and to become an employer of choice in this competitive world may hesitate to adopt this type of testing, because it could reflect badly on the company. However, is this information inherently more sensitive than that revealed by psychological testing which is conducted by the same employer?

## Conclusion

I would argue that not only is the standard of reasonableness a legal requirement for management practices in many circumstances, but it is also in the interest of employers. Studies have shown that in workplaces where there is an excessive degree of monitoring, there is a correspondingly high degree of employee stress. Employee stress can prove to be an expensive proposition for employers when it results in stress leaves and the departure of valuable employees.

It seems intuitively right that a respectful workplace will be more stable and productive, and mutual respect is bolstered by the reasonable exercise of management powers.

Employers must incorporate reasonableness as a core element of workplace policy and procedure. For unorganized employees, in the new era of PIPEDA, the employer is no longer the sole arbiter of what is reasonable. Therefore, before taking action, the employer should be asking - *What would the reasonable and objective outsider think is appropriate in the circumstances?*