Arbitrator Awards Damages For Employer's Privacy-Breaching Access Of YouTube Video

Bottom Line

In the recent decision in *Corporation of The District of West Vancouver v. Amalgamated Transit Union, Local 134*, the arbitrator ordered that the employer pay $30,000 of damages to the Union as a result of the employer's "unnecessary and invasive" investigation into the Union's local President ("Grievor"). Among other things, the investigation involved accessing and using an unlisted YouTube Video to discipline the Grievor in a manner that breached the Grievor's privacy, as well as the British Columbia *Labour Relations Code* and the collective agreement.

Background Facts

In this case, a member of management at The Corporation of the City of West Vancouver (the "Employer") received access to an "unlisted" YouTube video (the "YouTube Video"). The YouTube Video showed a recorded speech by the Grievor while he was acting in his capacity as the President of the Amalgamated Transit Union, Local 134 (the "Union"). The Grievor had taken steps to make the YouTube Video confidential and to limit its viewership to Union members only, including by doing the following:

- The YouTube Video was only published to a Union website, which required member sign-in with individual verification to access the material on the website.
- The YouTube Video's privacy setting was "unlisted", such that it did not appear in searches or otherwise on the public section of YouTube. Instead, the YouTube Video could only be accessed by persons with the relevant URL.
- The Grievor had provided three levels of confidentiality warnings for potential viewers of the YouTube Video, including on the Union website, the Union's YouTube channel and on the individual YouTube Video. These warnings advised viewers that content was intended for Union members only, and was strictly confidential.

The Employer accessed the YouTube Video, proceeded with an investigation (which involved further accessing and retaining the YouTube Video), and thereafter disciplined the Grievor, in part on the basis of statements made in this YouTube Video. The Union grieved the discipline, and the Union also grieved the Employer's access to, use, and retention of the YouTube Video (the "Privacy Grievance"), which was the subject of this decision.

The Decision

Arbitrator Sullivan found that, by accessing, viewing, and relying upon the YouTube Video, the Employer breached the Collective Agreement and BC's *Labour Relations Code* when it "unreasonably investigated" the Grievor on the basis of comments made in the confidential YouTube Video. In particular, the arbitrator concluded that the comments made by the Grievor were "within the four walls of protected union speech", such that there was no legitimate basis for the employer to undertake an investigation into his conduct in the first place. The arbitrator concluded the Employer's decision to investigate the Grievor on the basis of his protected union speech caused a "chill" in the "willingness of employees to engage with the Union, much less become involved with it".

The arbitrator further found the Employer had breached the BC *Freedom of Information and Protection of Privacy Act* ("BC FIPPA") by improperly collecting the YouTube Video. In particular, Arbitrator Sullivan assessed whether the Employer's collection and retention of the YouTube Video breached section 26(c) of BC FIPPA, which requires that Employers only collect personal information if "the information relates directly to and is necessary for a program or activity of the public body". Arbitrator Sullivan concluded that the Employer's investigation breached section 26(c) of BC FIPPA as it had not been "necessary" to a program or activity of the public body. Notably, the arbitrator found that the Employer did not have a legitimate reason to collect the Grievor's information, in part because the YouTube Video constituted protected union speech by a union elected official that did not intrude on the Employer's legitimate business interests.

Further, the arbitrator concluded that the Grievor had an "objectively reasonable expectation of privacy" in the YouTube Video, since he had taken steps to limit its access to only Union members registered to the Union's website, and provided clear confidentiality warnings with respect to the YouTube Video. The arbitrator concluded that even though a member of the Union had first breached the confidentiality of the YouTube Video by providing it to the Employer, this action did not remove the Grievor's reasonable expectation of privacy between him and the Employer. As the arbitrator stated, "[i]t cannot be that a wrongful act by a person with access to confidential information then provides an employer with justification to collect and use personal information it would not otherwise be entitled to".

The arbitrator concluded that the privacy violation had been significant, as the YouTube Video contained protected union speech of the Grievor, which was "highly sensitive information" in the context of the labour relations relationship.

Arbitrator Sullivan ordered that the Employer pay $30,000.00 in damages to the Union, and destroy all copies of the YouTube Video or associated notes and other documents relating to the YouTube Video.

Takeaways

This case provides insight into the extent to which "confidential" information can be used in respect of a workplace investigation, and the scope of protection offered by the BC FIPPA. In light of this decision, employers should be careful before accessing or relying on confidential information intended solely for union membership relating to union matters, even where provided by a member of the union. Where such information is found to constitute protected union speech, any investigations arising from such confidential information may result in allegations of interfering with the administration of the union, among other legal risks.

matter. Specialist advice should be sought about your specific circumstances.

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