Case In Point

Improperly Sent Email Has Legal Consequences For Employer

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In a fast-paced workplace, misdirected emails can easily happen and may occasionally result in an embarrassing disclosure of information to the wrong person. A recent decision of the Divisional Court confirms that the inadvertent email can also result in significant legal consequences for employers.

In *Fernandes v. Marketforce Communications*, the employer forwarded the email of a supervisor questioning the plaintiff's continued employment to its lawyer to seek advice on terminating the plaintiff's employment. Unfortunately, the employer inadvertently copied the email to the plaintiff. The employer acted quickly to place three recall notices and sent confirmation to the plaintiff that the email that she had received was confidential. The employer requested that the plaintiff delete the email without reading or copying its contents.

Of course, the plaintiff read the email, copied it and forwarded it to a lawyer. She subsequently refused to return to work, asserting that the contents of the email constituted the termination of her employment. The plaintiff commenced a claim for wrongful dismissal, relying upon the email between the employer and its lawyer in her claim.

The employer brought a motion to strike the references to the confidential email, asserting solicitor-client privilege. The motion judge confirmed that the email was a privileged communication between solicitor and client. Further, the employer had acted promptly to retrieve the information. However, when considering whether to waive privilege upon inadvertent disclosure, the motion judge held that it would be unfair to the plaintiff if she could not rely on the email as it greatly affected her state of mind and underscored the subsequent decision she made in respect of her employment. The motion judge dismissed the motion and permitted the plaintiff to rely upon the email.

On appeal, the Divisional Court agreed that principles of fairness must be considered when determining whether privilege will be waived after inadvertent disclosure. On the facts before it, the Court agreed that "[w]ithout the ability to rely on the email, and its impact upon her, the plaintiff would be at a significant disadvantage in establishing the context for these actions and that her actions were reasonable."

The Divisional Court does differentiate this decision from those cases in which inadvertent disclosure is made during the litigation process. It confirmed that inadvertent disclosure of strategy during litigation is not likely to meet the fairness standard for waiving privilege, despite the fact that the opposing party might be better prepared for litigation if it could rely upon the privileged documents. However, where the inadvertent disclosure underpins the foundation for the claim, and it would not serve the interests of justice to prevent the trial judge from having the benefit of the privileged information, privilege may be waived.

This case serves as a strong reminder to employers to be vigilant in reviewing the list of recipients on confidential emails—and that there are worse things than copying your mother on an embarrassing email joke.