

## Videotaped evidence and employee privacy rights

More often than not, when deciding whether to admit evidence obtained through covert surveillance of employees, arbitrators will apply tests that balance the employee's right to privacy against the employer's right to investigate suspected wrongdoing. Now, a British Columbia court has pronounced on the question of the use of videotaped evidence in employment-related disputes, and its conclusions have been praised by employers.

The decision, *Richardson v. Davis Wire Industries Ltd.* (April 21, 1997), dealt with a wrongful dismissal claim brought by a production foreman who was dismissed for sleeping on the job and then lying about it. Two weeks out of three, Keith Richardson worked the night shift from midnight to 7:30 a.m. For some time before Richardson's dismissal, the employer had received reports from other employees that he was sleeping on his shift. Rather than confronting Richardson directly, the general manager chose to investigate by installing a hidden surveillance camera in the lunch room.

After reviewing tapes made over several days, the general manager concluded that Richardson had indeed been sleeping on the job. After again observing on the monitor that Richardson appeared to be asleep, the general manager went to the lunch room and startled him by turning on the light. Richardson, before being told about the existence of the surveillance camera, denied that he had been sleeping on previous occasions. He was summarily dismissed.

### EVIDENCE IS ADMISSIBLE IF RELEVANT AND NOT OTHERWISE EXCLUDED

At trial, Richardson's counsel sought to exclude the use of the videotaped evidence, arguing that both the decision to conduct the surveillance and the manner of the surveillance itself were unreasonable, and that there had been other alternatives open to the employer to obtain evidence. Counsel also invoked the province's *Privacy Act*, which makes it unlawful for one person to violate the privacy of another. The employer had the right to investigate, counsel conceded, but this had to be balanced against the employee's expectation that he would be afforded some privacy in the lunch room.

The Court ruled against Richardson, holding that relevant evidence should be admitted if it is not excluded by any rule of evidence. Here, the Court observed, there was no question that the evidence was relevant, as it established several important facts of the case. Nor, the Court held, could it be said that the tapes should be excluded due to a breach of the employee's privacy: Richardson had no reasonable expectation of privacy under the circumstances, and even if he had such an expectation, a violation of the *Privacy Act* does not serve to exclude relevant evidence:

"[E]ven if [Richardson] had an expectation of privacy, a breach of privacy does not lead to exclusion of the evidence in this case. The *Privacy Act* merely provides the foundation for a claim in tort and does not prohibit the admission of evidence, even if it were gathered contrary to the Act.

Mr. Richardson could not reasonably expect to have the protection of privacy when he was sleeping on company time, on company property, and in circumstances where he could be expected to be contacted if needed."

The Court went on to reject the contention that the employer had no reasonable basis for conducting the surveillance: it had made its decision based upon a reasonable suspicion that Richardson had been sleeping on the job.

## REGRETS CONCERNING THE EMPLOYER'S ACTIONS

After ruling the evidence admissible, the Court expressed regret about the methods used by the employer to investigate Richardson's misconduct. The Court stated that sleeping on the job, while foolish and irresponsible, was not the type of wrongdoing that would justify summary dismissal. By attempting to catch the employee in such actions by secretly videotaping him rather than being open with him, the employer risked undermining its relations with employees in general:

"[T]he surveillance ... is itself a practice which jeopardizes the relationship of trust and confidence that is so crucial to the employer/employee relationship. It is unfortunate that Davis Wire did not attempt to solve this problem by honestly confronting Mr. Richardson once it became suspicious, and making it clear to him that sleeping on the job would not be tolerated."

## In Our View

The interest-balancing tests applied by arbitrators are essentially those argued by the plaintiff in this case: to admit evidence obtained through surveillance, both the decision to obtain the evidence and the manner of obtaining it must be reasonable, and the employer must have considered whether it had other alternatives. By contrast, the Court broadened the scope for admitting this evidence by requiring only that it be relevant and not otherwise inadmissible. It should be noted that at least one Ontario arbitrator has adopted the Court's approach.

The decision has been hailed by employers as providing a sound basis for determining admissibility. One observer has said that the decision focuses on the proper consideration: whether the employee had a reasonable expectation of privacy, given that he was sleeping on company time and property. (See also "[Video surveillance: Invasion of privacy or reasonable response to misconduct?](#)".)

For more information on this subject, please contact [George Rontiris](#) at (613) 563-7660, Extension 275.

For more news about recent developments in Employment and Labour Law, and for information about how our firm can assist you, please visit <http://www.emondharnden.com/>