In the Matter of a Labour Arbitration pursuant to the Ontario *Labour Relations Act*

Between:

St. Lawrence Cement Inc. a.k.a. Holcim (Canada) Inc.

-and-

International Brotherhood of Boilermakers, Local D366

Grievance of Stephen Jellett

Arbitrator:	Randi H. Abramsky	
Appearances **For the Union:**	Joanne McMahon	Counsel
For the Employer:	Simon Mortimer	Counsel
Hearing:	June 3, 2011 in Mississauga, Ontario	

AWARD

On June 7, 2010, the grievor, Stephen Jellett, was discharged for fraudulently claiming WSIB benefits. In making that decision, the Company relied on video surveillance evidence. The Union has raised a preliminary objection to the introduction of the video surveillance evidence and any documentary or *viva voce* evidence based on the surveillance. No evidence was called. Consequently, at this point, the only issue is the standard to be applied in regard to the admissibility of such evidence – the "relevance" test as argued by the Company, or the "reasonableness" test, as asserted by the Union. This Award deals with that issue.

I have carefully reviewed the case law submitted by the parties. The Employer relied on *Re Greater Toronto Airports Authority and PS.A.C., Local 0004* (2010), 191 L.A.C. (4th) 277 (Shime) and *Re Greater Essex County District School Board and C.U.P.E., Local 27 (Postman)* (2006), 151 L.A.C. (4th) 315 (Hunter). The Union relied on *Re Labourers' International Union of North America, Local 625 and Prestressed Systems Inc. (Roberts)* (2005), 137 L.A.C. (4th) 193 (Lynk); *Re Toronto Transit Commission and Amalgamated Transit Union Local 113 (Adams),* (1997) 61 L.A.C. (4th) 218 (Saltman); *Re Hershey Canada Inc. and CAW-Canada, Local 462 (K.W. Grievance)* (2008) 178 L.A.C. (4th) 170 (Levinson); and *Re Intercontinental Hotel and U.F.C.W., Local 333 (Xu Grievance)*[2011] O.L.A.A. No. 209 (Sheehan). For the following reasons, I conclude that the "reasonableness" test should apply.

First, I accept that Section 48(12)(f) of the Ontario *Labour Relations Act* empowers an arbitrator to exclude relevant evidence in an appropriate case. It gives arbitrators the power "to accept the oral or written evidence as the arbitrator...in its discretion considers proper, whether admissible in a court of law or not." Although this provision is worded to expand the scope of evidence that an arbitrator may accept, it also mentions that the arbitrator has "discretion" to include evidence considered "proper."

Historically, arbitrators have excluded evidence that, although relevant, has been deemed "improper", such as discussions during a mediation session, grievance discussions and settlement negotiations. Arbitrators have developed a "labour relations" privilege and a "shop steward" privilege. While some of these exclusions have been based on a "Wigmore" type analysis, these holdings clearly demonstrate that arbitrators do have the power to exclude relevant evidence.

The exclusion of relevant evidence, however, may only be done where there are compelling reasons to do so. *Re Intercontinental Hotel, supra* at par. 18. As stated by then Arbitrator Whitaker in *Re Securicor Cash Services and Teamsters, Local 419* (2004), 125 L.A.C. (4th) 129, 141 (Whitaker): "I would go so far as to say however that there must be extremely compelling reasons to exercise such a discretion and that it would only be appropriate to do so in the narrowest of circumstances."

I also conclude that although there is no statutory "right" to privacy in Ontario, as there is in other jurisdictions, employees have a reasonable expectation of privacy in relation to their off-duty conduct in regard to their employer. There have been a number of rationales expressed in the arbitral case law as the basis of this expectation. Arbitrator Lynk determined that privacy is part of the arbitral "common law" of the unionized Ontario workplace. *Re LIUNA, Local 625 and Prestressed Systems Inc. (Roberts), supra.* Arbitrator Whitaker determined that there was a limited common law right to privacy in Ontario and a statutory basis for it under the *Personal Information Protection and Electronic Documents Act (PIPEDA). Re Securicor Cash Services, supra.* These determinations have evoked significant skepticism from other arbitrators. *Re Greater Essex County District School Board and C.U.P.E., Local 27 (Postman), supra.*

In my view, the proper basis for a reasonable expectation of privacy in the workplace is the "just cause" rationale articulated by Arbitrator Nairn in *Re Centre for Addiction and Mental Health and OPSEU* (2004), 131 L.A.C. (4th) 97. Arbitrator Nairn stated that the basis for an employee's reasonable expectation of privacy is the just cause standard in the collective agreement. To discipline or discharge an employee, the employer must have just cause. Generally what an employee does in his or her off-duty private life is not the concern of the Employer. It is only when that off-duty conduct potentially impacts the employer that the employer has a legitimate interest in the employee's conduct. As stated by Arbitrator Sheehan in *Re Intercontinental Hotel, supra* at par. 23: "An employee's life outside the workplace, absent the establishment of a legitimate employer interest, is of no concern to the employer." Arbitrator Sheehan then

quotes from a decision of Arbitrator Nairn in *Re Centre for Addiction and Mental Health and OPSEU, supra* at 113 :

> ... A cornerstone of virtually all collective agreements... is the requirement that an employer show just cause before imposing a penalty of discipline, including discharge. Within that framework and, absent some legitimate employer interest in off-duty conduct, an employee's 'private life' is none of the employer's concern.
>
> Thus within the collective agreement context, and if it need be framed in the context of a privacy interest, in my view it may fairly be said that an employee has a reasonable expectation of privacy from their employer when engaged in activities outside of work that do not otherwise negatively impact on the employer's legitimate business interests. The fact that surveillance is not otherwise unlawful is not a sufficient inquiry. As a matter of just cause, which incorporates the notion of due process, an employer should demonstrate that there is a reasonable basis for undertaking surveillance before it intrudes on that reasonable expectation of privacy.

In other words, because of the requirements of just cause, an Employer's interest in an employee's private life arises only when that conduct has the potential to adversely affect the business and its operations. An Employer does not otherwise have the right to intrude upon an employee's private life. Then Arbitrator Whitaker also made this point in *Re Securicor Cash Services, supra* at p. 142: "It would seem self-evident that an employer has no interest in collecting personal information about employee conduct away from the workplace unless that information assists the employer in the administration and management of the enterprise."

Without question, an employer may have a legitimate interest in an employee's off-duty conduct in relation to a claim for WSIB benefits. As stated by Arbitrator Shime in *Re Toronto Transit Commission and A.T.U, Local 113 (Russell)* (1999), 88 L.A.C. (4^{th}) 109, quoted in *Re Centre for Addiction and Mental Health, supra* at 108-09:

> Where an employee claims benefits from a sick fund or a disability fund, an employer who pays premiums to maintain the fund, or who maintains an employer funded sickness or disability fund, has a legitimate and substantial interest in seeing that the claims against the fund are honest. Thus, when an employer investigates an employee, the employer is investigating the veracity of the claim that is filed either with the employer or with its insurer, as well as the conduct or behavior of the employee off the premises. ...
>
> Certainly, off-duty conduct or behaviour, which may negate a claim against a fund maintained or paid for by the employer, should entitle the employer to investigate the off-duty behaviour of employees making claims against the fund. The employee's conduct or behavior is the proper subject of investigation, because of the employer's legitimate and substantial interest in the fund and the potentially negative impact of an employee's improper conduct or behavior.

Consequently, while employees' have a reasonable expectation of privacy from the employer in regard to their off-duty time and conduct, the Employer may have a legitimate interest in that off-duty conduct when that conduct potentially impacts the business or its operations. In my view, it is the "reasonableness" test - not the "relevance" test - which best balances the competing interests of the employee and the employer, consistent with the requirement of just cause. Under this standard, the employer must have some reasonable basis to undertake surveillance of the employee and the surveillance must be conducted in a reasonable manner. As then Arbitrator Whitaker states in *Re Securicor Cash Services, supra* at p. 142: "it really boils down to a weighing of the employer's reasons for wanting the information and the methods used – against the degree of intrusion into an employee's private life in all the circumstances."

In so ruling, I respectfully cannot agree with Arbitrator Shime in *Re Greater Toronto Airports Authority, supra* at p. 328, that the decision of the Ontario Court of Appeal in *Landolfi et al. v. Fargione* (1006), 79 O.R. (3d) 767 (Ont. C.A.) "resolves the

arbitration controversy" over the standard to apply in regard to the admission of video surveillance in labour arbitration. *Landolfi* involved a civil negligence action arising from a motor vehicle accident. After the plaintiff testified about his injuries, the defense sought to introduce three surveillance videos to impeach his credibility about his injuries and to undermine the factual assumptions made by his medical experts. The trial judge did not permit the introduction of these videos, applying a higher standard for the admission of video evidence, and that ruling was overturned on appeal. (*Landolfi* at par. 42) The case was decided based on the rules of civil procedure and the standards set out there in regard to video evidence used for impeachment purposes.

The Court of Appeal did state that there was "no principled basis for video evidence to attract a different and more stringent test for admissibility at trial than that which applies to any other form of evidence." But there was no analysis by the Court of Appeal concerning covert surveillance videos in an employment context, and the special considerations that apply based on that relationship and the requirement of just cause. Civil litigants (or neighbours, or passersby), unlike employers, are not subject to a just cause requirement. Employers, because of the requirement of just cause, must have a reasonable basis to engage in off-duty surveillance of employees.

Further the "relevance" test would permit the Employer to engage in ongoing surveillance of an employee, with admissibility assured if the surveillance just happened to uncover something potentially affecting the employer. As Arbitrator Nairn stated in *Re Centre for Mental Health, supra* at p. 114:

> With limited exception arbitrators have articulated discomfort with the notion of unbridled employer surveillance of employee off-duty conduct. This is not simply a personal distaste, nor is it an attempt to remedy a power imbalance. It flows from an overall understanding of the nature of the employment relationship as embodied in the collective agreement; balancing the nature and extent of an employer's legitimate interest and rights with the protection provided to employees by the concept of just cause.

I agree.

Conclusion:

For all of the reasons set forth above, I conclude that the "reasonableness" test applies to the admission of video surveillance in this matter.

Issued this 21st day of June, 2011.

/s/ Randi H. Abramsky

Randi H. Abramsky, Arbitrator