

Secret Recordings In The Workplace Can Lead To Dismissal



The British Columbia Court of Appeal decision ***Shalagin v. Mercer Celgar Limited Partnership***, 2023 BCCA 373 (CanLII) is a reminder for employers and employees alike that surreptitious recordings (a.k.a. secret recordings) in the workplace by employees may constitute just cause for dismissal.

The Case

The Employee, a Chartered Professional Accountant with ten years of service, was terminated by his Employer without cause.

The Employee filed a human rights complaint and a wrongful dismissal action.

The Employer learned from disclosure at the British Columbia Human Rights Tribunal that the Employee had been secretly recording hundreds of meetings and conversations with supervisors and other employees in the workplace throughout his ten years of employment.

The Employer amended its wrongful dismissal defence, alleging that the Employee's surreptitious recordings constituted after-acquired cause for dismissal. The trial judge found that the Employee's conduct constituted just cause for termination and that the Employer had established after-acquired cause for dismissal. The wrongful dismissal action was dismissed and the Employee appealed this decision. We previously reported on the trial judge's decision linked here: [Secretly Recording Workplace Conversations Can Result in Termination](#).

The Court of Appeal reinforced the contextual analysis of the trial judge, assessing whether the nature and degree of the employee's dishonesty warranted dismissal. The Court of Appeal concluded that there was just cause for dismissal as the Employee's recording activity was *"underhanded and would be regarded by most employers as misconduct undermining the trust relationship between employer and employee."*¹

The Employee's actions were also found to violate the privacy of the individuals in the recordings as well as the privacy of individuals who were discussed in the recordings.

When Might Secret Recordings Be Justified?

The Court of Appeal acknowledged that in some circumstances surreptitious recordings in the workplace may be justified if an employee has reason to believe they are being discriminated against on a protected ground and the recordings would protect their legal position. In this case, the Employee's recordings were not rationally connected to any discrimination and were not justified.

Takeaways for Employers

This case reinforces that surreptitious recordings in the workplace may constitute just cause for dismissal when it causes a breakdown of trust in the employment relationship.

However, in each case, the Court will assess the circumstances in which the recordings were made by the employees as the recordings may be justified if an employee has reason to believe they are experiencing discrimination in the workplace.

Employers should have clear written policies on confidentiality and privacy in the workplace to reinforce expectations surrounding surreptitious recordings in the workplace.

Footnote

1. *Shalagin v. Mercer Celgar Limited Partnership*, 2023 BCCA 373 (CanLII) at para 42.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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