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Employer surveillance of employees: criteria and application in the age of social media[1]

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Several reasons may lead an employer to conduct surveillance on an employee, to have him followed without his knowledge and to observe his activities. Rumours that an employee absent from work for health reasons is engaged in activities that are incompatible with his alleged health condition, a questionable diagnosis or contradictory medical evaluations, may raise suspicions. Surveillance therefore enables the employer to ensure that the employee's absence is legitimate. However, since such a measure is, on its face, a violation of the employee's privacy, it will only be legal if it complies with specific legislative and jurisprudential parameters.

Privacy and the particular nature of the employment context

The *Charter of Human Rights and Freedoms*[2] *("Quebec Charter")* and the *Civil Code of Québec*[3] provide the legal framework for assessing the legality of the employer's decision to conduct surveillance on an employee. Such a decision generally means that there must be an evaluation of the right to privacy as well as the various aspects involved in such a right, such as the right to secrecy and to anonymity.[4] However, this right is not absolute and may be restricted in certain circumstances.[5]

On the other hand, the employment context means that special considerations must be taken into account. Indeed, there is a relationship of legal subordination of the employee to his employer. A corollary to this relationship is the employer's management rights,[6] which can, to some extent, justify the surveillance and control of its employees' work. Therefore, in some cases, the employer's interests may take precedence over the employee's right to privacy. As a result, the courts must often strike a balance between these two types of interests.

The dos and don'ts of surveillance

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In the *Bridgestone* case,[7] the Québec Court of Appeal set out the criteria for the admissibility of evidence obtained by surveillance. In that case, the employer dismissed an employee who had been absent from work for health reasons after obtaining information by way of surveillance. The Court held that the surveillance was, at first glance, an infringement of the right to privacy. In addition, this right is not limited to private places because it follows the person and not the place.[8]However, the Court noted that this right is not absolute and can be restricted. Therefore, surveillance outside of the workplace will be permitted by section 9.1 of the *Quebec Charter* and can be admitted into evidence if it is justified on rational grounds and conducted by reasonable means.

Grounds

The employer may not conduct surveillance on the basis of mere doubts.[9] Vague suspicions, rumours or the employer's impressions[10] are insufficient. The employer must have serious grounds for questioning the honesty of the employee's conduct:

> There must be a connection between the measures taken by the employer and what is required to ensure the effective operation of the business;
> The decision to conduct surveillance cannot be a purely arbitrary one applied at random;
> Reasonable grounds must exist before the decision to conduct surveillance is made. Therefore, the grounds will not be justified by the results of the investigation.[11]

Means

With respect to the methods chosen by the employer, the surveillance must be necessary to verify the employee's actions.[12] In addition, the method must not be abusive or violate the employee's dignity. Finally, the surveillance must be conducted in the least intrusive manner possible. In *Bridgestone*, the Court held that the surveillance met this standard because the employee had been filmed for only three days and it was conducted either in public places or in the vicinity of his residence.

Application to the facts

In the recent decision of *Groupe Hexagone et Fortier*,[13]the Administrative Labour Tribunal considered the admissibility of surveillance conducted by the employer. In this case, a video published on social media seemed to demonstrate that an employee on sick leave was in fact quite well. While the employee did not contest the filing of the video as evidence, he subsequently contested the merits of the surveillance conducted by the employer.

After admitting the authenticity of the evidence, the tribunal considered the grounds and the means taken by the employer in conducting surveillance on the employee. First, it noted that only inconsistencies or contradictions of a serious medical or factual nature which raised doubts about the worker's honesty could justify surveillance conducted outside of the workplace.[14] In this case, the absence of witnesses to the employee's workplace accident as well as the vague nature of the medical report were not, in and of themselves, rational or sufficient grounds for initiating the surveillance.[15]

However, the tribunal found that there were contradictions or inconsistencies between the contents of the video and the worker's claims relating to his ability to work which were significant enough to raise legitimate questions in the mind of the employer. This was therefore a rational ground for implementing the surveillance.

As for the means which were used to conduct the surveillance, the tribunal noted that surveillance is a last resort, and one must therefore assess whether other means were or could be taken to achieve the same purpose.[16] In this case, the employer had taken such measures. However, the

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inconclusive results of the examinations and medical follow-ups, combined with the worker's having been completely off work and the contents of the video, had made surveillance necessary.

Therefore, the infringement of the worker's privacy was justified on rational grounds and the surveillance was conducted through reasonable means. According to the tribunal, there were no less intrusive means than the surveillance to verify the worker's honesty,[17] particularly given that it was conducted in places which were accessible. Indeed, although the worker submitted that the parking lot and yard of the building where he lived were private places, the tribunal found that, since they were common areas accessible to many people, they were not as private as the worker had claimed.[18]

Consequences of the illegality of the surveillance

Evidence which is obtained under conditions that infringe fundamental rights and freedoms and whose use would tend to bring the administration of justice into disrepute should be rejected.[19] However, where evidence is obtained through surveillance in violation of the parameters referred to above, it may still be admitted if its use would not tend to bring the administration of justice into disrepute.[20] This would be the case, for example, where the surveillance, while not justified, was conducted in a manner which minimized the impact on the privacy of the individual in question.[21]

Decision-makers therefore have two things to consider: they must first ask themselves:

> whether the evidence was obtained in a manner which violates fundamental rights and freedoms, and moreover, whether the use of the evidence would tend to bring the administration of justice into disrepute.[22]

These two criteria are just as relevant when information is obtained through social media.[23] In the case of *Hexagone*, the video in question was posted on the employee's public Facebook profile. That case is different from those in which the contents of the Facebook profile is private. In such a case, the criteria set out in the *Bridgestone* case will be relevant where the employer decides to verify the behaviour of an employee who is absent for health reasons through surveillance of his Facebook profile.[24]

Conclusion

In conclusion, before any employer proceeds with surveillance, it is important to clearly identify the circumstances surrounding the employee's absence and to understand the inherent risks of surveillance. If the criteria set out in the legislation and in the case law are not met, the evidence obtained in the surveillance could be declared inadmissible by the court.

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1. The masculine is used in this text solely for reasons of brevity.
2. CQLR c C-12, ss. 5 and 9.1.
3. CQLR c C-1991, arts. 3, 35, 36 and 2858 [C.C.Q].
4. *Syndicat des travailleuses et travailleurs de Bridgestone Firestone de Joliette (CSN)* c. *Trudeau* [1999] RJQ 2229 [Bridgestone], at p. 38.
5. Section 9.1 of the *Quebec Charter* provides that "[i]n exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec. In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law."
6. *C.C.Q.*, art. 2085.
7. *Bridgestone* (see note 4).
8. *Ibid*., at p. 38.
9. *Ibid*, at para 30.
10. *Kaizra et Gardium Sécurité*, 2016 QCTAT 1898 [Kaizra], at para. 61.
11. *Ibid*, at para 60.
12. *Bridgestone*, at p. 45.

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13. *Groupe Hexagone et Fortier*, 2016 QCTAT 4128 [Hexagone].
14. *Ibid*, at para 78.
15. *Ibid*, at paras 79 and 81.
16. *Ibid*, at para 87.
17. *Ibid*, at paras 87 to 90.
18. *Ibid*, at paras 92 and 93.
19. *Act respecting administrative justice*, CQLR, c. J-3, s. 11 [A.A.J.]; art. 2858 C.C.Q.
20. *Lessard et Meubles Canadel inc.*, C.L.P. 187899-04-0207, December 2, 2003, (decision granting the motion for revision) [Lessard].
21. See, in particular, the case of *Kaizra*, in which the judge held that while there were other means for verifying the employee's health condition, the fact that the surveillance was conducted in public places or in the vicinity of the employee's residence, as well as the employee's admissions that he had engaged in activities that were not very compatible with his health condition, minimized the seriousness of the infringement of privacy and were admitted into evidence.
22. See *Lessard et Transport TFI 22, S.E.C. et Bourgeois*, 2015 QCCLP 1114. For example, a serious violation of the employee's fundamental rights could give way to the tribunal's obligation to seek the truth.
23. *Maison St-Patrice inc. et Cusson*, 2016 QCTAT 482.
24. *Ibid* at para 26.

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