# How and When May Employees be Tailed?

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Last October, the Court of Appeal of Québec handed down an interesting decision regarding the shadowing (tailing) of employees,[1] pointing out the extent to which surveillance results may be used as evidence to justify disciplinary measures imposed on employees.

## The Facts

The complainant, Sylvie Turpin, worked as a patient services attendant. At one point, she had to take a leave of absence due to an injured left shoulder. After being off work for more than two months, her employer required Turpin to undergo a medical examination, to be carried out by its designated physician.

When she arrived at the clinic, the doctor who would be examining her was sitting in his car in the clinic parking lot. The doctor then watched her get out of her car, move her left arm normally and carry her handbag on her left shoulder.

The medical examination was conducted as planned. The designated physician concluded, based on his prior observations in the parking lot, that Turpin was faking her symptoms. The doctor noted that her complaints were inconsistent with what he saw in the parking lot.

Based on the opinion of its designated physician, the employer decided to have Turpin followed, and a one-day surveillance operation was carried out.

After watching video of the shadowing, the employer dismissed Turpin for having engaged in activity incompatible with her alleged disability.

## The Arbitral Award

Arbitrator Claude Martin dismissed the videotaped evidence of the shadowing, concluding that Turpin's firing was unjustified.[2]

The arbitrator based his decision on section 2858 of the Civil Code of Québec (the CCQ), which provides that: "The court shall, even of its own motion, reject any evidence

obtained under such circumstances that fundamental rights and freedoms are violated and whose use would tend to bring the administration of justice into disrepute."

In light of this, the arbitrator decided that the shadowing ordered by the employer had violated Turpin's right to privacy. They also decided that the employer had no grounds to arrange for her to be followed, since there was no evidence that cast doubt on her honesty before the surveillance was carried out. In the arbitrator's opinion, it was automatically his duty to exclude the video evidence.

## Superior Court Judicial Review

In judicial review, the Superior Court held that the arbitrator had made a mistake in dismissing the surveillance video,[3] and remanded the case to the arbitrator.

## Court of Appeal Decision

The Court of Appeal took this opportunity to recall the basic principles governing the admission of video recording evidence.

A two-pronged analysis is required to comply with section 2858 of the CCQ:

- The first stage required the court to determine whether the recording was "obtained under such circumstances that fundamental rights […] were violated."

That first inquiry required a decision on whether the employer had any rational grounds for implementing the surveillance operation.

- In the second stage, it must be decided whether the "*use [of the recording] would* tend to bring the administration of justice into disrepute."

The test of proportionality must be applied in the second stage. The decision-maker would then consider the seriousness of the breach of privacy, the employer's motivation, and the methods used to perform the surveillance. Essentially, the decision-maker must determine whether it would be acceptable to authorize the employer to make use of the recording.

The Court of Appeal reiterated that this two-pronged analysis is mandatory.

It held that the arbitrator had erred in law, since he only carried out the first stage of the analysis. The arbitrator concluded that the video should be excluded from evidence as soon as a violation of a fundamental right was demonstrated. He never addressed the issue of whether excluding the recording would likely bring the administration of justice into disrepute. As a result, the Court of Appeal ruled that the arbitrator's decision was unreasonable.

However, the Court of Appeal made no final ruling on whether the employer had rational grounds for ordering the shadowing, in view of its conclusion with respect to the second stage of the analysis. It found it unnecessary to state any formal conclusion as to whether such rational grounds existed.

That being said, the Court of Appeal did clarify the following points:

- The employer was right in basing its decision on the opinion of its designated physician, who took into account the incongruity between what he observed in the parking lot and what Turpin told him directly.
- It was also wholly reasonable for the employer to consider the fact that Turpin had misrepresented her health status in the past.
- The employer's motivation was legitimate and it acted in good faith.
- Before ordering the surveillance, the employer waited several weeks after receiving the reports from the doctor.

With respect to the second stage of the analysis (bringing the administration of justice into disrepute), the Court of Appeal concluded that the quest for truth was paramount in this case. In addition, the means used by the employer to carry out the shadowing were reasonable. The tailing lasted one day and was carried out in public places, in plain view (i.e. where privacy expectations are lower). The video recording of the surveillance should therefore have been admitted as evidence.

The Court of Appeal did mention in passing, however, that it would have been preferable for the employer to ask Turpin to start working again, rather than to shadow her. The failure to do so was not deemed decisive in the circumstances of this particular case, however.

# Takeaways for Employers

Shadowing is certainly an effective tool for identifying employees who are simulating a medical condition. That being said, if employers have any doubt as to why employees are on disability, it is better to ask the employee to start working again before having them followed. In our opinion, should the employee refuse to start working again, making such a request would not jeopardize the chances of success of any subsequent shadowing.

Furthermore, before resorting to having an employee followed, one must be sure that there are rational grounds to justify it. A case-by-case analysis is required to determine whether these grounds exist. As the Court of Appeal held, evidence collected by shadowing may be admitted, even absent any rational grounds, where its exclusion would likely bring the administration of justice into disrepute.

In all cases, reasonable means must be employed in any such surveillance operation. For example, it should ideally be conducted in public locations and be limited to the shortest possible period.

If there is ever doubt about whether to engage in shadowing or about proper methods of doing so, it is best to speak with a legal advisor.

[1] Syndicat des travailleurs et travailleuses du CSSS Vallée-de-la-Gatineau (CSN) c. Centre de santé et de services sociaux de la Vallée-de-la-Gatineau, 2019 QCCA 1669.

[2] CSSS de la Vallée-de-la-Gatineau et STT du CSSS de la Vallée-de-la-Gatineau CSN (Sylvie Turpin), D.T.E. 2013T-213 (TA). This arbitral award was rendered by Claude Martin.

[3] Centre de santé et de services sociaux de la Vallée de la Gatineau c. *Martin*, 2016 QCCS 1927.

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