

Secret Recordings In The Workplace



A recent decision of the British Columbia Court of Appeal, *Shalagin v Mercer Celgar Limited Partnership*, 2023 BCCA 373 ["*Shalagin*"], affirmed a lower court decision that, in certain circumstances, an employer can terminate an employee for "just cause" if they make secret workplace recordings.

Background of the Case

In 2002, at the age of 20, the employee emigrated to Canada from his home country of Russia and became a Chartered Professional Accountant (CPA). In 2010, he started working as a financial analyst with the employer. In 2016, he was promoted to senior financial analyst and in 2019 became eligible for an annual discretionary bonus. The employee was bound by a number of professional and ethical obligations under the employer's workplace policies and the CPABC's Code of Conduct. As an employee he was also required to maintain confidentiality over non-public personal or proprietary information of the company and its employees.

In March 2020, the employer terminated the employee on a "without cause" basis. There was no employment contract in place. The employer paid the employee the amount of notice required under the *Employment Standards Act*.

In response, the employee filed a wrongful dismissal action in the British Columbia Supreme Court against the employer, for amongst other things, additional notice. He also filed an employment standards complaint and a human rights complaint with the Human Rights Tribunal ("HRT") for discrimination based on his ethnicity and national origin.

In the course of the HRT proceedings, the employee produced documents which included information about surreptitious recordings he made while employed. Later, at examination for discovery for the wrongful dismissal action, the employee disclosed that he had made over 100 surreptitious recordings of his co-workers over his 10 years of employment. These included recordings of group meetings and one-on-one meetings with his supervisors and HR personnel.

Upon discovering that the employee had made these secret recordings, the employer amended its defence in the wrongful dismissal action to assert that the employee's recordings "revealed a character of untrustworthiness, incompatible with continued employment" and constituted just cause for termination which meant he had no entitlement to notice.

In discovery, the employee explained that his initial reason for making the recordings was to improve his English. He did not deny this admission when put to him at trial. However, he further testified that after experiencing some negative workplace interactions, he began making the recordings to use them as evidence to support a potential discrimination complaint or possible future employment action.

There was also evidence that the recordings had a negative impact on the employee's colleagues. The subjects of the recordings felt violated by them, particularly as some included information not relevant to the workplace involving personal and family matters.

Analysis at the BC Supreme Court

Ultimately, the Court ruled that the employer did have just cause to terminate the employee. The surreptitious recordings ruptured the employment relationship to the point the mutual trust between employer and employee was broken. The numerous recordings which spanned 10 years were not something that the employer could be expected to overlook.

The Court was not satisfied that the employee's reasons for making the recordings were justified.

The employee knew the recordings were wrong, if not legally then at least ethically. The Court noted there were other ways the employee could have improved his English that did not involve secretly recording his colleagues. The Court also found that the employee's alleged fear of discrimination did not constitute a legitimate basis to make the recordings.

The Court's position was that it would not be a positive public policy decision to accept the employee's reasons for making the surreptitious workplace recordings. Privacy is an important value in Canadian society. Deciding that an employee can make surreptitious recordings to the extent the employee did could open the floodgates for other employees to follow suit, which would pose ongoing harm to employment relationships across the province.

Takeaways

In general, surreptitious recordings in the workplace, particularly where they capture sensitive personal information of colleagues, can put an employee at risk of termination for just cause. However, in limited instances where an employee's safety or human rights may be being compromised, these recordings may be justifiable.

As part of their workplace policies, employers can include prohibitions surrounding the recording of employees or clients in the workplace. At the same time, employers should ensure they have options for employees to raise concerns, formally and informally, in the event they have concerns about workplace conduct.

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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