

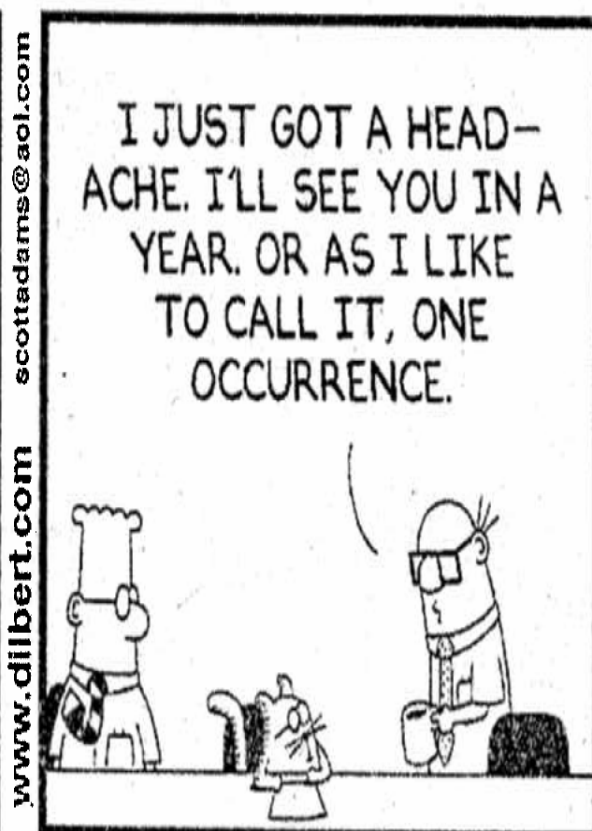
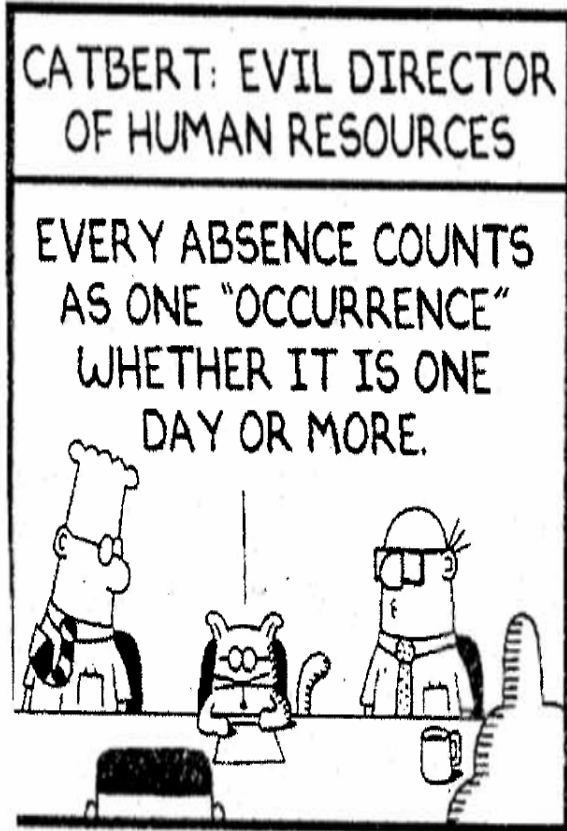


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Ottawa Regional Contact Centre Association
Managing Absenteeism and the Duty to Accommodate

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Dilbert



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Overview

- **Difficult issues for Employers:**
 - The duty to accommodate
 - Verifying employee absences
 - Discipline and the disabled employee
 - Frustration of contract
 - Privacy issues

The Problem of Workplace Absenteeism

- Absenteeism costs the Canadian economy up to \$10 billion a year
- Absenteeism is most expensive for employers, who must pay:
 - Wages for replacement employees
 - Expenses related to rising medical premiums
 - Costs of overtime and lower productivity
 - Benefit Claims

The Disabled Employee

- Very broad meaning in Canadian Law
- Ontario:
 - “... an illness, injury or disfigurement that creates a physical or mental impairment and thereby interferes with a person’s physical, psychological and/or social functioning.”
- Federal:
 - “disability means any previous or existing mental or physical disability and includes, disfigurement and previous or existing dependence on alcohol or a drug.”

The Disabled Employee – (cont'd)

- **Yes:**
 - Post traumatic stress disorder
 - Height
 - Obesity
 - Speech impediment
 - Tobacco addiction
 - Pteromerhanophobia
 - Kleptomania
- **No:**
 - The Flu
- **Maybe:**
 - Internet porn addiction
 - Being tired

The Duty to Accommodate

- Where does it come from?
 - Human Rights legislation
 - Courts
 - Tribunals
 - Arbitration
 - Etc.

The Duty to Accommodate – (cont'd)

- Supreme Court of Canada says:
 - *Renaud*:
 - “More than mere negligible effort is required to accommodate. The use of the term « undue » infers that some hardship is acceptable; it is only « undue » hardship that satisfies this test ”.
 - *Meiorin*:
 - “To show that standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees...without imposing undue hardship upon the employer ”.

Undue Hardship

- Six factors:
 1. Financial cost
 2. Safety
 3. Interchangeability of the workforce and facilities
 4. Impact of collective agreement
 5. Size of employer
 6. Employee morale?

Employer's Rights to Medical Information

- The employer may request medical information in order to:
 - Determine whether an illness is bona fide
 - Assess the impact of the illness or disability on the employee's future attendance
 - Evaluate whether the employee is fit to return to work
 - Right to request depends on purpose

Employer's Rights to Medical Information – (cont'd)

- The onus is on the employer to explain to the employee why the information that has already been provided is not satisfactory
- The employer must outline the specific information required
- The information requested must be reasonably related to the employee's job duties

Just Cause

- **Common Law**
 - Serious employee misconduct that strikes at the very root of the employment contract such that the employment contract cannot continue or be repaired.
- *Employment Standards Act, 2000*
 - An employee is not entitled to notice of termination if the employee “has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer.”

Discipline and disability

- **Non-Union Context**
 - At current time, discipline is limited to either written reprimands or termination of employment.
- **Unionized Context**
 - Disciplinary response can be wide and varied (including unpaid suspensions).
- **Requirements to Impose Discipline**
 - Misconduct which is blameworthy and culpable.

Discipline and disability – (cont'd)

“The *Code* is not intended as a protective device or shield for employees who commit major employment offences.”

- Arbitrator Shime, *Toronto Transit Commission and A.T.U. (Geobey)*

Discipline and disability

- Is the conduct culpable?
- Discipline where there is a nexus between disability and misconduct.
 - Example: conduct “caused” by alcoholism or drug addiction.
- If there is a causal link between the misconduct and the disability, the misconduct may be deemed non-culpable and discharge will not be a viable penalty.

Frustration of Contract

- **Five Factors:**
 1. The terms of the contract, including any provision as to sick pay;
 2. How long employment was likely to last in absence of the sickness;
 3. The nature of the employment;
 4. The nature of the illness or injury and how long it has already continued and the prospects of recovery; and
 5. The period of past employment.

Frustration and the Duty to Accommodate: Examples

- *Parisien and Ottawa-Carleton Regional Transit Commission*
 - “Extremely excessive atrocious” absenteeism
- *Desormeaux and Ottawa-Carleton Regional Transit Commission*
 - “there is nothing...to require employers to indefinitely maintain on their workforce employees who are permanently incapable of performing their jobs.

Keays v. Honda Canada Inc.: The Importance of Accommodation

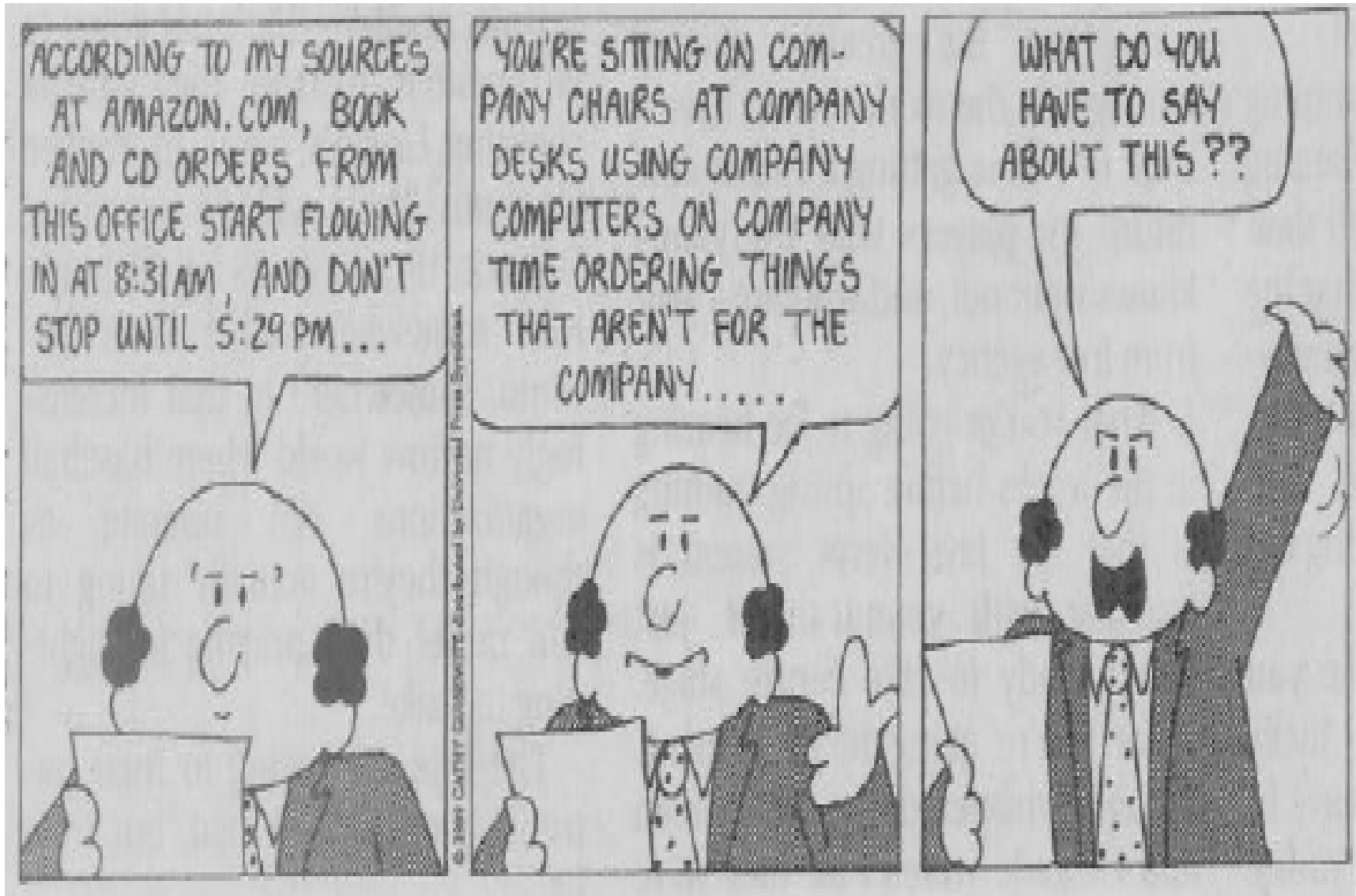
- **The Facts:**
 - Employee with fourteen years service developed Chronic Fatigue Syndrome (“CFS”) which negatively impacted his attendance at work.
 - Employee did not receive adequate accommodation for his illness and employer subjected him to disciplinary actions and unreasonable demands, leading to termination for insubordination.
 - Employee sued for wrongful dismissal.

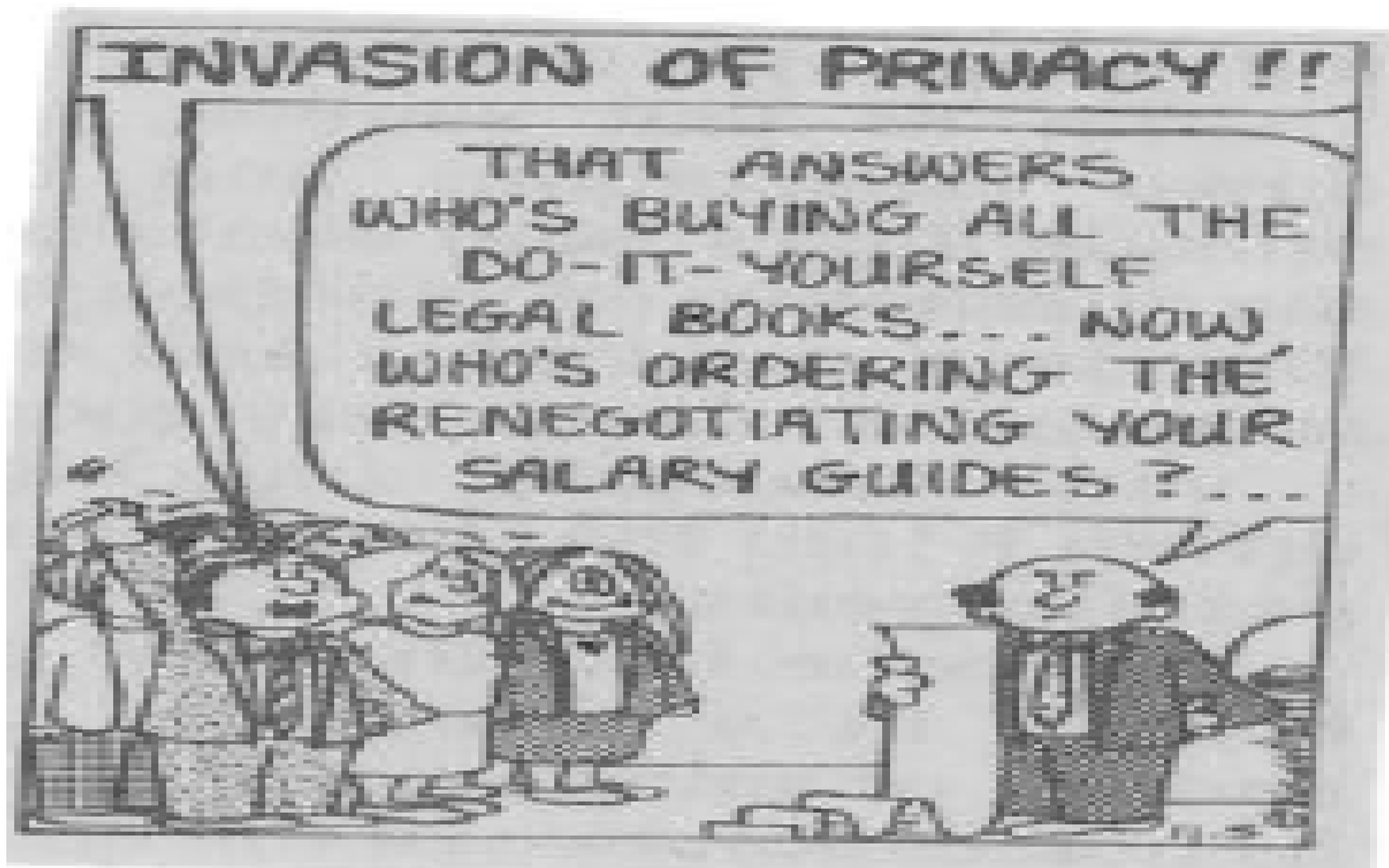
Keays v. Honda Canada Inc...

- **The Decisions:**
 - Ontario Superior Court of Justice held that the employer breached the duty to accommodate the employee and there was no just cause for dismissal.
 - Conduct of the employer was done in “bad faith” and amounted to discrimination and harassment of the employee.
 - Court awarded 24 months’ salary, \$500,000 in punitive damages and costs.
 - Court of Appeal upheld the decision but reduced punitive damages to \$100,000.

SCC DECISION

- Wallace damages: \$0
- Punitive and aggravated damages: \$0
- “The need to monitor the absences of employees who are regularly absent from work is a bona fide requirement”





What is Privacy?

- **Has been characterized as the right to be left alone, to be secure in one's home and free from unwanted interference**
- **In the context of new laws, privacy means having control over one's personal information**
 - Choice of whether to disclose information at all
 - Control over with whom it is shared
 - Control over how it is used
- **Law summarized in two words:**
 - Consent
 - Reasonableness

Privacy Law - Legislation

- “A patchwork quilt”
- Public Sector laws
 - Federal
 - ▶ *Canadian Human Rights Act – 1977*
 - ▶ *Privacy Act – 1983*
 - Provincial
 - ▶ *Freedom of Information and Protection of Privacy Act – 1988*
 - ▶ *Municipal Freedom of Information and Protection of Privacy Act - 1991*

Privacy Law - Legislation

■ Private Sector Laws

- Federal

- ▶ *Personal Information and Protection and Electronic Documents Act – 2001*

- Provincial

- ▶ *Personal Information Protection and Electronic Documents Act – 2004*

- ▶ *Personal Health Information and Protection Act - 2004*

Sources of Privacy Law

- **Privacy Commissioners**
 - Office of the Privacy Commissioner of Canada
 - Information and Privacy Commissioner of Ontario
 - Other Provinces
- **Labour Arbitrators**
- **Courts**
- **Boards (i.e. Public Service Labour Relations Board)**
- **Anyone (Everyone) Else?**

Purpose

- **The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.**

Privacy Principles

- **Consent - The knowledge and consent of the individual are required for the collection, or disclosure of personal information, except where inappropriate. Form of consent is dependent upon the sensitivity of the information.**
- **Limiting Collection – the collection of personal information shall be limited by that which is necessary for the purposes identified by the organization. Information shall be collected by fair and lawful means.**

Consent Exceptions

- S. 7(1)(b) – “it is reasonable to expect that the collection with the knowledge or consent of the individual **would compromise** the availability or the accuracy of the information and the collection is reasonable for purposes **related to investigating a breach of an agreement or a contravention of the laws of Canada or a province.**”
 - ▶ Can be collected and used
 - ▶ Has been used and upheld by bank in the course of fraud investigation

PHIPA: Scope and Application of the Act

- *PHIPA* applies to the collection of personal health information by a health information custodian
- *PHIPA* applies to the use or disclosure of personal health information by a health information custodian
- *PHIPA* applies to the use or disclosure of personal health information by a person who is not a health information custodian

Personal Health Information

- **Information about an individual in oral or recorded form**
 - Relating to the physical or mental health of the individual, including a health history of the individual's family
 - Relating to the provision of health care, including the identification of a provider of health care
 - That is a plan of service
 - Relating to payments or eligibility for health care
 - Relating to a donation of a body part of substance or is derived from the testing of same
 - That is the individual's health number

Medical Information

- WSIB claims
- Claims for insured benefits
- Occupational health and safety issues
- Accommodation issues
- Verification of legitimacy of absence
- Discipline issues

Video Surveillance

- **Courts**
 - Admitted if relevant and reliable
- **Arbitrators**
 - Reasonableness
- **Privacy Commissioner**
 - Reasonableness
 - Section 7(1)(b)

Where are We Now?

- **Reasonableness**
 - Ensure decision is reasonable
 - Ensure surveillance is reasonable
 - Ensure evidence reasonably supports your position



Hey boss. I'm not sure our covert surveillance is real covert any more.