Crown Employees
Grievance Settlement Board

Suite 600
180 Dundas St. West
Toronto, Ontario M5G 1Z8
Tel. (416) 326-1388
Fax (416) 326-1396

Commission de règlement des griefs
des employés de la Couronne

Bureau 600
180, rue Dundas Ouest
Toronto (Ontario) M5G 1Z8
Tél. : (416) 326-1388
Téléc. : (416) 326-1396

Ontario

GSB#2010-2489

IN THE MATTER OF AN ARBITRATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE GRIEVANCE SETTLEMENT BOARD

BETWEEN

Ontario Public Service Employees Union
(Grievor)

Union

- and -

The Crown in Right of Ontario

BEFORE	Felicity D. Briggs	**Vice-Chair**
FOR THE UNION	Katherine Ferreira Koskie Minsky LLP Counsel	
FOR THE EMPLOYER	Peter Daillebout Treasury Board Secretariat Legal Services Branch Counsel	
HEARING	November 23, 2011; January 30, May 18, 2012; April 9 & 25, May 9, June 3, 2013	
CONFERENCE CALLS	September 9, October 27, 2011; March 27, 2012; April 23, May 22 & 28, June 4, 2014	
FURTHER SUBMISSIONS	June 23 & June 26, 2014	

Decision

[1] Subsequent to the conclusion of the hearing into this grievance there was discussion between the parties and the Board regarding the desirability of making this decision anonymous. It was ultimately decided that due to the highly sensitive nature of some of the evidence received in this matter it makes good labour relations sense to do so. Accordingly, all names and geographical references will be altered. Further, the work performed in the workplace will be described in a generalized fashion. In this decision the grievor will be referred to as Ms. M.

[2] The parties agreed to have the Board issue two separate decisions each covering one of the two substantive allegations captured by the grievance. The first allegation was that the grievor was subjected to bullying and harassment by her coworkers and supervisors. That aspect of this grievance was dismissed in a written decision issued earlier. This decision deals only with the second allegation described below.

[3] Following a number of days of hearing the Union put the Employer on notice that it would bring a motion before this Board that the "effect of the tort of 'intrusion upon seclusion' as contemplated in *Jones v Tsige* (2012 ONCA 32)", is significant to the disposition of this grievance. In correspondence dated March 7, 2012, the Union stated, in part:

> You will recall that the Union provided particulars of its case in September of 2011. These particulars include an account of an incident that occurred in, approximately, February of 2010 while Ms. M. was on leave from work. Shortly before she was due to return, her colleague (Ms. X) accessed Ms. M.'s Employment Insurance ("E.I.") file. Ms. X. accessed this file while at work and used the Employer's computer do to so. Ms. X showed Ms. M.'s E.I. information to at least one other colleague, Ms. Smith ("Smith"). Ms. X suggested to Smith that the E.I. information indicated that Ms. M was about to run out of benefits and that the closure of benefits was the reason Ms. M. had decided to return to work.

[4] The Union asked for an interim ruling in this regard. However, the Board determined that it would reserve on the matter and rule following the conclusion of all of the evidence.

[5] There was no dispute between the parties that Ms. X. accessed the grievor's E.I. file during her working hours with no *bona fide* reason to do so. While much of the evidence about this issue was not in dispute, the Employer viewed the severity of the breach as something less than was being suggested by the Union.

[6] Some evidence touching upon this issue was called and it is useful to review it before setting out the submissions. It was apparent from the evidence that during the course of the normal operations of this office, access to the Employment Insurance files of certain clients may be necessary. The grievor learned that her EI file had been accessed by a fellow employee from Ms. Smith, a coworker who gave evidence in this proceeding. Ms. Smith testified that one day while the grievor was on sick leave she was invited by another employee, (who will be referred to as "Ms. X"), to look at her computer screen and directed to read the grievor's Employment Insurance file. According to Ms. Smith, Ms. X. said to her, "this is why she is coming back to work – she is out of EI." Ms. Smith saw the grievor's EI file with her name and the listing of her payment records on the computer screen.

[7] In cross-examination Ms. Smith said that she was aware that employees were not supposed to go into the EI records of people except for the *bona fide* work purposes. She said that it was just common decency not to access other files and that "we had to go through clearance just to get access to that system." She knew that she should not use the EI system or any other system for personal use and that it is an invasion of someone else's privacy. She had never seen this occur in the workplace before this instance.

[8] Evidence was also proffered by the grievor's supervisor. She testified that she first became aware that Ms. X reviewed the grievor's EI file during a grievance meeting held with Ms. Smith. Once she learned of this she arranged for a full forensic audit of Ms. X's computer. That audit – which was a time-consuming exercise - confirmed that on February 26, 2010, Ms. X had accessed the grievor's record twice on the same day. There were no other instances. Once that investigation was complete in April of 2012, the grievor's supervisor participated in a disciplinary meeting wherein Ms. X was suspended for fifteen days. According to her letter of discipline Ms. X was suspended for:

- On February 26, 2010 you accessed the EI LMDA database to view the EI records of a coworkers without consent or reasons relating to your position;
- On February 26, 2010 you summoned another coworker in the room to review the results of your unauthorized EI access of a coworker;
- On February 26, 2010 you violated the Ontario Public Service Information and Technology Security Directive.

[9] The policy referred to in the letter of discipline is seventeen pages in length and states as part of its purpose "to protect the government's interest in ensuring the

I&IT resources are used only for government business or other approved purposes." It states, in part at section 6.2:

> Government of Ontario Information Technology (IT) resources are to be used exclusively for government business, unless otherwise approved by your manager. In addition, government business must be only conducted on government resources, unless otherwise explicitly approved by your manager. This includes, but is not limited to computers, laptops, email, internet, intranet, extranet, personal digital assistants, cellular phones, memory sticks, etc.
>
> - IT resources **must not** be used for activity which is prohibited by federal and provincial statutes, or the common law, and may result in criminal or civil liability.
> - IT resources **must not** be used for unacceptable activity. Unacceptable activity includes, but is not limited to:
>   - The use of government I& IT resources for personal use, without a manager's approval
>   - ……
>   - Using IT resources to discriminate against or harass, threaten or intimidate other employees or to create a hostile or humiliating work environment.
>   - Performing unauthorized network scans on, or conducting unauthorized access attempts to government systems, applications or services, or spreading viruses or malicious codes to other systems. (emphasis not mine)

[10] The grievor's supervisor testified in her evidence in chief that privacy of information is a topic "often discussed". She reviews with every employee at the time of their hire that there is an obligation to keep people's information private. Further, she explains that it should be utilized only for the purpose for which it was intended. This discussion often involves the criminal record check that all employees must undertake. She also discusses various paper files that have private information that cannot be misused. Employees are reminded of this obligation and are asked to agree via a "pop-up" window when accessing their computer.

[11] The grievor's supervisor also said that there has been much discussion with her staff about privacy as a result of the "clean desk policy". There have been conversations at meetings about the need to put personal and private information in locked or otherwise safe areas each day end to ensure that others like cleaning staff do not have access.

[12] In cross-examination the grievor's supervisor agreed that the only staff meeting minutes offered as evidence that revealed any discussion of the OPS privacy policy were dated after she became aware of Ms. X.'s breach of the policy. However, she maintained the matter of privacy had been discussed in that forum earlier but conceded she could not find documented evidence of staff discussions. She also agreed that she did not have any formal mechanism in place to ensure that she had such a discussion with her staff on a regular basis.

[13] The questions for this Board to determine in this matter are:

- Does this Board have the jurisdiction to determine the matter of intrusion against seclusion as set out in the case?
- If so, is the Employer vicariously liable for the actions of Ms. X? and
- If so, does this Board have the jurisdiction to award damages?

[14] I will address these matters in order.

Jurisdiction to determine the matter of intrusion against seclusion in this case

[15] As is apparent from the March 7, 2012 letter from the Union set out above, it was the Union's view that the act of Ms. X improperly accessing the grievor's EI information was a further instance of workplace harassment suffered by the grievor. That assertion was set out in the Union's original particulars provided to the Employer in September of 2011. The grievance itself alleged:

> I grieve that management has violated articles 2, 3 and 9 of the Collective Agreement but not limited to. [sic] And any other article of the Collective Agreement and/or legislation.

[16] It was the Union's view that there has been a violation of not only those Collective Agreement provisions set out in the grievance but also a breach of *Freedom of Information and Protection of Privacy Act* R.S.O. 1990, Chapter F-31 ("*FIPPA*"). Section 21.3 of *FIPPA* states:

> Presumed invasion of privacy
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that

> disclosure is necessary to prosecute the violation or to continue the investigation;
> (c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;
> (d) relates to employment or educational history;
> (e) was obtained on a tax return or gathered for purposes of collecting a tax;
> (f) describes an individual's fiancés, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
> (g) consists of personal recommendations or evaluations, character references or personnel evaluations or;
> (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

[17] The Union contended that Section 48.12 of the *Labour Relations Act* 1995 S.O. 1995 c.1, Schedule A., provides that arbitrators have the jurisdiction to interpret employment related statutes. As *FIPPA* applies to all Provincial Ministries and personnel, there is no doubt that this Board has the necessary jurisdiction to hear and determine the matter.

[18] The Union was also of the view that in addition to the Board's power to apply the provisions of *FIPPA,* the Collective Agreement has an implied requirement that employees respect the privacy of one another. There is an express or implied right under the Collective Agreement to keep confidential information confidential.

[19] In this regard the Union relied upon *Re Government of the Province of Alberta & Alberta Union of Provincial Employees (Privacy Rights Grievance)* (2012), 221 L.A.C. (4th) 104 (Sims); *Re Kawartha Pine Ridge District School Board & Elementary Teachers' Federation of Ontario* [2008] CanLII27810 (ON LA); and *Re Canadian Union of Public Employees, Local 133 v. Niagara Falls (City) (Iaonnoni)* [2005] O.L.A.A. No. 228

[20] The Union asked the Board to review in *Re Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324* [2003] S.C.J. No. 42. it was said:

> Under *McLeod*, a collective agreement cannot extend to an employer the right to violate the statutory rights of its employees. On the contrary, the broad power of the appellant to manage operations and direct employees is subject not only to the express provisions of the agreement, but also to the statutory rights of its employees. Just as the

> collective agreement in *McLeod* could not extend to the employer the right to require overtime in excess of 48 hours, the collective agreement in the current appeal cannot extend to the appellant the right to discharge an employee for discriminatory reasons. Under a collective agreement, as under laws of general application, the right to direct the work force does not include the right to discharge a probationary employee for discriminatory reasons. The obligation of an employer to manage the enterprise and direct the work force is subject not only to the express provisions of the collective agreement, but also to the statutory rights of its employees, including the right to equal treatment in employment without discrimination.
>
> ...
>
> For the foregoing reasons, the Board was correct to conclude that the substantive rights and obligations of the *Human Rights Code* are incorporated into each collective agreement over which an arbitrator has jurisdiction. Because of this interpretation, an alleged violation of the *Human Rights Code* constitutes an alleged violation of the collective agreement and falls squarely within the Board's jurisdiction. Accordingly, there is no reason to interfere with the Board's finding that the subject matter of Ms. O'Brien's grievance is arbitrable. The Board's finding that the discriminatory discharge of a probationary employee is arbitrable is not patently unreasonable.

[21] The Union further suggested that this might well be the only forum that would hear the grievor's complaint. In any event, even if there is not an express provision of the Collective Agreement that has been violated the matter arises inferentially out of the employment relationship and therefore under the Collective Agreement.

[22] The Employer strongly urged otherwise. It was asserted that the Union is asking this Board to take jurisdiction over a dispute between two bargaining unit members. There has been no violation of the Collective Agreement and according to the Board's long-standing jurisprudence, there must be a direct or inferential link to the Collective Agreement. In this case, there simply is nothing in the Collective Agreement that contemplates that the Employer has responsibility for invasions of privacy as between employees.

[23] The Employer relied upon *Re The Crown in Right of Ontario (Ministry of Correctional Services) and OPSEU (Andersen et al)* GSB No. 1093/01 (R. Brown); *Re The Crown in Right of Ontario (Ministry of the Environment) & OPSEU (Dobroff et al)* GSB 2003-0905 (Dissanayake); *Re The Crown in Right of Ontario (Ministry of Community Safety and Correctional Services) & OPSEU (Belanger); Re Seneca College & Ontario Public*

Employees Union (Olivo) 92001), 102 L.A.C. (4th) 298 (P.Picher); *Re Transit Windsor & (ATU, Local 616 (Orsi)* (2003), 114 L.A.C. (4th) 385 (Brandt); *Re Toronto Police Services Board & Toronto Police Services Association* [2006] CanLII 50481 (ON LA); *Re Weber V. Ontario Hydro* [1995] S.C.J. No. 59; and *Re Regina Police Association Inc. v. Regina (City) Board of Police Commissioners* [2000] S.C.J. No. 15.

[24] In its review of the Board's decisions the Employer emphasized that even post the decision in *Re Weber V. Ontario Hydro* [1995] 2 S.C.R. 929, jurisdiction is restricted to the express or implied violations of the Collective Agreement. It was noted in *Re Andersen et al* at page 9:

> The foregoing review of the case law leads me to conclude that the exclusive jurisdiction of arbitration includes all controversies with a factual basis governed by the express or implied terms of a collective agreement but extends no further.
>
> > The Supreme Court's decision in *Weber* did not broaden the range of disputes coming within the scope of arbitration, even though the Court curtailed the range of disputes that judges may decide. This point can be illustrated by considering two types of conflicts between an employer and employees governed by a collective agreement. In the first, the factual basis of the dispute gives rise to an alleged violation of some common-law right but not to any allegation that the collective agreement has been breached. The courts had exclusive jurisdiction over matters of this sort before *Weber* and continue to have it after. The Supreme Court's decision does not give arbitrators any role in this context. The impact of *Weber* is limited to another sort of controversy, one where the factual basis of the dispute gives rise to both an alleged contravention of the collective agreement and an allegation of some common-law wrong. In this scenario before *Weber*, an arbitrator had authority to interpret and apply the express and implied terms of the agreement, and a court could entertain an action at common law based on the same facts. The Supreme Court's decision precludes a judge from playing any part in the resolution of such a conflict and relegates it to the exclusive jurisdiction of arbitration. Now all legal issues arising from a common set of facts must be adjudicated in the single forum or arbitration.
> >
> > *Weber* does not widen the range of disputes which may be arbitrated, but it does alter in two way the role of arbitrators when dealing with the sorts of controversies with which they

> have always dealt. The Supreme Court's decision gives arbitrators a larger set of legal tools to use in fashioning resolutions to these problems. For example, an arbitrator may award damages for defamation based upon facts which also constitute a violation of a collective agreement. (See *Bhanduria and Toronto Board of Education*, [1999] O.J. 582 (C.A.) holding only an arbitrator could entertain a claim for defamation based upon allegations which resulted in a teacher's termination.) The second impact of Weber on the role of arbitrators is less obvious than the first but just as significant. By empowering arbitrators to apply the common law, the Court assigned to them the task of determining to what extent this judge-made law has been displaced or modified by a collective agreement. In a case like *O'Leary*, an arbitrator will be the one to decide whether a contractual prohibition against discipline with just cause modifies or negates an employer's common law right to be compensation for a loss caused by the negligence of an employee.

[25] Vice Chair Brown ultimately found that his jurisdiction did "not extend beyond controversies with a factual basis governed by the express or implied terms of the collective agreement."

[26] The Employer also directed the Board's attention to *Re Dobroff (supra)* wherein Vice Chair Dissanayake stated at page 25:

I adopt the reasoning in Re Andersen. It sets out correctly the impact of the Weber ruling on the jurisdiction of an arbitrator. Therefore, this Board's jurisdiction remains restricted to matters arising either explicitly or implicitly from the collective agreement. In other words, the matter must be governed by an express or implied term of the collective agreement. As I have noted, union counsel appeared to concede this limitation in his reply submissions when he clarified that he was not asserting that the Board has a "free standing" jurisdiction to review the exercise of management rights for reasonableness. He submitted, however, that the effect of Weber was to make it easier for a party to establish the required link to the collective agreement by directing arbitrators to be more liberal and flexible in recognizing that required link. I find no such direction by the Supreme Court in Weber. To the contrary, as observed in Re Andersen (supra), "the Supreme Court's decision in Weber did not broaden the scope of arbitration even though the Court curtailed the range of disputes judges may decide" (p.9). However, it did broaden the jurisdiction of an arbitrator, once an arbitrator has determined that a dispute arises from the collective agreement, either explicitly or implicitly. (emphasis not mine)

[27] In considering this matter I found the case law provided by the parties of much assistance. In *Re Government of Alberta (supra)*, Arbitrator Sims was asked to determine whether damages should flow as the result of a breach of privacy for a group of employees. In that case, the Employer ordered a peace officer in its Special Investigation Unit to investigate possible employee fraudulent activity in a particular office. The peace officer so assigned undertook credit checks of the employees without authorization from the Employer in order to determine if anyone was in financial difficulty. It was ultimately found by the peace officer that the fraudulent activity was the responsibility of parties outside of the government.

[28] According to the agreed facts in that case the employees reported the breach to the Province's Privacy Commissioner and the government conceded that the searches performed were inappropriate and in violation of the *Freedom of Information and Protection of Privacy Act.* After the breach was revealed the Employer apologized to the affected employees and told them that all records had been destroyed. The investigation undertaken by the Privacy Commission found that the breach was unauthorized and carried out in contravention of the privacy legislation.

[29] In that decision the arbitrator stated at page 7:

> Both parties accepted the proposition that, as arbitrator under this collective agreement, I am entitled to consider a breach of the *Freedom of Information and Protection of Privacy Act* as a matter that could be adjudicated within the principles set out in by the Supreme Court of Canada in the *Weber* and *Parry Sound* decisions. The Union refers to Article 5 of the collective agreement, providing for management's rights, and argues that those rights are circumscribed by the obligation to follow the law.
>
> > 28. As a practical matter, this means that the substantive rights and obligations of employment-related statutes are implicit in each collective agreement over which an arbitrator has jurisdiction. A collective agreement might extend to an employer a broad right to manage the enterprise as it sees fit, but this right is circumscribed by the employee's statutory rights. The absence of an express provision that prohibits the violation of a particular statutory right is insufficient to conclude that a violation of that right does not constitute a violation of the collective agreement. Rather, human rights and other employment-related statutes establish a floor beneath which an employer and union cannot contract.
> >
> > 29. As a result, the substantive rights and obligations of the parties to a collective agreement cannot be determined solely by reference to the mutual intention of the contracting parties

> as expressed in that agreement. Under *McLeod*, there are certain terms and conditions that are implicitly in the agreement, irrespective of the mutual intentions of the contracting parties. More specifically, a collective agreement cannot be used to reserve the right of an employer to manage operations and direct the work force otherwise than in accordance with its employees' statutory rights, either expressly or by failing to stipulate constraints on what some arbitrators regard as management's inherent right to manage the enterprise as it sees fit. The statutory rights of employees constitute a bundle of rights to which the parties can add but from which they cannot derogate. *(Parry Sound (District) Social Services Administration Board v. OPSEU Local 324, 2003* SCC 42 [2003] 2 SCR 157.

[30] In *Re Kawartha (supra),* Arbitrator Luborsky was asked to determine whether the dissemination of confidential health information of an employee to a third party was a matter properly before him. In that case, the relevant statute was the *Municipal Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. M.56. In determining the issue at hand Arbitrator Luborsky took into account earlier jurisprudence. He said, at paragraph 42:

> Consequently, just as I have found form the language of the collective agreement before me, Arbitrator Macdowell concluded that confidentiality of employment information in the possession of the employer was to implied from various provisions of the collective agreement in that case, conferring upon him jurisdiction to consider the alleged breach of that contractual obligation inferentially arising out of the collective agreement and damages flowing on a *Weber*-type analysis. However, if wrong in that regard, Arbitrator Macdowell concluded that *MFIPPA* was an employment-related statute, to the extent it touched on employment matters, that he was entitled to interpret and apply under section 48(13) of the *L.R.A.* and was substantively incorporated within the collective agreement under the principles in *Parry Sound, supra,* which formed an alternate basis for conferring jurisdiction. He stated the following at para. 122 of the decision, which I adopt as applicable in the case before me.
>
> > Accordingly, whether the provisions of these employment related statutes are dealt with as *if* they were clauses in the collective agreement, or alternatively, whether they are merely "enforceable" at arbitration, so as to prevent managerial actions inconsistent with them, (i.e. as an arbitrable constraint

> on the exercise of management rights) the result seems the same: *that an arbitrator can interpret and apply these employment related statutes so as to give a remedy for their violation, even if there is no violation of some express employee right found in the collective agreement, standing alone.* It is insufficient if the employer exercises its right to run the business in a manner that collides with an employment related statute, and that some employee, covered by the collective agreement, is adversely affected by that collision. If that is the case, then the employee can seek relief at arbitration; and no independent breach of some other collective agreement provision can be demonstrated. (Indeed, as in *Parry Sound*, the claim can be adjudicated even if the bargaining parties have provided that that kind of dispute is not a "difference" between them that can be arbitrated.
> (*Emphasis not mine)*

[31] While I appreciate the Employer's argument in this matter particularly in view of the Board's jurisprudence, I am of the view that its suggestion that this Board is without jurisdiction cannot succeed in this case. Like others before me, I accept that *FIPPA* is an employment related statute and the substantive rights and obligations found therein are implicit in this collective agreement. Therefore I have the jurisdiction to hear and determine this matter. It is worth mentioning that in the cases relied upon by the Employer there was no assertion that an employment related statute had been violated.

Is the Employer vicariously liable for the actions of Ms. Smith?

[32] Having found I have the jurisdiction to determine this matter, the next issue to address is whether the Employer can be held vicariously liable for this breach.

[33] It was the Union's view that the evidence heard regarding the highly improper accessing of the grievor's EI file by Ms. X., revealed that while the Employer's privacy policy was discussed with employees at the time of their hire in the context of criminal checks, there was no formal process in place to repeat the importance of the need for privacy. The fact that the clean desk policy was discussed with staff was not enough to protect employees from this type of breach. The Employer cannot rely on its policies because the evidence was clear that enforcement of those policies was lacking. The value of any policy is diminished when it is not enforced. Employer liability can be found when either an employee's acts are authorized by the Employer

or when unauthorized acts are so connected with authorized acts that they may be regarded as methods of doing the authorized act. In this case, the fact that Ms. X was not a member of management does not relieve the Employer of liability. The Employer permitted a workplace environment in which such activity was tolerated. There was a factual and functional nexus between the employment and the misuse of confidential information which must lead to a finding of vicarious liability. Therefore, according to the Union, the Employer should be held vicariously liable.

[34] The Union relied upon *Re Bazley v. Curry* [1999] 2 S.C.R. 534; and *Re 671122 Ontario Ltd. V. Sagaz Industries Canada Inc.* [2001] 2 S.C.R. 983.

[35] The Employer submitted that, unlike the facts in *Re Province of Alberta*, *(supra)*, the facts of this case are clear that a rogue employee used her access to a particular database for her own personal reasons to ascertain when the grievor's EI benefits were coming to an end. In *Re Province of Alberta*, the breach was as the direct result of an employee carrying out a management ordered investigation albeit his methods were neither ordered nor sanctioned. That direct link is not present in the instant case.

[36] It is trite to say that a determination of whether an employer is vicariously liable is wholly dependent on the facts. The matter of vicarious liability was described in *Re Sagaz Industries (supra)* as the event when the law holds one person responsible for the misconduct of another because of their relationship. It was also noted that the most common relationship that gives rise to vicarious liability is the employer and employee relationship.

[37] In *Re Bazley (supra)*, the Supreme Court was dealing with the matter of whether a Foundation – which was a non-profit organization which operated two residential care facilities - was liable for the sexual abuse of some of its vulnerable children by an employee who was a pedophile. The Foundation checked the employee's reference at the he was hired and was told that he was a suitable employee. After investigating a complaint it discharged the employee. One of the abused children sued for damages contending that the Foundation was vicariously liable. In its decision the Supreme Court provided helpful direction for those considering vicarious liability. It said at paragraph 41:

> Reviewing the jurisprudence, and considering the policy issues involved, I conclude that in determining whether an employer is vicariously liable for an employee's unauthorized, intentional wrong in cases where precedent is inconclusive, courts should be guided by the following principles:

- They should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath discussions of "scope of employment" and "mode of conduct".
- The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice. Once engaged in a particular business, it is fair that an employer be made to pay the generally foreseeable costs of that business. In contract, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.
- In determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following:
    (a) the opportunity that the enterprise afforded the employee to abuse his or her power;
    (b) the extent to which the wrongful act may have further the employer's aims (and hence be more likely to have been committed by the employee);
    (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
    (d) the extent of power conferred on the employee in relation to the victim;
    (e) the vulnerability of potential victims to wrongful exercise of the employee's power.

[38] The Court undertook a comprehensive review of the jurisprudence to date. Turning to other portions of the decision of keen interest in this matter, the Court said, at paragraph 21:

> At the heart of the dishonest employee decisions is consideration of fairness and policy: see Laski, supra, at p. 121. As P.S. Atiyah, Vicarious Liability in the Law of Torts (1967), at p. 263, puts it, "certain types of

> willful acts, and in particular frauds and thefts, are only too common, and the fact that liability is generally imposed for torts of this kind shows that the courts are not unmindful of considerations of policy." The same logic dictates that where the employee's wrongdoing was a random act wholly unconnected to the nature of the enterprise and the employee's responsibilities, the employer is not vicariously liable. Thus an employer has been held not liable for a vengeful assault by its store clerk: Warren v. Henlys, Ltd. [1948] 2 AII E.R. 935 (K.B.D).

[39] The Court went on to note that cases where employers were found to be vicariously liable for employees' unauthorized torts had three general classes of cases but each had a common feature: in each case the employer's enterprise had created the risk that produced the tortious act. The Court stated at para 22:

> .....The language of "furtherance of the employer's aims" and the employer's creation of "a situation of friction" may be seen as limited formulations of he concept of enterprise risk that underlies the dishonest employee cases. The common theme resides in the idea that where the employee's conduct is closely tied to a risk that the employer's enterprise has place in the community, the employer may justly be held vicariously liable for the employee's wrong.

[40] In the Court's deliberations on "Policy Considerations" it was said at paragraph 36:

> On further analysis, however, this apparently negative policy consideration of when liability would be appropriate is revealed as nothing more than the absence of the twin policies of fair compensation and deterrence that justify vicarious liability. A wrong that is only coincidentally linked to the activity of the employer and duties of the employee cannot justify the imposition of vicarious liability on the employer. To impose vicarious liability on the employer for such a wrong does not respond to common sense notions of fairness. Nor does it serve to deter future harms. Because the wrong is essentially independent of the employment situation, there is little the employer could have done to prevent it. Where vicarious liability is not closely and materially related to a risk introduced or enhanced by the employer, it serves no deterrent purpose, and relegates the employer to the status of an involuntary insurer. I conclude that a meaningful articulation of when vicarious liability should follow in new situations ought to be animated by the twin policy goals of fair compensation and deterrence that underlie the doctrine, rather than by artificial or semantic distinctions.

[41] Being guided by the principles set out in *Re* Bazley, I am of the view that the Employer is not vicariously liable for actions of Ms. X. Simply put, the "wrongful act" was not sufficiently related to conduct authorized by the Employer. Indeed, the accessing of the grievor's EI file had nothing to do with the work assigned to employees. Employees were able to and indeed did access EI files but only in those instances where it was necessary to assist their clients.

[42] The evidence established that the Employer had clear and sufficient policies regarding the protection of private information. Privacy matters were discussed with employees at the point that they were hired and although those policies could have and perhaps should have been formally reviewed more frequently by management, employees were reminded of their obligations frequently by way of a "pop up" upon entering their computers.

[43] Further, Ms. Smith, a co-worker of the grievor, who testified for the Union was very forthright in her cross-examination that she knew that she was not to access the private information of anyone for her own interest. Moreover, this intrusion was the first time that she knew of anyone in the workplace doing such a thing. It might well be argued that this reinforces the view that the policy was known and followed in the workplace. Certainly there was no evidence of any other breach.

[44] This intrusion was not an abuse of power. It was not an instance where someone with power over the grievor utilized their authority to carry out the wrong. It was a coworker – indeed I am of the view that it was the action of a rogue employee who, for her own purposes accessed the grievor's EI file. It was not an action that could be seen to "further the Employer's aims." Indeed this activity was done without the sanction or knowledge of the Employer. I accept the Employer's evidence that it knew nothing of the intrusion until being told by a coworker of the grievor and upon learning took immediate action to investigate and manage the issue and the Ms. X who received a significant suspension.

[45] Finally, it must be recalled that this Board dismissed the grievor's allegations that the Employer and her coworkers were bullying and harassing her in a separate decision. Accordingly it seems to me that it cannot be said that the intrusion into her EI records by Ms. X was "related to friction, confrontation or intimacy inherent in the employer's enterprise."

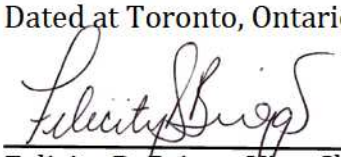
[46] There is no question that the grievor suffered a wrongdoing at the hands of Ms. X. However, it was an intrusion upon seclusion for which I find the Employer not vicariously liable.

[47] I hope that it provides some comfort to the grievor to know that the Employer took swift and significant action to hold Ms. X responsible for her reprehensible conduct.

[48] Given my decision it is not necessary to consider the matter of damages.

[49] For all of those reasons, I must dismiss the grievance.

Dated at Toronto, Ontario this 16th day of March 2015.



Felicity D. Briggs, Vice-Chair