

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2009-011

March 30, 2010

Cardinal Coach Lines Ltd.

Case File Number P0650

Office URL: www.oipc.ab.ca

Summary: The Complainant made a complaint to the Office of the Information and Privacy Commissioner (“this office”) that Cardinal Coach Lines Ltd. (“Cardinal”) disclosed his personal information in contravention of the *Personal Information Protection Act* (“the Act”). The Complainant alleged that Cardinal’s management disclosed to its employees that the Complainant was under suspension and the reason for the suspension. The Complainant also complained that Cardinal disclosed his personal information without his consent when it told another employer of the Complainant that he was employed at Cardinal, under suspension, and made a comment which reflected on his capacity to safely perform his work duties.

The Adjudicator found that the Complainant was an employee of Cardinal at the time of the disclosures. The Adjudicator also found that Cardinal did not disclose the specific reason for the Complainant’s suspension to its employees, as the Complainant had alleged. The Adjudicator found that Cardinal had disclosed to the Complainant’s other employer only that the Complainant was employed at Cardinal but was under suspension for “not meeting company policy and requirements”. The Adjudicator found that Cardinal did not comply with the Act when it disclosed the Complainant’s personal employee information to the Complainant’s other employer as the disclosure was not reasonable for the purpose for the disclosure. As well, Cardinal had not given the Complainant notice prior to the disclosure as required by section 21(2)(c) of the Act.

Statutes Cited: AB: *Personal Information Protection Act* S.A. 2003, c. P-6.5 ss. 1(e), 1(j), 1(k), 7, 8, 16, 18, 19, 21.

Authorities Cited: AB: Orders P2006-006, P2006-007, P2007-CS-003, P2007-IR-004, P2007-005; *PIPEDA Case Summary #382*; R Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Vancouver: Butterworths Canada Ltd., 2002) at 247.

I. BACKGROUND

[para 1] The Complainant was a bus driver employed by Cardinal. On February 26, 2007, the Complainant was randomly selected to take a substance test for which he tested positive. The Complainant informed Cardinal that he wished to continue his employment with Cardinal. As a result, both the Complainant and a representative from Cardinal signed a letter dated February 27, 2007 confirming that the Complainant was temporarily suspended without pay until he was able to produce a satisfactory test result. The Complainant would also be subject to random testing following his suspension and should he test positive again, his employment with Cardinal would be terminated.

[para 2] According to the Complainant, he needed an income while suspended from Cardinal and on March 5, 2007, he applied for a position with another bus company (“Company A”). On March 6, 2007, after he passed a substance test, Company A hired the Complainant as a bus driver. The Complainant states that he had told his local manager at Cardinal that he had accepted the new position with Company A but that he intended to return to work at Cardinal as soon as he was able.

[para 3] During this time, the Complainant became aware that other drivers employed by Cardinal knew he was under suspension for failing the test. The Complainant states that Cardinal’s management must have informed the other drivers of the reason for his suspension. Cardinal denies that its management told other employees the reason for the Complainant’s suspension.

[para 4] According to the South Rural Operations Manager for Cardinal (“Cardinal’s Manager”), she had not been informed that the Complainant was working for Company A, a competitor, during his suspension. It is not clear from the submissions how Cardinal’s Manager became aware of the Complainant’s employment with Company A. In any event, Cardinal’s Manager contacted Company A and asked for confirmation that the Complainant was employed at Company A.

[para 5] After checking the records, a Company A employee contacted Cardinal’s Manager and informed her that the Complainant was employed as a bus driver with Company A. According to the statement that Cardinal’s Manager provided to this office, the conversation with the Company A employee continued as follows:

[the Company A employee] then inquired as to why I was asking. I responded by telling her that Cardinal still considered the Complainant to be a Cardinal employee, that he was currently suspended and that we were trying to determine

if he had any intention of returning to work for us. [the Company A employee] was surprised, indicating that it was her understanding that the Complainant's employment with Cardinal had been terminated.

[the Company A employee] asked me to provide further details. [Company A] confirmed that the Complainant had listed Cardinal as a prior employer on his application and indicated that further details regarding the suspension were required.

I declined to provide further specifics to [Company A], stating only that the Complainant's suspension was a result of his not meeting Company policy and requirements.

[para 6] According to the Complainant, on March 19, 2007, he was called in to speak with Company A's Safety Supervisor and was advised that someone at Cardinal had made remarks that reflected on his capacity to safely perform his duties. The Complainant was asked by Company A to take a substance test. His test result was unsatisfactory and he was terminated by Company A on March 19, 2007.

[para 7] The Complainant resigned from Cardinal effective March 19, 2007 and this resignation was processed by Cardinal on March 24, 2007.

[para 8] The Complainant's letter submitting his complaint was received by this office on March 23, 2007. This matter was referred to mediation but this was not successful in resolving the matter. On February 21, 2008, the Complainant requested an inquiry. The Notice of Inquiry was sent to both the Complainant and Cardinal. On February 5, 2009, this office received Cardinal's submissions. No submissions were received by this office from the Complainant.

II. RECORDS AT ISSUE

[para 9] There are no records at issue in this matter.

III. ISSUES

[para 10] The Notice of Inquiry, dated December 3, 2008, sets out the following issues:

Issue A:

At the relevant time, was the Complainant an "employee", as defined by section 1(e) of the Act?

Issue B:

If the Complainant was an employee did the Organization use/disclose his "personal employee information", as defined by section 1(j) of the Act?

Issue C:

If the Organization used/disclosed the Complainant’s personal employee information, did the Organization comply with section 18 and section 21 of the Act in so doing?

Issue D:

Did the Organization use/disclose the Complainant’s “personal information” as defined by section 1(k) of the Act?

Issue E:

If the Organization used/disclosed the Complainant’s personal information, did the Organization comply with section 16(1) and section 19(1) of the Act in so doing?

IV. DISCUSSION OF ISSUES

[para 11] The issues in this matter revolve around two disclosures. The first was the alleged disclosure by Cardinal’s management to other Cardinal employees that the Complainant was suspended after failing a substance test. The second was the disclosure of information to Company A by Cardinal’s Manager detailed in the background section of this order.

A. At the relevant time, was the Complainant an “employee”?

[para 12] The first issue that needs to be addressed is whether the Complainant was an employee of Cardinal at the time of the disclosure of the information at issue. According to the Complainant’s initial complaint and the submissions of Cardinal, both of the disclosures at issue occurred following the Complainant’s temporary suspension on February 27, 2007.

[para 13] Employee is defined by section 1(e) of the Act as follows:

1 (e) “employee” means an individual employed by an organization and includes an individual who performs a service for or in relation to or in connection with an organization

(i) as an apprentice, volunteer, participant or student, or

(ii) under a contract or an agency relationship with the organization;

[para 14] There is no doubt that the Complainant was employed by Cardinal prior to his suspension. He was performing a service for Cardinal and being paid for that service. However, following his suspension, the Complainant was no longer performing duties for Cardinal nor was he being paid by Cardinal.

[para 15] That being said, there was still clearly an intention by the Complainant to return to his duties as soon as he was able and also an intention by Cardinal to continue to hold a position open for the Complainant, to which he could return as soon as he produced a satisfactory test result. Cardinal's own submissions state that the Complainant was considered an employee and that is why Cardinal's Manager was surprised to hear he had taken employment with Company A. As well, the Complainant's record of employment lists his final pay period ending date as March 24, 2007.

[para 16] I do not accept Cardinal's submission that by accepting a position with Company A the Complainant had effectively resigned his position with Cardinal. It is clear from the Complainant's complaint letter that he had intended to return to active employment with Cardinal once his suspension was complete.

[para 17] Based on the evidence before me, I find that the Complainant was employed by Cardinal until his resignation of March 19, 2007 and was an employee of Cardinal at all relevant times.

B. Did the Organization use/disclose his "personal employee information"?

[para 18] The Complainant did not provide this office with submissions. Therefore the only evidence that I have regarding the alleged disclosures is the initial complaint of the Complainant and the statement of Cardinal's Manager.

[para 19] The Complainant assumes that Cardinal's management disclosed the specific reasons for his suspension to other Cardinal employees because a Cardinal employee, who was not a manager, had told other drivers about the Complainant's test results. The Complainant gave no compelling evidence that the source of the information was a disclosure by Cardinal's management.

[para 20] On the other hand, Cardinal's management stated in its submission that it had asked the employee whom the Complainant had identified as the person who had told other drivers about his test results and that this person had confirmed that he had not been told the reason for the Complainant's suspension by Cardinal management. Rather, he said that he had assumed that the Complainant was suspended as a function of the test result because he was suspended soon after the test.

[para 21] Based on the evidence before me, I find that there was no disclosure of the Complainant's test result by Cardinal to its non-management employees.

[para 22] However, both the Complainant and Cardinal agree that Cardinal disclosed personal information to Company A. Cardinal submits that the only information it disclosed was that the Complainant was still an employee of Cardinal but under suspension for "...not meeting company policy and requirements". In his letter of complaint, the Complainant states that he was told by Company A that Cardinal's

Manager had, "...made strong remarks..." that reflected on the Complainant's capacity to safely perform his work duties.

[para 23] Cardinal's Manager was a party to the conversation with Company A's employee when the disclosure was made. The Complainant was not. Therefore, I find Cardinal's Manager's evidence is more reliable.

[para 24] Based on the evidence I have before me, I find that Cardinal's Manager disclosed only that the Complainant was an employee of Cardinal and under suspension for not meeting company policy and requirements. As I have found that this is the only information that was disclosed, it is the only information that I will consider throughout the remainder of this Order.

[para 25] Section 1(j) of the Act defines personal employee information as follows:

1(j) "personal employee information" means, in respect of an individual who is an employee or a potential employee, personal information reasonably required by an organization that is collected, used or disclosed solely for the purposes of establishing, managing or terminating

(i) an employment relationship, or

(ii) a volunteer work relationship

between the organization and the individual but does not include personal information about the individual that is unrelated to that relationship;

[para 26] The Complainant's employment status is information that is reasonably required by Cardinal and was used for the purposes of managing its employment relationship with the Complainant. Information about the Complainant's suspension was generated in the course of managing the employment relationship between Cardinal and the Complainant. Part of the information, the result of the test, was collected and used by Cardinal to manage the employment relationship, but the fact of the suspension itself is not precisely captured by these words. Therefore, the fact that Complainant was suspended does not strictly fit into the definition of personal employee information. However, for the purposes of this discussion I will assume that all the information disclosed by Cardinal pertaining to the Complainant's personal employment status and the reasons for this status, was the Complainant's personal employee information.

C. Did the Organization comply with section 18 and section 21 of the Act?

[para 27] Section 18 of the Act governs the use of personal employee information. In this matter, Cardinal disclosed the Complainant's personal employee information; therefore, the relevant section Cardinal must comply with is section 21 of the Act which states:

21(1) Notwithstanding anything in this Act other than subsection (2), an organization may disclose personal employee information about an individual without the consent of the individual if

(a) the individual is or was an employee of the organization, or

(b) the disclosure of the information is for the purpose of recruiting a potential employee.

(2) An organization shall not disclose personal information about an individual under subsection (1) without the consent of the individual unless

(a) the disclosure is reasonable for the purposes for which the information is being disclosed,

(b) the information consists only of information that is related to the employment or volunteer work relationship of the individual, and

(c) in the case of an individual who is an employee of the organization, the organization has, before disclosing the information, provided the individual with reasonable notification that the information is going to be disclosed and of the purposes for which the information is going to be disclosed.

(3) Nothing in this section is to be construed so as to restrict or otherwise affect an organization's ability to disclose personal information under section 20.

i. Did Cardinal have consent to disclose the information?

[para 28] Section 21 of the Act provides guidelines for when an organization can disclose personal employee information without the consent of the individual. However, section 7 of the Act allows an Organization to disclose information with consent.

[para 29] Express consent is not always necessary under the Act. Consent can be deemed. Section 8 of the Act states:

8(1) An individual may give his or her consent in writing or orally to the collection, use or disclosure of personal information about the individual.

(2) An individual is deemed to consent to the collection, use or disclosure of personal information about the individual by an organization for a particular purpose if

(a) the individual, without actually giving a consent referred to in subsection (1), voluntarily provides the information to the organization for that purpose, and

(b) it is reasonable that a person would voluntarily provide that information.

(3) Notwithstanding section 7(1), an organization may collect, use or disclose personal information about an individual for particular purposes if

(a) the organization

(i) provides the individual with a notice, in a form that the individual can reasonably be expected to understand, that the organization intends to collect, use or disclose personal information about the individual for those purposes, and

(ii) with respect to that notice, gives the individual a reasonable opportunity to decline or object to having his or her personal information collected, used or disclosed for those purposes,

(b) the individual does not, within a reasonable time, give to the organization a response to that notice declining or objecting to the proposed collection, use or disclosure, and

(c) having regard to the level of the sensitivity, if any, of the information in the circumstances, it is reasonable to collect, use or disclose the information as permitted under clauses (a) and (b).

...

[para 30] In her written statement to this Office, the Cardinal's Manager stated:

[Company A] confirmed that the Complainant had listed Cardinal as a prior employer on his application and indicated that further details regarding the suspension were required...

It was and remains my understanding that [Company A's] application process is similar to Cardinal's in that prospective employees provide authorization to contact past employer to verify information contained in their employment application...

[para 31] I find that the Complainant voluntarily disclosed to Company A that he had worked at Cardinal and that his purpose in doing so was to reveal to Company A that he had been employed by Cardinal as well as to implicitly authorize Company A to verify that this was so with Cardinal. In my view this also constituted deemed consent under section 8(2) of the Act for Cardinal to disclose its employment relationship with the Complainant to Company A for the purpose of confirming his "past" employment with Cardinal. I find that it is reasonable that the Complainant would have voluntarily supplied that information to Company A for that purpose. It is arguable that Cardinal was implicitly authorized to disclose only that the Complainant had formerly been employed by it and was not currently so employed. However, as such a response by Cardinal would have been misleading I cannot find that the implicit authorization by the Complainant was limited in this way.

[para 32] That being said, as I will discuss in greater detail below, Cardinal's stated purpose for disclosing to Company A that the Complainant continued to be employed by Cardinal was to investigate whether the Complainant was also employed by Company A; it was not for the purpose (to which the complainant can be said to have implicitly consented) of confirming for Company A that the complainant was employed by Cardinal. This is significantly different from a situation in which a prospective employer contacts a current or former employer to check a reference. In a reference check situation, there may be implicit consent for the current or former employer to disclose information about work history to the prospective employer to help the prospective employer determine the prospective employee's suitability for employment. In other words, the 'consented-to' purpose for the disclosure by the current or former employer is to enable the prospective employer to check the employee's suitability for employment.

[para 33] I cannot find that the Complainant voluntarily provided information to Company A about his employment with Cardinal for the reverse purpose – that Cardinal would be enabled to check with Company A whether he was (also) employed there. Therefore, I cannot find that he consented, implicitly or otherwise, to the disclosure of his personal information by Cardinal – the fact he was employed there – for the purpose for which Cardinal disclosed his personal employee information.

[para 34] As well, the information provided to Company A was limited to his employment with Cardinal. I have no evidence before me that the Complainant voluntarily provided information to Company A about his suspension. Therefore, I find that there was no deemed consent for the disclosure of the suspension or the reason for it, as this information was not voluntarily provided to Company A by the Complainant for the purpose that it be confirmed. Thus section 8(2) of the Act does not apply to this information. I do not accept Cardinal's argument that by including Cardinal as a past employer on his application the Complainant gave his implicit consent to disclosure of all of his personal employee information.

[para 35] Cardinal cites P2007-CS-003 and *PIPEDA Case Summary #382* as authority that it was able to answer questions about the Complainant's work history as long as it related to his employment history and performance. Case Summary P2007-CS-003 appears to deal with a reference check which, as I detailed above, significantly differs from this matter and therefore, I do not find that case summary to be of assistance.

[para 36] *PIPEDA Case Summary #382* deals with a former employee who had signed a consent form allowing the collection and disclosure of this information to a prospective employer whereas in this matter the Complainant was a current employee of both Cardinal and Company A. For this reason, I do not find *PIPEDA Case Summary #382* helpful in deciding this matter.

[para 37] Order P2007-005 states:

I would also add that section 7 must be read within the context of section 19 of the Act. As the Act prohibits disclosure for unreasonable purposes, it does not matter whether the Complainant consented to the disclosure or not: the Organization is prohibited from

disclosing personal information if its purpose for disclosure is unreasonable. The limit section 19 places on disclosure would have no purpose if individuals could consent to the unreasonable disclosure of personal information under section 7. (Order P2007-005 at para. 17)

[para 38] Therefore, even if I am incorrect, and the Complainant consented to the disclosure of his personal employee information, Cardinal must still show that the purpose for disclosing the Complainant's personal employee information was reasonable and that the disclosure was reasonable for the purpose. I will discuss this requirement and Cardinal's purpose for the disclosure in greater detail below.

ii. Did Cardinal have a reasonable purpose for disclosing the information and was the disclosure reasonable for that purpose?

[para 39] Given that I have found that the Complainant did not consent to the disclosure of his personal employee information, Cardinal must meet the criteria in section 21(2) to have properly disclosed the Complainant's personal employee information without consent. Section 21(2) of the Act requires the organization to:

- disclose only what is reasonable for the purposes of the disclosure
- disclose only information that is related to the employment or volunteer work relationship of the individual, and
- in the case of an individual who is a current employee of the organization, provide the individual with reasonable notice that the information is going to be disclosed and of the purposes for which the information is going to be disclosed.

[para 40] In addition, in Order P2007-005, the Commissioner drew in the requirement under section 19 of the Act that the purpose for disclosures of personal information must be reasonable, and concluded that an organization may not disclose personal information if the purpose for the disclosure is unreasonable.

[para 41] *Sullivan and Driedger on the Construction of Statutes* states:

From the earliest recognition of the golden rule, contradiction and internal inconsistency have been treated as forms of absurdity. Legislative schemes are supposed to be coherent and to operate in an efficient manner. Interpretations that produce confusion or inconsistency or undermine the efficient operation of a scheme may appropriately be labeled absurd.

(R Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Vancouver: Butterworths Canada Ltd., 2002) at 247.)

[para 42] Reading section 21(2) of the Act as the Commissioner read section 19 of the Act in Order P2007-005 avoids an absurd result. If the purpose for the disclosure did not need to be reasonable, an organization could properly disclose sensitive and confidential

information for any purpose, no matter how unreasonable, as long as the information disclosed was reasonable for the purpose. Therefore, in order to avoid this result, the purpose for the disclosure of personal employee information must be reasonable and the disclosure must also be reasonable for the purpose. In my view, it is purpose of the organization disclosing the information that dictates whether the disclosure is reasonable.

[para 43] On review of Cardinal's submissions, the Complainant's personal employee information was disclosed in response to a question asked by Company A. Paragraph 25 of Cardinal's brief states:

The disclosure of the Complainant's employment status with the Organization to [Company A] was something that was justified pursuant to Section 20(m) of the Act. The Organization was conducting an investigation to confirm whether the Complainant had, in fact, commenced employment with [Company A]. Employment with [Company A] was entirely inconsistent with continued employment with [Cardinal]. The steps taken and information disclosed by [Cardinal] in the process of obtaining this employment check were reasonable for the purposes of such an investigation and, as such, neither the consent of the Complainant nor notice to the Complainant was required...

[para 44] Cardinal's Manager states that it was necessary to confirm the Complainant's employment with Company A because a position was being held for him and if the Complainant decided not to return to Cardinal, a permanent replacement needed to be hired.

[para 45] Based on this portion of Cardinal's submissions, it appears as though Cardinal's purpose for the disclosure of the Complainant's personal employee information was to assist in the investigation of the Complainant's employment status with Company A. Given the information that the Complainant was employed by a competitor, and that Cardinal was holding a position for him, I find that investigating the Complainant's employment status with Company A was a reasonable purpose.

[para 46] Cardinal disclosed three distinct pieces of the Complainant's personal employee information. The first was that the Complainant was employed at Cardinal. The second piece of the Complainant's personal information that was disclosed by Cardinal was that the Complainant was under suspension and the third was the reason that the Complainant was suspended. None of this information was disclosed by Cardinal until after Company A had confirmed that the Complainant was currently in its employ.

[para 47] As noted earlier, not only must disclosure of personal employee information be for a reasonable purpose; the disclosure itself must be reasonable for the purpose.

[para 48] Had the disclosure by Cardinal that the Complainant was still its employee been done before Company A had confirmed that the Complainant was its employee, I might have found that the disclosure by Cardinal that the Complainant was also still in its employ was reasonable for the purpose of investigating the Complainant's employment status with Company A. Possibly, it would be required in order to provide a reason for

Company A to respond to the query. The same might have been true of the fact that he was under suspension, to provide an explanation and context for the reason for the question of whether the Complainant was employed by Company A.

[para 49] However, given the facts as revealed by the evidence before me – that none of the information about the Complainant was disclosed by Cardinal until after Company A had already indicated to it that the Complainant was in its employ – I find that the disclosure of all this information was not reasonable for the purpose.

[para 50] I would reach the same conclusion even if I were of the view that the phone call to Company A had been for the more general purpose of managing Cardinal's employment relationship with the Complainant, and that the purpose of the disclosure of the Complainant's personal employee information was for Cardinal to manage its employment with the Complainant generally. Disclosing the Complainant's employment status, suspension and the reason for it to Company A was not connected in any reasonable way to managing Cardinal's employment relationship with the Complainant. Simply put, there was no need for Cardinal to disclose this information.

[para 51] If I am incorrect, and the purpose of the disclosure was not to assist in the investigation, then I find that Cardinal has not provided me with evidence of the purpose of the disclosure and therefore, cannot find that the purpose was reasonable or that the disclosure was reasonable for the purpose.

iii. Was Cardinal required to give the Complainant notice of the disclosure?

[para 52] Section 21(2)(c) of the Act applies because the Complainant was a current employee of Cardinal. Section 21(2)(c) of the Act requires Cardinal to give the Complainant reasonable notice of what information was going to be disclosed and the purpose of the disclosure. This notification must be done prior to the disclosure. Cardinal did not notify the Complainant that his personal employment information was going to be disclosed to Company A, and therefore Cardinal did not comply with section 21(2)(c) of the Act.

[para 53] Cardinal cites Investigation Report P2007-IR-004 in support of its position that it did not need to notify the Complainant prior to its disclosure of the Complainant's personal employee information. In that investigation, the Organization had its employee sign a consent form when he started his employment which allowed the Organization to disclose his personal information during an investigation. I have no evidence that the Complainant in this matter signed a similar consent form.

[para 54] Cardinal also directed this office to Orders P2006-006 and P2006-007 which it felt may be of assistance in deciding this matter. It did not elaborate on how these orders applied to this matter. I have reviewed them and note that these orders dealt with a former employee and therefore are not directly applicable to this matter, as section 21(2)(c) does not apply to former employees.

[para 55] I find Cardinal failed to comply with section 21 of the Act when it disclosed the Complainant’s personal employee information relating to his suspension and the reason for his suspension to Company A.

D. Did the Organization use/disclose the Complainant’s “personal information” as defined by section 1(k) of the Act?

[para 56] “Personal employee information” is a subset of the larger category of “personal information” which is also defined and protected by the Act.

[para 57] However, I have found that the Complainant’s information that was disclosed was personal employee information and, there is no need to deal with issues D and E.

V. ORDER

[para 58] I make this Order under section 52 of the Act.

[para 59] I order Cardinal to cease disclosing the Complainant’s personal employee information in contravention of section 7 of the Act, without complying with 21 of the Act.

[para 60] I impose the following term on Cardinal:

Cardinal is to ensure that it does not disclose personal employee information of the Complainant by ensuring that its employees are made aware of Cardinal’s obligations under sections 7 and 21 of the Act.

Keri H. Ridley
Adjudicator