OCTOBER 2006

Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Employment Notes

Labour and Employment Group

Elizabeth J. Forster
(Co-editor)
Direct 416.593.3919
eforster@blaney.com

Maria Kotsopoulos
(Co-editor)
Direct 416.593.2987
mkotsopoulos@blaney.com

William D. Anderson
Direct 416.593.3901
wanderson@blaney.com

Attila Ataner
Direct 416.596.2878
aataner@blaney.com

Lisa M. Bolton
Direct 416.593.2997
lbolton@blaney.com

Mark E. Geiger, Chair
Direct 416.593.3926
mgeiger@blaney.com

Michael J. Penman
Direct 416.593.3966
mpenman@blaney.com

D. Barry Prentice
Direct 416.593.3953
bprentice@blaney.com

Jack B. Siegel
Direct 416.593.2958
jsiegel@blaney.com

Neal B. Sommer
Direct 416.596.2879
nsommer@blaney.com

Robert C. Taylor
Direct 416.593.2957
rtaylor@blaney.com

David S. Wilson
Direct 416.593.3970
dwilson@blaney.com

VOICEPRINT SECURITY: IS IT TOO INVASIVE?

Bill Anderson

Asking employees for a blood test to obtain a DNA print is not considered normal practice, but what if employees are asked for a voice print? This very issue was decided by *Turner and the Telecommunications Workers Union v. Telus Communications Inc. and the Privacy Commissioner of Canada.*

In this case, the federally regulated Telus Communications asked its employees for their voice prints so that the employees could access network operations from anywhere by telephone. These voice prints were digitally stored for the express and only purpose of voice recognition security. A secure database was used to store the voice prints and this database was monitored under tightly controlled conditions. Some Telus employees refused to provide voice samples and objected to the collection and use of their voice prints. Telus responded by threatening to implement "progressive discipline" for those employees who refused to co-operate. A backlash ensued and individual complaints were made to the Privacy Commissioner that the Telus employees' privacy rights were being violated.

At the hearing, Telus established that it had implemented the system to enhance systems security, including protecting its systems from unauthorized access to private personal information, and to improve its efficiencies and competitiveness. The Privacy Commissioner agreed that the system was reasonable in the circumstances and concluded that the employees' complaint was not well founded. The Federal Court concurred and dismissed the employees' application for review.

The Federal Court confirmed that employee voice prints are "personal information", and hence the collection, use and disclosure of such personal information, in respect of federally regulated employers, is governed by the *Personal Information Protection and Electronic Documents Act* ("PIPEDA"). The Federal Court further confirmed that a "reasonable person" would conclude that the collection and use of the voice prints for security purposes was appropriate in the circumstances. The Court placed great emphasis on the fact that the minor intrusion into the employees' privacy was outweighed by the increased security over the confidential personal information contained in the Telus systems. The Court was also persuaded by the fact that the vast majority of employees consented to the use of their voice prints, although not much was made about the legitimacy of those consents given the spectre of discipline which existed. Of particular interest was the Court's view that the employees who refused to consent to the recording and use of their voice prints were not acting reasonably in the circumstances and that the employer could rely upon an exception to the requirement of employee consent to the collection and use of the personal information because the collection of the voice prints was "clearly in the interests of the individuals" and that consent could not be obtained "in a timely way" because the employees were refusing to provide them. Both points are clearly questionable.

What the decision does seem to clearly indicate is that the Privacy Commissioner will not permit a few unreasonable employees from standing in the way of a sound business policy which improves the protection of private personal information. ■

EMPLOYMENT NOTES

"When recruiting foreign workers to Canada, it is important to determine whether the person requires a work permit."

Suzanne Bailey can be reached at 416.593.3903 or sbailey@blaney.com.

Ian Epstein can be reached at 416.593.3915 or iepstein@blaney.com.

RECRUITMENT OF FOREIGN WORKERS TO CANADA

Suzanne Bailey and Ian Epstein

When recruiting foreign workers to Canada, it is important to determine whether the person requires a work permit. In general, to be eligible to work in Canada, people must be Canadian citizens or permanent residents of Canada. If they are not, then they must first obtain a work permit or fall within one of the exemptions set out in the *Immigration and Refugee Protection Act* ("**IRPA**") and/or the Immigration Regulations.

The methods by which a foreign worker can obtain a work permit in Canada are:

Intra-Company Transfers

Intra-company transfer applications are for executives, senior managers and specialized knowledge workers of multi national corporations under either the Immigration Regulations, **NAFTA** (**North American Free Trade Agreement**) or **GATS** (**General Agreement on Trade In Services**).

The foreign worker must have been employed by the related company abroad for 1 full year (out of the past 3 years) and be seeking to come to Canada to undertake similar type of work.

Specialized knowledge workers must demonstrate they have a special knowledge of a company's product or service.

Professionals

Applications as a Professional business person under the NAFTA are restricted to citizens of the United States, Mexico and Canada. The list of professional occupations included under this category is restricted. There is a similar provision under the GATS for foreign workers from signatory countries other then the United States, Mexico and Canada (who are a signatory to the GATS Treaty) but this list of professionals is even more restrictive than the NAFTA list of Professionals.

Investors

Investors are business people who are seeking temporary entry to Canada to develop and direct the operations of an enterprise in which they have invested or are actively in the process of investing a substantial amount of capital. Investor status is not available to non-profit organizations.

Traders – NAFTA

Under NAFTA, a trader is a business person from a signatory nation who is seeking temporary entry to another signatory nation in order to carry on substantial trading of goods and services, principally between Canada and one or both of the other signatories. The position that a trader will assume in Canada must be supervisory, executive or involve essential skills to the business.

Service Canada Confirmations

If the foreign worker does not qualify for a work permit under the foregoing provisions, the only alternative is to seek a Confirmation for Labour Market Opinion from Service Canada. This application is a two step process. First, it involves the employer submitting an application to Service Canada. In most cases, the employer must demonstrate that it has attempted to recruit a Canadian for the position, but has been unable to find anyone qualified. Alternatively, if the employer can prove there are clear benefits to the Canadian labour market by the hiring of the foreign worker, the advertising requirement may be waived.

If the employer's application is approved, the second step is for the foreign worker to apply for the work permit either at a port of entry to Canada (if the foreign worker is eligible to apply there) or to apply at a Canadian visa post abroad.

EMPLOYMENT NOTES

"...the Privacy Commissioner of Canada has established limits on an employer's right to know the details of an employee's medical situation in the event of an absence from work."

Bill Anderson can be reached at 416.593.3901 or wanderson@blaney.com.

In general, Service Canada confirmation applications are difficult to obtain and other options for work permits should be explored first before considering the Confirmation application.

Spouses

In certain circumstances, spouses of the foreign worker are also eligible for an open work permit.

In order for the spouse to qualify, the temporary worker must have been issued a work permit for at least 6 months or more and his/her occupation in Canada must be of a specific management level or specific skill level which is contained in the National Occupation Specification System used by Citizenship and Immigration Canada.

Both married and common-law spouses qualify under this provision. It is not necessary that the spouse first obtain an offer of employment in Canada to qualify for an open work permit. The spouse's open work permit will not exceed the validity period of the work permit issued to the principal foreign worker.

Criminal and Medical Clearances

To be eligible for a work permit, both the foreign worker and his/her spouse must not be criminally or medically inadmissible to Canada. Past criminal charges and convictions and health problems must be explored with the foreign worker before the worker seeks entry to Canada.

Business Visitors

In some cases, a work permit is not necessary for persons coming to Canada who do not intend to work in Canada, such as Business Visitors. Business visitors can be from any country (i.e. their entry to Canada is not restricted by the country of citizenship).

To qualify for entry to Canada as a Business Visitor for a short duration, the business person must demonstrate that he/she is seeking to engage in international business activities in Canada without entering the Canadian labour market; that his/her principal place of business and accrual of profits remains primarily outside of Canada; and his/her remuneration is from a source outside of Canada. ■

Ian Epstein and Suzanne Bailey are members of Blaney's Immigration Practice Group. They would be pleased to assist with any immigration recruitment matters that may arise.

Jill McCutcheon can be reached at 416.593.2956 or jmccutcheon@blaney.com.

SICK LEAVES AND MEDICAL DIAGNOSIS – THE LIMITS OF AN EMPLOYER'S RIGHT TO KNOW

Jill McCutcheon

In related privacy complaints against one or more unidentified transportation related services companies, the Privacy Commissioner of Canada has established limits on an employer's right to know the details of an employee's medical situation in the event of an absence from work.

In PIPED Act Case Summary #233 and #257 individuals complained to the Privacy Commissioner because their employer required that a medical diagnosis be included on the doctor's certificate required in order to substantiate a sick leave. The Commissioner concluded that:

- It is appropriate and reasonable for an employer to require medical certificates when an employee's absence exceeds the allowable limit for uncertified sick leave;
- In most cases it is not necessary to require employees to provide diagnostic information to support the reason for an absence from work and a statement of the employee's physician that the absence was justified should suffice; and

EMPLOYMENT NOTES

"...organizations subject to PIPEDA cannot demand a diagnosis from employees unless required to address defined risks or identifiable safety issues."

PIPEDA applies to federal works and undertakings such as banking, telecommunications and transportation enterprises. The employment practices of an organization located in Ontario which is not a federal work or undertaking is outside the scope of PIPEDA. Ontario does not presently have its own private sector privacy law of general application.

- An employer is entitled to diagnostic information but only when necessary in order to ensure an employee's fitness to resume regular occupational duties.

In these cases, one of the complainants was an office worker and the other complainants were in high risk safety sensitive positions. In the latter instance, it was acknowledged that the employer had the right to inquire, upon return to work, about whether the employee had been under a doctor's care and about any restrictions, including any medications the employee might be taking which might prevent him/her from doing his/her job safely. However, in the context of both complaints, the Privacy Commissioner concluded that the employer did not need to learn the employee's diagnosis in order to administer the employer's sick leave policy. Consequently, both complaints were well-founded and the company was directed to drop its requirement for mandatory inclusion of diagnoses in the medical certificates of employees seeking sick leave benefits.

The Privacy Commissioner's conclusions mean that organizations subject to PIPEDA cannot demand a diagnosis from employees unless required to address defined risks or identifiable safety issues. Sick leave policies which require the disclosure of a diagnosis as a precondition to eligibility for benefits, except in unusual circumstances, are not in compliance with PIPEDA, and should be revisited relative to any legitimate safety concerns. Where an employer's legitimate interests can be served without detailed medical information, only the necessary medical details of an employee's absence should be sought. In short, there are limits on an employer's right to know medical information about its employees and this is the case even where the information is relevant to an absence from work, a sick leave or a disability claim. ■

THE SUPREME COURT OF CANADA RULES ON THE TREATMENT OF DISABLED EMPLOYEES

Elizabeth J. Forster

In our last newsletter we reported to you on a decision of the Ontario Court of Appeal in *Egan v Alcatel Canada Inc.* The case involved a woman who became disabled shortly after her termination.

The Ontario Court of Appeal held that the employer, Alcatel was liable to her for the disability benefits she would have received had she been permitted to work through the reasonable notice period. However, the court held that she was not entitled to severance payments during the period she was receiving disability benefits.

The Supreme Court of Canada has refused to grant leave to appeal this decision even though it appears to be at odds with earlier decisions of the Supreme Court of Canada. We expect that there will be considerable litigation over this decision and that the courts will be called upon to clarify when an employee who becomes disabled during a reasonable notice period is entitled to both disability benefits and severance benefits. We will keep you advised of any further developments in this area. ■

Elizabeth Forster can be reached at 416.593.3919 or eforster@blaney.com.

EXPECT THE BEST

Blaney McMurtry
BARRISTERS & SOLICITORS LLP

2 Queen St. East, Suite 1500
Toronto, Canada M5C 3G5
416.593.1221 TEL
416.593.5437 FAX
www.blaney.com