

# EMPLOYMENT & LABOUR LINE

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## EMPLOYEE PRIVACY RIGHTS

Think you can access, copy and use all the information on your employee's work computer? **Think again.**

The police breached an employee's privacy rights under of the *Charter of Rights and Freedoms* when they accessed temporary internet files on an employee's work laptop. As a result, the evidence in those files was excluded and could not be relied on in court. The decision in *R. v. Cole*, 2011 ONCA 218, provides new guidance to employers about an employee's reasonable expectations of privacy in a workplace computer.

Mr. Cole was a high school computer science teacher. He was given a laptop for work, and the school allowed him to use it for reasonable personal use. One day, during a routine monitoring process, the school's information technician discovered an abnormality with Cole's connection. He accessed Cole's laptop remotely and found a hidden file that might have threatened the network's safety. He opened it. To his great surprise, he found a nude photo of a female student at the school. The technician copied the photograph and consulted with the principal. At the principal's request, Cole surrendered his computer, and the technician copied all of Cole's temporary internet files and imaged the hard drive. All of those files and the laptop were provided to the police without a search warrant. The police did not think a warrant was necessary because the school said it owned the computer and all of the data on it.

The Court of Appeal distinguished between the initial search by the technician and the complete search of the computer by the police. It found that the latter, broader search had infringed the teacher's privacy rights. The initial search did not, so the photograph found during that search was admissible. The Court said that Cole had a reasonable expectation of privacy over the data on his laptop, modified to the extent that he knew the laptop would be monitored to maintain the integrity of the network.

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# KEEP IN TOUCH

A recent appeal underscores the importance of communicating with employees who are absent from work.

On February 18, 2009, Ms. Beggs' home burned down. The next day she called her supervisor to tell him about the fire, and that she was going to be off work indefinitely. When her supervisor phoned her later that week, her line had been disconnected.

He only called once more. Ms. Beggs didn't explain her continued absence because she had been off for long periods of time twice before without doing so. One month later, with no further word from Ms. Beggs, the store manager assumed she had quit and produced a record of employment ("ROE") stating as much.

On April 3rd, Ms. Beggs obtained a doctor's note so that she could apply for employment insurance disability benefits. She was suffering from depression and anxiety following the fire. She called her employer and requested an ROE indicating that she was on sick leave. She was told her ROE had already been prepared, so she picked it up. Only later did she realize the ROE indicated she had "quit". Ms. Beggs concluded she had been dismissed.

Ms. Beggs' lawyer wrote to the employer to tell them that she had not quit but was off sick. After 6 months of exchanging letters in which Ms. Beggs' lawyer said she was on a medical leave of absence and the store's lawyer accused her of not wanting to return to work, Ms. Beggs sued.

**'there was no evidence to support a finding that the employer had intentionally issued an incorrect ROE: they honestly believed Ms. Beggs had quit.'**

This case, *Beggs v. Westport Foods Ltd.*, 2011 BCCA 76, raised three issues: 1) Did Ms. Beggs resign or did she quit?; 2) Did she fail to mitigate her damages by refusing an offer to return to work?; and 3) Was she entitled to extra compensation due to the "callous" manner in which she was terminated?

Both courts agreed that Ms. Beggs had not quit. The Court of Appeal also found that the communications between the lawyers that ultimately ended the employment relationship could have been avoided had the parties (or their lawyers) spoken directly with one another about why Ms. Beggs had not returned to work after the fire.

Both courts also agreed that Ms. Beggs had not failed to mitigate her losses. The Court of Appeal reiterated that the appropriate test



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is whether a reasonable person would accept the offer to return. The critical consideration is that an employee does not have to mitigate by working in an atmosphere of hostility, embarrassment, or humiliation. On the facts in this case, Ms. Beggs did not have to return to her workplace to mitigate her losses.

On the third issue, the trial judge found that the employer had not dealt with Ms. Beggs fairly and in good faith when it dismissed her and awarded her \$20,000 in compensation. The employer should have made more of an effort to determine why Ms. Beggs was absent. Two phone calls to follow-up were insufficient. Further, the employer acted callously when it learned of Ms. Beggs' medical status but still maintained Ms. Beggs quit.

The Court of Appeal disagreed with the trial judge's decision on this issue. There was no evidence to support a finding that the employer had intentionally issued an incorrect ROE: they honestly believed Ms. Beggs had quit.

In this case, neither party made an effort to inform themselves of the other side's position, and the efforts of counsel for both parties were lacking when the true facts came to light. The result was an unintentional dismissal by the employer. The moral of the story is to "keep in touch" when an employee is off work for an extended period.

## NOTEWORTHY NEWS

- Minimum Wage increased to \$8.75/hr on May 1st, 2011, with further increases to come on November 1st, 2011 (\$9.50) and May 1st, 2012 (\$10.25).
- Mike Weiler answered hard-hitting questions from attendees at the 2011 Accommodation Law Conference held on May 19th at the Fairmont Hotel Vancouver.
- Check out Anne Muter's new blog on breaking issues in employment law at [employmentlawblog.ca](http://employmentlawblog.ca).

# TO EMPLOY & PROTECT?

Teachers and professors are constantly exposed to hazards to their reputations. The new generation of students broadcast their opinions, thoughts and whims about anything and, more importantly, anyone across the indelible medium of the internet.

For professors, in particular, their students are often using their laptops in class, discreetly maintaining their active online social lives and standing ready and willing to comment to anyone who will listen about any particular component of a professor's presentation, among other things.

**'Passing notes is now texting. Doodled pictures are posted on Facebook. Rumors are spread by student blogs.'**

Schools, universities and other educational institutions are increasingly concerned about how easy, and how common, it is for students to use the internet as a tool to defame, harass and otherwise manipulate their educators by careless, disrespectful or malicious online activity. Students use the internet and related technologies the way students used to use, well, nearly everything. Passing notes is now texting. Doodled pictures are posted on Facebook. Rumors are spread by student blogs.

In this context, it is tempting for employers to take any and all steps necessary to spare their employees from an online assault. In the recent case of *Windsor-Essex Catholic District School Board & Seguin v. Lentini et al*, 2010 ONSC 6364, a student had to pay damages and costs to a principal and school board when he posted harmful comments online. The principal had made an unpopular decision regarding a school hockey team, and disgruntled students and parents began voicing their frustrations on Facebook. Those comments quickly devolved into juvenile accusations that the principal had engaged in pedophilia.

The school board stepped in and sent notices of defamation to the offending individuals, nearly all of whom retracted their comments. One former student who had posted most of the comments refused to comply. The school board then commenced an action in defamation against the student, which was successful.

In contrast, the recent case of *Pridgen v. University of Calgary*, 2010 ABQB 644, demonstrates the failure of an educational institution to respond appropriately to online comments regarding an employee.

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# SAVE THOUSANDS WITH WRITTEN EMPLOYMENT AGREEMENTS

Wrongful dismissal lawsuits continue to plague employers. Consider these two employers:

1. **Employer A** terminated a longstanding sales employee and paid a judgement of \$205,148 plus likely \$100,000+ in legal fees.
2. **Employer B** terminates a longstanding employee, pays 8 weeks' severance pay under an enforceable written employment contract and pays lawyer \$0 to defend wrongful dismissal action.



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Employers and employees should both have written employment agreements. Agreements bring clarity to the relationship and avoid the anxiety and costs associated with a termination. The termination provisions in these agreements are key because they help avoid wrongful dismissal suits.

In a wrongful dismissal suit, the employer has terminated the employee without cause or working notice. The claim is usually for damages (not severance pay) based on the loss of employment during the notice period. In the absence of an enforceable written agreement, the court will determine the amount of notice (which can be up to 24 months) based on key criteria. It will then decide what damages are included in the claim. Loss of salary is not the only issue – courts can include lost bonuses, pension, benefits, stock options and more. Claims for mental stress, defamation, punitive damages, and legal fees can also arise. If there is no enforceable written contract in place, the amount of notice has to be determined by the courts on a case by case basis. There is no rule of thumb such as "one month for each year of service". An employee with less than two years' service was once awarded damages based on 9 months' notice!

**'Agreements bring clarity to the relationship and avoid the anxiety and costs involved in a termination.'**

**'Loss of salary is not the only issue – a court will often include the loss of bonuses, pension, benefits, stock options and more.'**

Well-drafted severance provisions ensure fairness and certainty and avoid litigation. Why pay a lawyer tens of thousands of dollars to defend a lawsuit over how much notice should be given or what should be included in the severance pay when that can be determined and agreed upon in advance?

Employers should be wary of internet precedents as there are many pitfalls which can make a written contract unenforceable.

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## Written Employment Contracts Cont...

Things to consider include:

- Whether the severance provisions give the employee at least the minimum notice or pay in lieu of notice to which he is entitled under the *Employment Standards Act*.
- Whether the agreement will be enforceable if the employee's job changes in a fundamental way.
- A clear statement that all health and other benefits end on termination and that the employer is not liable for any loss of benefits.

How much contractual notice or severance pay should be stipulated in your employment contract? Subject to the legal restrictions noted above, the amount of notice or severance will be determined by the parties' relative negotiating strength and their mutual goals.

Many employers worry that talking about termination with their employees will put a damper on the hiring process, but a little discomfort at the outset is worth it. Not having enforceable written employment agreements can result in unnecessary, vitriolic and expensive litigation down the line.

## To Employ & Protect? Cont...

The plaintiffs were twin brothers who had both taken a course with an unpopular professor and were dissatisfied.

The brothers each posted comments on Facebook about the course and the professor; the comments were childish and disrespectful but not necessarily defamatory. The professor saw the comments and complained to her superiors. Subsequently, internal university bodies found the brothers had committed non-academic misconduct, placing them each on probation.

The brothers applied for judicial review on the basis that the disciplinary measures taken against them violated their right to free expression under the Canadian *Charter of Rights and Freedoms*. The Alberta Court of Queen's Bench agreed that the university had in fact violated the brothers' right to free expression, acknowledging that online comments by students about the quality of their education should be encouraged within reasonable limits. Additionally, the Court noted that if the professor had felt defamed she could have commenced an action in defamation against the brothers, an option that neither she nor her employer pursued.



Educational institutions seeking to protect the reputation of their employees must accept that imposing disciplinary measures against students who post critical comments is not necessarily the appropriate response. While such measures might have been imposed in *Pridgen* in an attempt to prevent the nature of the comments from taking a turn for the worse, those comments had not passed the threshold required to justify the university's response.

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## Employee Privacy Rights Cont...

Once the school had the photo, it had an obligation to protect the safety of its students, so its search of the computer and copying of files did not violate Cole's right to privacy. However, the technician's initial discovery did not lessen Cole's reasonable expectation of privacy in the overall contents of his laptop in relation to the police.

Since the laptop was also used for personal use, the court drew a parallel with the prior decision of the Supreme Court of Canada in *R. v. Morelli*, 2010 SCC 8, where the court held:

'It is difficult to imagine a search more intrusive, extensive, or invasive of one's privacy than the search and seizure of a personal computer.'

These cases make it very clear that employers should have policies confirming their rights to monitor the use of workplace computers and to restrict the personal use of these devices.

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### DON'T MISS OUT!

If you would like to ensure you receive this newsletter on a regular basis, please contact **Dari Gilham**, Legal Assistant to the Employment & Labour Group by phone **604.647.4141** or by email at **dgilham@boughton.ca**.

The content in this newsletter is for your general information and should not be taken as legal advice. If you have a specific problem, please contact one of our lawyers to discuss your situation.