

# B.C. Court Of Appeal Confirms That Secretly Recording Conversations With Co-Workers Can Be Just Cause For Dismissal



In *Shalagin v. Mercer Celgar Limited Partnership*, [2023 BCCA 373 \(CanLII\)](#), the British Columbia Court of Appeal affirmed the lower court's decision that the employee's surreptitious recordings of his colleagues constituted just cause for his dismissal.

## **Background**

The appellant, Mr. Shalagin, became a Chartered Professional Accountant and was employed by the respondent Mercer Celgar Limited Partnership as a financial analyst for ten years. He was not asked to sign a written employment contract; however, he was bound by Mercer's policies, including a Code of Business Conduct and Ethics, and a confidentiality policy.<sup>1</sup> He was also subject to the Chartered Professional Accountants of British Columbia Code of Conduct which prohibited the use of confidential information of any employer for his advantage.

Mr. Shalagin was originally terminated without cause, and he filed a complaint under the *Employment Standards Act*, a complaint to the Human Rights Tribunal, and sued for wrongful dismissal. He advanced allegations of discrimination and that Mercer had been dishonest with him about its management bonus plan. During the Human Rights Tribunal hearing, Mr. Shalagin disclosed that he had secretly recorded several training sessions, including over 100 meetings where he often presented, and at least 30 meetings with supervisors and human resources personnel.<sup>2</sup> He also recorded other conversations with co-workers, which he says occurred accidentally. After learning of the secret recordings by the employee, Mercer amended its pleading to assert that his recording activity constituted just cause for his dismissal.

## **Trial Decision**

At the initial trial, the court stated there was no evidence that the secret recordings had been shared with anyone other than the Human Rights Tribunal and the employer. The recordings were used to advance Mr. Shalagin's position in relation to the various proceedings he filed.

The main issue at trial was whether Mercer had just cause for terminating Mr. Shalagin's employment. Mr. Shalagin acknowledged that he did not ask his co-workers for permission to record and that at least some of his recordings were unethical,

though not illegal. Some of the recorded conversations included personal details about his co-workers that had nothing to do with the workplace.

The court highlighted that professionals in positions of high accountability such as Mr. Shalagin can be expected to respect the standards established by their profession. The secret recordings were seen as destroying the trust between the plaintiff, his colleagues, and his employer. The trial judge did not find there was a legitimate basis to make recordings based on a fear of discrimination. The court held that the surreptitious recordings did constitute just cause for Mr. Shalagin's dismissal given the effect on the relationship of trust. Mr. Shalagin appealed the trial judge's decision.

## **Court of Appeal**

The British Columbia Court of Appeal noted that the recording activity would be regarded by most employers as misconduct undermining the trust relationship between employer and employee. It also violated the privacy interests of the co-workers who were recorded.

The court relied on the decision of the Supreme Court of Canada in *McKinley v. BC Tel*, [2001 SCC 38](#), to analyze the issue of just cause, which requires a contextual approach and a determination of whether the nature and degree of the dishonesty warranted dismissal.<sup>3</sup> This approach involves the court bearing in mind the sense of identity and self-worth individuals derive from their employment. The analysis should balance terminating that sense of identity and self-worth with the severity of the employee's misconduct.

The court found the trial judge addressed the issue of cause by analyzing the particular circumstances surrounding the employee's behaviour and held that there was no palpable and overriding error. As a result, the court dismissed the appeal upholding the lower court's decision.

## **Takeaway**

The British Columbia Court of Appeal expressed no opinion on whether secretly recording conversations in the workplace may be justified in supporting an employee's legal position. This case suggests that just cause may be justified particularly when an employee secretly records conversations that partly have nothing to do with the alleged mistreatment by the employer. If an employee is a professional, misconduct that involves confidentiality or privacy issues may likely constitute just cause, especially if it leads to the breakdown of trust with the employer.

## **Footnotes**

1. *Shalagin v. Mercer Celgar Limited Partnership*, [2023 BCCA 373 \(CanLII\)](#), at para. 9.
2. *Ibid* at para. 2.
3. *Ibid* at para. 42.

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