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WORKPLACE CONFIDENTIAL? SUPREME COURT RULES THAT EMPLOYEES HAVE RIGHT TO PRIVACY OVER THEIR WORK COMPUTER

— By Andy Pushalik, © Fraser Milner Casgrain LLP, www.fmc-law.com.

Now what?

That's the question many employers are asking themselves after the Supreme Court of Canada's decision that employees charged with a criminal offences have a reasonable expectation of privacy over the contents of their work computers where personal use is permitted or reasonably expected.

In *R. v. Cole*, the Court heard the story of Richard Cole, a high school teacher who was found to have nude and partially nude photographs of a female student on his school issued laptop. The photos were saved to a disc and Cole's laptop was confiscated. School board technicians subsequently copied a series of temporary Internet files from Cole's laptop containing a large number of pornographic images to a second disc. The laptop and the two discs were ultimately turned over to the police, who, in the absence of a warrant, reviewed the discs and carried out their own search of the laptop. The police subsequently charged Cole with the criminal offences of possession of child pornography and unauthorized use of a computer.

On a pretrial application, the trial judge ruled that the evidence gathered by the police was inadmissible: Cole had a reasonable expectation of privacy over the contents of his laptop and the searches by the technicians and the police had breached Cole's constitutional right, under the *Canadian Charter of Rights and Freedoms*, to be secure from unreasonable search and seizure. After conflicting decisions by the Superior Court of Justice and the Court of Appeal for Ontario, the matter was heard by the Supreme Court of Canada.

Notwithstanding the school's computer policy, which specifically stated that the school owned "all data and messages generated on or handled by board equipment", the Court ruled that Cole nonetheless had a reasonable expectation of privacy over the contents of his school issued laptop. In reaching its decision, the Court paid special attention to the nature of the information in question, holding that Cole's personal use of his school-owned laptop had generated information that was ". . . meaningful, intimate, and organically connected to his biographical core." While the school's ownership and policies regarding the laptop diminished Cole's expectation of privacy, such factors did not eliminate the expectation altogether. Despite this, a majority of the Court decided that it

could still consider the evidence in deciding whether Cole was guilty of the criminal offences. While the Court accepted that the police had breached Cole's constitutional rights by conducting a warrantless search, the majority concluded that the breach was not high on the scale of seriousness. Similarly, Cole's diminished privacy interest and the fact that the evidence would inevitably have been discovered had the police obtained the proper warrant in the first place significantly mitigated the impact of the breach.

Cole is a criminal case. So what are the implications for employers? Firstly, courts and adjudicators will likely frown upon overreaching computer searches by employers that retrieve employees' private, personal communications that are not connected with the workplace. Depending on how the *Cole* decision is applied, employers who conduct such intrusive searches may, depending on the facts, have difficulty relying on the fruits of those searches to discipline or terminate employees.

Second, policies stating that employees have "no expectation of privacy" over their use of employer-supplied electronic devices may not altogether eliminate employees' expectation or privacy. Employers should therefore consider whether the language of their policy is consistent with the Supreme Court's reasoning in *Cole*. In particular, employers should ensure that that their policies clearly set out what will constitute acceptable use, including the extent to which employees can use their employer-supplied electronic devices for personal purposes.

Thirdly, in extreme cases, some employees may claim that the employer's computer search constituted "intrusion upon seclusion"— a serious breach of privacy — and therefore entitled the employee to sue for damages, pursuant to the Ontario Court of Appeal's recent decision in *Jones v. Tsige*.

In summary, although *Cole* is a criminal case, employers should consider the Court's decision that employees will have a reasonable expectation of privacy over the contents of their employer-supplied electronic devices. To the extent that employer policies and practices are consistent with that expectation, employers are likely to get more sympathy before a court or adjudicator when attempting to rely on evidence obtained from an employee's work computer.

Q & A

Do Employees Owe Their Employers Any Notice When They Quit?

An employee has duties to an employer under a contract of employment, just as the employer has duties to the employee. Like the employer, if an employee terminates the employment relationship without cause, the employee must give notice of termination. The length of this notice varies with the circumstances, depending mainly on how difficult it will be for the employer to replace the employee.

Employment standards legislation in Alberta, Manitoba, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, and Yukon specifically sets out a minimum period of notice that employees are legally required to provide (generally one or two weeks, depending on length of service).

Although actions by employers against employees for failure to provide reasonable notice are theoretically possible, they are quite rare. In today's labour market, most employees can be replaced with only moderate difficulty, so there is little incentive for employers to pursue claims against former employees. Also, it can be difficult for employers to prove and quantify damages in such cases.

PROGRESS OF LEGISLATION

Federal Government Introduces Second Budget Bill

On October 18, 2012, the federal government introduced Bill C-45, the *Jobs and Growth Act, 2012*, another large, omnibus Bill that contains amendments to implement certain provisions of the 2012 federal Budget. The Bill proposes amendments to many Acts, including the *Canada Labour Code* and the *Employment Insurance Act*.

If passed, Bill C-45 will amend the *Canada Labour Code* to:

- simplify the calculation of holiday pay;
- set out timelines for making certain complaints under Part III of the Code, and the circumstances in which an inspector may suspend or reject such complaints;
- set limits on the period that may be covered by payment orders; and
- provide for a review mechanism for payment orders and notices of unfounded complaint.

The Bill also proposes to amend the *Employment Insurance Act* to extend the hiring tax credit for small businesses. An employer whose Employment Insurance premiums were $10,000 or less in 2011 will be refunded the increase in 2012 premiums, to a maximum of $1,000.

Other proposed amendments to the *Employment Insurance Act* would dissolve the Canada Employment Insurance Financing Board and enact an interim Employment Insurance premium rate-setting regime.

Bill C-45 received first reading in the House of Commons on October 18 and second reading on October 30.

Ontario's Proposed Family Caregiver Leave Will Not Go Forward

Bill 30, *An Act to amend the Employment Standards Act, 2000 in respect of family caregiver leave*, which was previously reported in *Labour Notes* No. 1459, dated September 24, 2012, will not go forward.

On October 15, 2012 the Ontario Legislature was prorogued. As a result, all Bills before the legislature that had not been passed died on the order paper. For family caregiver leave to go forward, a new Bill will need to be introduced when the legislature resumes.

Prince Edward Island Inviting Submissions for Minimum Wage Review

The Prince Edward Island Employment Standards Board is conducting its annual review of the province's minimum wage in accordance with section 5(2) of the Prince Edward Island *Employment Standards Act*.

Interested stakeholders are invited to submit written comments to:

Hazel Walsh, Employment Standards Board
PO Box 2000, 161 St Peters Road, Charlottetown, PE C1A 7N8
Fax: (902) 368-5476, Email: hawalsh@gov.pe.ca

Submissions will be accepted until **November 15, 2012**.

Northwest Territories Proposes To Prohibit Discrimination on the Basis of a Criminal Conviction Subject to a Record Suspension

Bill 12, *An Act To Amend The Human Rights Act*, proposes to expand the definition of discrimination on the ground of criminal conviction. Currently, the *Human Rights Act* prohibits discrimination only on the basis of "a conviction for which a pardon has been granted." Bill 12 would amend the Act to prohibit discrimination on the basis of "a conviction that is subject to a pardon or record suspension."

A "pardon or record suspension" would be defined as:

> a pardon that has been granted under Her Majesty's royal prerogative of mercy or under section 748 of the *Criminal Code*, or a record suspension that has been ordered under the *Criminal Records Act* (Canada), unless the pardon or record suspension has been revoked or has ceased to have effect;

Bill 12 received first and second reading on October 29, 2012.

MITIGATION, CONSIDERATION AND LITIGATION: DRAFTING EMPLOYMENT CONTRACTS FOR KEY EMPLOYEES

— By Drew Demerse, Roper Greyell Employment + Labour Lawyers.

"An Ounce of Prevention is Worth a Pound of Cure" *— Benjamin Franklin*

Departing senior executives and other key employees can wreak havoc on your business. They have intimate knowledge about your customers, your product, and your operation. Often, they will be eager to put this information to work on behalf of their new employer — your competitor. The first question your lawyer will ask when you call for advice about how to stop the bleeding will be: *do you have a restrictive covenant?*

Properly drafted restrictive covenants can protect an employer's interests when the employment relationship turns sour. Without a restrictive covenant, little stops a departing senior manager, executive, or key sales employee from competing against their former employer, and from causing significant financial hardship in the process.

The phrase "restrictive covenant" covers a wide range of contractual terms, the most common being non-competition and non-solicitation clauses. There is further information about drafting and using restrictive covenants in the March 2012 issue of the RG *Information Update*.

A recent B.C. Supreme Court decision — *Graham Funeral Homes v. Nunes-Pottinger* — illustrates the importance of having valid restrictive covenants in place.

For many years, Graham was the *only* funeral home in town. After managing Graham for 17 years, Mr. Nunes tried unsuccessfully to purchase the business. When he and the owner could not agree on a price, Mr. Nunes struck out on his own. He opened a competing funeral home and persuaded Graham's entire staff to join him. He copied Graham's customer files, and opened Nunes-Pottinger Funeral Service ("NP"). There were now *two* funeral homes in town.

Much of a funeral home's revenue is derived from "pre-need" contracts, through which a person arranges and pays for their funeral needs while they are living. Customers are permitted to change the designated funeral home at any time prior to their death. NP ran advertisements in the local paper both to solicit new business, and also to reach out to those with pre-need contracts with Graham. NP's advertisements proclaimed they could "help transfer your policy!" A great many of Graham's customers took NP up on its offer.

Mr. Nunes' employment agreement did not contain any restrictive covenants. He was therefore free to compete against Graham, provided he did not do so unfairly. He would, of course, continue to be bound by his common law duty of confidentiality: he could not disclose, use, or trade on any of Graham's confidential information.

Did Mr. Nunes compete unfairly?

The Court found that Mr. Nunes had breached his duty of confidentiality, and awarded Graham over $260,000. The Court reached this finding by the narrowest of margins. Two key conclusions swung the case in Graham's favour.

First, Mr. Nunes copied confidential customer files and his team actively used Graham's confidential information to encourage customers to transfer their pre-need contracts. NP's possession of Graham's files gave it an unfair advantage in what would otherwise have been normal commercial competition.

Second, Graham was able to prove that Mr. Nunes' breach of confidentiality was the *direct cause* of Graham's loss of business. This is easier said than done, and was likely only made possible in this case because there were only two funeral homes in this small town. The Court said the large exodus of customers from Graham to the newly-formed NP was consistent only with NP having directly solicited Graham's customers using the copied customer files.

Had Mr. Nunes not made the fatal error of copying Graham's customer files, and had this drama unfolded anywhere other than a 'one horse town', it is very likely that NP could have successfully pilfered much of Graham's business, and its revenue stream, without consequence. Mr. Nunes would have been free to market his and his family's name, history, reputation, and experience in the business, and Graham would have had no recourse.

There are two important lessons for employers in this case.

First, the Court awarded damages not only against Mr. Nunes, but also against NP. Employers should take great care in recruiting to ensure they do not encourage, condone, or permit a new employee to breach either a restrictive covenant or the common law obligations they owe to their former employer.

Second, Graham would have been in a much stronger position to resist or withstand Mr. Nunes' departure if it had valid restrictive covenants in place in his employment agreement.

Care should be taken when hiring a key employee to ensure you negotiate enforceable protection and prevention mechanisms. If you do not, there will be little recourse available when your key employees leave and take your customers with them. Unless, of course, you happen to run the only funeral home in town.

Restrictive covenants are useful tools for several reasons:

(1) They can serve to dissuade an employee from resigning to compete against you.

(2) They are a useful tool to dissuade a competitor from poaching a key employee to steal your business.

(3) In the event an employee resigns and starts competing against you, you would significantly increase your prospects of:

(a) halting the employee from competing against you by obtaining a court injunction; and/or

(b) obtaining a damage award against the employee and their new employer that more closely mirrors your actual loss of business.

Drew is an associate lawyer at Roper Greyell. He provides proactive and strategic advice to employers on labour, employment and human rights issues in the workplace. He enjoys keeping up on trends in the wide world of workplace law and many of Roper Greyell's workplace law "tweets" are courtesy of him.

AGE DISCRIMINATION ISN'T JUST APPLICABLE IN FIRING CASES

— By George Waggott, partner, and Rachel Gold, student-at-law, © McMillan LLP.

David Shaw, an experienced firefighter with the City of Mississauga, was looking for work in Ottawa after moving there with his wife in 2003. In 2005, 37-year-old Shaw applied to the City of Ottawa for an entry level probationary firefighter position. After a four-stage recruitment process using a detailed points system, he was not hired. In 2008, he applied for the same position at the City of Ottawa, but again was not hired. Shaw subsequently filed a complaint with the Ontario Human Rights Tribunal alleging the City did not employ him because of age discrimination (*Shaw v. Ottawa (City)*, 2012 HRTO 593). Shaw argued the discrimination was based on (1) the points system used to assess candidates, (2) the City requiring candidates to provide documents disclosing their ages, and (3) the City refusing to hire him because he was an older candidate.

The key issue in the case was whether or not the applicant had established a case of *prima facie* discrimination. Shaw had to prove three elements: (1) he was, or was perceived to be, an older candidate; (2) he received adverse treatment; and (3) his age was a factor in the adverse treatment. The Adjudicator considered each of Shaw's three arguments regarding discrimination to decide the issue.

On the first issue, the finding was that the City's point system had no adverse, discriminatory effect on older candidates. This answered Shaw's claim that the points system excluded older workers, and Shaw did not provide credible evidence to support his theory.

On the second issue, the Adjudicator held that Shaw successfully established the City indirectly classified candidates by age when it asked candidates for birth certificates and driver's licenses before the interview. The City had infringed section 23(2) of the Ontario *Human Rights Code* (the "Code"), which says direct or indirect classification based on a prohibited ground of discrimination infringes the right to equal treatment regarding employment.

On the third and final issue, the Adjudicator held that Shaw did not prove that the City did not employ Shaw because of age discrimination. The Adjudicator found Shaw had insufficient evidence to show the City refused hiring him because of his age, and he cited the following points to dismiss the allegation:

(1) The City's 2010 recruitment brochure aimed at post-secondary and secondary students had no probative value;

(2) Shaw had disclosed his approximate age in his 2005 application to the City by specifying he had worked as a firefighter since 1994;

(3) Shaw's low score on one of his answers during the interview as compared to other candidates answers was appropriately scored;

(4) The City's statistics on ages of successful probationary firefighter candidates since 2004 showed a significant number of candidates in Shaw's age range (30–39) were hired; and

(5) In the 2008 recruitment, the City produced a letter sent to Shaw inviting him to stage three of the process and Shaw admitted on cross-examination it was possible the City sent him a letter. Shaw never followed up with the City after he did not hear back from the City after stage two of the process.

Two remedial issues were considered, since the City was found to infringe section 23(2) of the Code: (1) whether the City had to pay Shaw for injury to his dignity, feelings and self-respect; and (2) whether the order should oblige the City to promote Code compliance. In the result, the City did not have to pay Shaw because there was no evidence that asking for his personal information documents caused compensible injury and Shaw did not specifically request compensation for the City's indirect age classification by requesting personal identification documents from candidates.

As a prospective remedy, the Adjudicator ordered the City of Ottawa to stop asking firefighter job candidates for copies of documents with their birthdates and other personal identifiers for the recruitment process. The Adjudicator suggested that the City should only request such documents after a conditional offer of employment is made, and if requested before a conditional offer, then personal identifiers should be blacked out before submitting the document.

RECENT CASES

Employee Was Constructively Dismissed When Employer Withdrew Employee's Right To Purchase Company

Court of Queen's Bench of Alberta, March 7, 2012

ADM Measurements Ltd. ("ADM"), incorporated by McCullough, provided technicians to oil and gas companies for electrical services. A number of journeymen worked for ADM as independent contractors; they were dispatched by ADM, and then would bill the company some percentage of their hourly rate. Young, a journeyman electrician, was asked to join ADM by McCullough, in order to build the company and ultimately purchase it. Initially, Young was an independent contractor for ADM through his own electrical business, Bullet Electric Ltd. ("Bullet"). Over time, Bullet was engaged to provide Young's services to ADM as a manager. The relationship broke down when McCullough decided to sell the business to someone other than Young. As a result, Young stopped providing services for ADM, and formed a new company with a friend, called Bullet Energy. This company was in direct competition with ADM. ADM brought an action against Bullet and Young for breach of fiduciary duty, unjust enrichment, and unfair interference with contractual relationships. Young and Bullet brought a counterclaim for unpaid compensation.

The claim was dismissed, and the counterclaim was allowed. Young was an employee, not an independent contractor of ADM. He was subject to McCullough's direct control, he was integrated into the company, ADM provided the tools and equipment for his management role, he was contracted to provide services, and he was provided with a fixed monthly salary with no associated risk of loss. In addition, Young was not subject to any explicit or implied restrictive covenant. He was not a fiduciary of the company, since he fell outside ADM's core administration. Young was constructively dismissed when ADM made a fundamental change to his employment contract, namely withdrawing Young's right to purchase the company after the five-year profit share arrangement ended. The new company, Bullet Energy, did not interfere with ADM's contractual relationship after the split. ADM and its clients had contracts for individual work assignments, not long-term interactions. Young and his business partner were willing to compete with ADM in an aggressive, but legal, manner. In addition, the work by Young and his business partner to set up a competing business did not unlawfully lead to a reduction in profits for ADM. The counterclaim was allowed, as Young was entitled to his profit share bonus for the three years he worked prior to leaving ADM.

ADM Measurements Ltd. v. Bullet Electric Ltd., 2012 CLLC ¶210-053

Employer Could Not Rely on Employee's Post-Termination Conduct as Further Cause for Her Dismissal

Court of Queen's Bench of Alberta, February 16, 2012

Gillespie worked as an Occupational Therapist for the employer. A doctor that Gillespie worked with expressed reservations about her work performance, and a few days later, Gillespie used harsh words when speaking to a newly hired social worker. She was sent home for two days and given a letter of warning stating that she would be subject to disciplinary action if her behaviour did not improve immediately. When she returned to the office, she was dismissed, and was given two weeks' pay. As Gillespie cleaned out her desk to leave, she took a number of patient letters, which included complimentary comments about her. The letters also contained confidential information about the patients, which, under the non-disclosure agreements signed by Gillespie, she was not entitled to remove from the clinic. The employer relied on this post-dismissal conduct as further cause for dismissal. Gillespie brought an action for wrongful dismissal. The trial judge held that, while the evidence of communication difficulties and interpersonal conflicts was insufficient to constitute grounds for dismissal, the removal of the documents did justify termination. Gillespie appealed.

The appeal was allowed. The trial judge found that the personality conflicts and communication problems did not demonstrate that Gillespie's conduct and demeanour were so incompatible with her duty, or so prejudicial to the employer's business, that a dismissal was warranted. The finding that the breach of the non-disclosure agreement was a breach of a material term of her contract could not be equated with a finding of a character flaw which would justify dismissal. As a result, the trial judge erred in concluding that Gillespie's post-termination conduct was sufficient to warrant termination for cause. The trial judge also erred in law in considering the cause for dismissal as a factor in determining a reasonable notice period. Gillespie was entitled to four months' reasonable notice.

Gillespie v. 1200333 Alberta Ltd., 2012 CLLC ¶210-052

No Reason To Interfere With Motion Judge's Decision To Stay Judgment for Damages, Pending Resolution of Counterclaim

Ontario Court of Appeal, September 25, 2012

Hinke founded Thermal Energy International Inc. ("TEI") and was the CEO, a director, and a principal shareholder. Disputes arose between Hinke and TEI respecting the extension of his employment agreement, the settlement of a convertible debenture related to a debt obligation, other debt obligations, and the reimbursement of expenses. In order to settle these issues, Hinke was given a new employment subagreement, was paid $50,000 to settle the debenture claim, and was asked to provide an accounting of the debts and expenses he claimed were owed. Hinke refused to sign the agreement, which TEI considered cause for dismissal. Hinke brought an action for wrongful dismissal, the value of the debenture, and the repayment of debts and expenses. TEI counterclaimed for damages based on alleged oppression, breach of fiduciary duty, and negligence. In a motion for summary judgment, the motion judge concluded that there was no basis to find that Hinke's failure to sign the draft employment agreement amounted to just cause, and judgment was granted (see 2012 CLLC ¶210-004). The remaining three claims were dismissed. However, the judgment for damages for wrongful dismissal was stayed, pending the resolution of the counterclaim, which was sent to trial. Hinke appealed.

The appeal was dismissed. The parties intended to settle their differences concerning four separate issues in four separate agreements, with each subagreement being a distinct and separate issue. As a result, the four subagreements were severable, and the rights and obligations arising out of the provisions remained in force notwithstanding TEI's breach of one subagreement. In addition, Hinke did not seek dismissal of the counterclaim, and by inference, he must have considered the counterclaim as having sufficient merit to raise a genuine issue requiring a trial. There was no reason to interfere with the motion judge's discretion in granting the stay requested by TEI.

Hinke v. Thermal Energy International Inc., 2012 CLLC ¶210-054

Arbitrator's Decision was Transparent and Reasonable

Supreme Court of Newfoundland and Labrador, Trial Division, August 9, 2012

The Long Harbour Employers Association Inc. ("LHEA") was an employers' organization representing contractors engaged in the construction of a nickel processing plant. The Resource Development Trades Council of Newfoundland and Labrador ("RDTC") was a council of trade unions representing employees in various trade classifications working for the contractors on the site. The collective agreement between the parties provided that employees who lived further than 34 kilometres away from the job site were entitled to a travel allowance. The employer was required to provide free camp accommodations for such employees. Eligible employees who did not live in the camp were paid a daily board allowance for "seven (7) days per week in which the employee [was] scheduled to work". The RDTC brought a grievance respecting the payment of board allowance for employees who began a seven-day rotation in the middle of the week. The LHEA and the RDTC disagreed on whether the employees should only be paid for the seven days on which they were scheduled to work, or whether they should be paid for two weeks where the employee's seven-day

rotation began on Monday, since midnight Saturday was the start of the work week. An arbitrator allowed the grievance, in part, finding that the LHEA violated the collective agreement by reducing the board allowance from 14 days to seven. The LHEA brought an application for judicial review.

The application for judicial review was dismissed. The arbitrator's decision was justified based on the evidence before him. While he referenced extrinsic evidence, it was used only in determining that there was no estoppel with respect to changing the work schedule or the board allowance. In addition, the arbitrator referenced numerous sources in determining what a "week" meant in the collective agreement. His reasons were transparent, and his decision was reasonable.

LHEA v. RDTC, 2012 CLLC ¶220-053

Employer Waived its Right To Consider Grievance Abandoned Since It Continued Negotiations

Supreme Court of Newfoundland and Labrador, Trial Division, August 9, 2012

The Long Harbour Employers Association Inc. ("LHEA") was an employers' organization representing contractors engaged in the construction of a nickel processing plant, while the Resource Development Trades Council of Newfoundland and Labrador ("RDTC") was a council of trade unions representing employees in various trade classifications working for the contractors on the site. The parties brought a grievance respecting the payment of a board allowance payable to employees who did not live close to the work site. The collective agreement required an unresolved grievance to be referred to arbitration within seven days of the completion of step three of the grievance procedure. In a preliminary decision, the arbitrator determined that the union did not file the grievance in time, although given that the parties were in negotiations during the period in which the grievance was filed, the employer waived its right to consider the grievance abandoned. The LHEA brought an application for judicial review of the preliminary decision. In addition, the LHEA brought an application for judicial review on the merits of the arbitration award (see 2012 CLLC ¶220-053).

The application for judicial review of the preliminary decision was dismissed. Under the provisions of the collective agreement, the time limits for filing grievances were absolute, and failure to advance a grievance to the next step within the time limit constituted an abandonment. There was no clear, written, mutual consent to extend the time limits of the grievance and the arbitration procedure. However, the arbitrator determined that the LHEA considered a settlement proposal by the Leaders' Roundtable on Commercialization, and did not invoke its right to refuse to consider the grievance on the ground that it had been abandoned. The LHEA could not actively discuss and consider the merits of the grievance while, at the same time, insisting that it was abandoned. This decision was reasonable, and the application to seek the dismissal of the preliminary award was dismissed. Respecting the merits of the grievance, the interpretation of the collective agreement regarding liability to pay out a living allowance was reasonable.

LHEA v. RDTC, 2012 CLLC ¶220-054

Employee with Scent Sensitivity Was Not Discriminated Against

Human Rights Tribunal of Ontario, August 14, 2012

Kovios informed her employer that she had a scent and fragrance sensitivity when she applied for a job in their call centre. The company told her that it had a fragrance-free policy. On her first day of training, Kovios noticed that one of her co-workers was wearing perfume, and complained about it on the second day. By the third day, the person wearing the perfume was no longer there; however, Kovios was taken out of training when she noticed the scent of cologne. She was sent to shadow a call centre employee to finish her training. Kovios left the workplace when she noticed the worker she was shadowing was wearing cologne. Kovios brought a human rights complaint, alleging discrimination on the basis of physical disability.

The complaint was dismissed. Kovios had a scent sensitivity, and the parties agreed for the purposes of the complaint that her scent sensitivity was a disability. Although Kovios complained that she was experiencing symptoms due to exposure to scents, the scents were not apparent to other employees who were in the same room. Given the hypersensitivity that Kovios had to scents in the environment, it appeared that she would have had difficulties in the workplace even if the fragrance-free policy had been more rigidly enforced. In addition, Kovios did not let her employer know that she required further accommodation. In particular, she did not inform her employer that the fan which was placed to blow on her was not helping, and she did not inform her employer that the call centre employee she was assigned to shadow was wearing a fragrance which was intolerable to her. Therefore, since Kovios did not specify the accommodation that she was seeking, she was not discriminated against.

Kovios v. Inteleservices Canada Inc., 2012 CLLC ¶230-030

Employer Was Required To Explore the Possibility of Accommodating Employee's Elder Care Responsibilities

Human Rights Tribunal of Ontario, August 17, 2012

Devaney worked for ZRV Holdings Limited ("ZRV") as an architect, and was assigned as the main architect on the Trump International Hotel and Tower project. Devaney was also responsible for taking care of his mother, who suffered from both osteoarthritis and osteoporosis. While Devaney was working on the Trump project, his mother's health deteriorated. Devaney's caregiving responsibilities increased, and his mother was eventually placed in a long-term care facility. ZRV was concerned about the amount of time Devaney spent away from the office, and gave him both written and verbal warnings indicating that attendance at the office during working hours was required, except for business-related meetings outside of the office. Eventually, ZRV terminated Devaney for cause, namely his poor attendance record, and provided him with 34 weeks' salary and eight weeks' benefits. Devaney was offered employment on a contractual basis, where he would be paid only for the hours he was in attendance at the office; however, he declined and accepted an offer working directly for the Trump project. Devaney brought a human rights complaint, alleging discrimination on the basis of family status.

The human rights complaint was allowed. Devaney's regular absenteeism from the office was required due to family circumstances that involved caring for his mother. His family care requirements were a significant factor in ZRV's decision to ultimately terminate Devaney's employment. Requiring attendance at the office during normal working hours had an adverse impact on Devaney, given his responsibilities to his mother. Furthermore, Devaney's employment was terminated based on a significant number of absences, the majority of which were required due to his caring for his mother. Therefore, Devaney had made out a *prima facie* case of discrimination on the basis of family status. Despite the fact that ZRV was aware that Devaney had elder care responsibilities affecting his attendance, it continued to insist that he attend work during normal working hours, rather than looking for information relating to his care requirements. ZRV had a duty to consider and explore the possibilities of accommodating Devaney's needs related to his elder care responsibilities. There was not sufficient evidence that accommodating Devaney would have resulted in undue hardship, nor that the absences may have caused some problems for his co-workers or affected morale. Devaney was awarded $15,000 for injury to dignity, feelings, and self-respect.

Devaney v. ZRV Holdings Limited, 2012 CLLC ¶230-031

THE ECONOMY

The statistics below provide a convenient overview of the latest Consumer Price Index (CPI) and other economic and labour indicators of interest. Do you need detailed CPI figures for all of Canada, individual provinces, regional cities, or specific goods and services (e.g., housing, food, and transportation)? If so, you can find the detailed CPI figures in the "Consumer Price Index" tab division of Volume 1 at ¶26 *et seq.*

Cost of Living — *Up*

The Consumer Price Index figure for September 2012, on the 2002 = 100 time base, was **122.0**, up 1.2% from the September 2011 figure of 120.6. On a monthly basis, the September 2012 figure was up 0.2% from August 2012. On the 1992 = 100 time base, the September 2012 All-Items figure was **145.2**.

Industrial Production — *Down*

The preliminary, seasonally adjusted figure of industrial production for the month of August 2012, in chained 2002 dollars, was estimated at $260,847 million, down 0.5% from the revised August 2011 figure of $262,036 million.

The preliminary, seasonally adjusted figure of industrial production for the month of July 2012, in chained 2002 dollars, was estimated at $263,026 million, up 1.9% from the revised July 2011 figure of $258,225 million.

Weekly Earnings — *Up*

In August 2012, the average weekly earnings (including overtime), seasonally adjusted at the industrial aggregate level were $907.19, up 3.6% from $875.62 in August 2011, according to a preliminary estimate based on a sample survey of reporting units.

In July 2012, the average weekly earnings (including overtime), seasonally adjusted at the industrial aggregate level were $906.68, up 4.1% from $870.97 in July 2011, according to a preliminary estimate based on a sample survey of reporting units.

Unemployment — *No Change*

In October 2012, the seasonally adjusted number of unemployed persons totalled 1,410,000, almost unchanged from September 2012, with an unemployment rate of 7.4% of an active labour force of 18,877,500. The employment level in October was 17,567,500.

In September 2012, the seasonally adjusted number of unemployed persons totalled 1,393,800, up slightly from August 2012, with an unemployment rate of 7.4% of an active labour force of 18,959,500. The employment level in September was 17,565,700.

Strikes and Lockouts — *Down*

For major collective bargaining agreements (those with 500 or more employees) in April 2012, there were 13,480 person days lost from 1 work stoppage. For April 2011, there were 23,660 person days lost from 3 work stoppages.

LABOUR NOTES

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