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Right to Privacy: Can the Employer conduct Surveillance?

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On October 3, the Court of Appeal of Quebec overturned an arbitral decision in which videotaped surveillance of an employee, suspected of activities incompatible with her alleged disability, would not be admitted into evidence.

The majority of the appeal court judges concluded that the employer was justified in following the recommendation of its designated physician, who, for various reasons, strongly questioned the employee's credibility.

What led the Court of Appeal to overturn the arbitration award?

Background

The employee had been working as an orderly in a seniors' residence for more than ten years when she took time off work due to an injured left shoulder. About two months after the onset of her disability, the employer summoned her for a medical expert opinion by its designated physician.

On the day of the appointment, the physician happened to be in his vehicle when the employee arrived at his office. He decided to observe her in his rearview mirror. He noted that the employee was moving her left arm normally and that she had placed the strap of her purse on her left shoulder without hesitation or discomfort.

The physician then formally examined the employee and, based on his objective examination, concluded that she was simulating all of her symptoms. He recommended that the employer carry out surveillance. The physician reminded the employer that the employee had already made false statements about her health during a period of disability a year earlier.

The employer therefore had the employee followed for a day during which she drove and shop in public commercial establishments (places where an individual's expectations of privacy are low).

After viewing the videotape, the designated physician said he believed that the employee was simulating her disability. She was dismissed for failing to comply with her obligations of loyalty and honesty, as well as for her lies, exaggerations, and fraud related to her participation in activities incompatible with her alleged health status.

This situation was then assessed successively by the Arbitration Tribunal, the Superior Court in a judicial review of that decision, and the Court of Appeal.

Court of Appeal decision

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The Court of Appeal concluded that the employer was justified in relying on the findings and recommendations of its designated physician, which constituted reasonable grounds to conduct the surveillance.

The Court of Appeal added that it was entirely legitimate for the employer to take into consideration the employee's previous false statements: it believed that ignoring them would be inappropriately idealistic.

The surveillance satisfied the proportionality test in the search for the truth, since the means were reasonable: one day of surveillance in public places and without traps.

The Court of Appeal returned the case to the Arbitration Tribunal to review the validity of the dismissal on the basis of the video evidence.

What do you need to know as an HR Manager?

Ultimately, an employer may be justified in requesting surveillance when it relies in good faith on the observations and recommendations of its physician, and when the surveillance is carried out sensibly. When there are reasonable grounds to suspect activities incompatible with the employee's limitations, surveillance can be an effective tool for unmasking fraud.

We will keep you informed of any developments in this case, including a possible application for leave to appeal to the Supreme Court of Canada.

Our Labour and Employment Law team is available to provide you with timely advice and solutions.

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