

# Surreptitious Recordings Of Colleagues At Work May Be Cause For Dismissal



In *Shalagin v. Mercer Celgar Limited Partnership*, [2022 BCSC 112](#), the British Columbia Supreme Court found that an employee's surreptitious recording of colleagues was cause for dismissal. The Court also provided helpful guidance on what constitutes after-acquired cause.

## **Background**

The Plaintiff was employed as a financial analyst for the defendant, Mercer Celgar Limited Partnership (Mercer). Issues arose when the Plaintiff raised several concerns about his bonus payment. The Plaintiff mentioned possible litigation, and Mercer decided it could no longer work with the Plaintiff and terminated his employment without cause.

The Plaintiff filed a wrongful dismissal action, as well as employment standards and human rights complaints. During the human rights complaint process, the Plaintiff produced information about surreptitious recordings he had taken while employed at Mercer. At his discovery for examination for his wrongful dismissal action, he further revealed that he had made over 100 surreptitious recordings over ten years while he was employed at Mercer. These included recordings of training sessions, group safety meetings, and one-on-one meetings with supervisors and human resources about compensation and recruitment.

The Plaintiff claimed he made the recordings to help him learn English and to protect himself from future mistreatment. He acknowledged that he had not asked any of the parties he recorded for their permission, in part because he knew they would feel uncomfortable if they knew they were being recorded.

Once Mercer learned the Plaintiff had made surreptitious recordings at work, it changed its original position (that the termination was without cause) and claimed that it had after-acquired cause based on its new knowledge of the surreptitious recordings.

## **Analysis and Decision**

Misconduct discovered post-termination may constitute cause, which is known as "after-acquired cause". For an employer to rely on after-acquired cause, it must establish that:

- the misconduct was sufficient to justify dismissal for cause had the misconduct been discovered before employment ended;
- it could not have known about the misconduct at the time of termination; and
- it acted promptly once it discovered the misconduct and did not condone it.

If an employer knew of the misconduct and expressly or implicitly condoned it, then it cannot establish after-acquired cause.

In Mercer's case, the clandestine nature of the recordings meant Mercer could not have known of the Plaintiff's misconduct at the time of termination. Mercer also took prompt action on discovering the misconduct (during the human rights proceeding and examination for discovery) by changing its position and alleging that it had after-acquired cause to terminate the Plaintiff's employment.

Therefore, the remaining issue was whether surreptitious recordings at work amount to cause. In other words, did the Plaintiff's surreptitious recordings fundamentally undermine the mutual trust required in an employment relationship.

The Court noted the following factors which supported its determination that Mercer had cause to terminate the Plaintiff's employment:

- The Plaintiff knew the recordings were ethically wrong and that his colleagues would have been uncomfortable being recorded.
- The Plaintiff had professional obligations as a Chartered Professional Accountant and should have known that he was in a position of power where it was inappropriate to record his subordinates and colleagues.
- Although the Plaintiff suggested he made some recordings to learn English, there were alternative ways to learn English without secretly recording his colleagues.
- Although the Plaintiff suggested his recordings were justified to protect himself from future mistreatment, there was no evidence that supported he had reasons to make such allegations.
- The fact that the bases for the recordings were unnecessary or ill-founded, and that several recordings included personal details about his colleagues that had nothing to do with the workplace, weighed against the mitigating factor that the Plaintiff had not acted with malice in making the recordings.
- The sheer volume of recordings, and the length of time over which they occurred, weighed against the mitigating factor that the Plaintiff did not publish the recordings or make use of them for his own benefit outside of the ongoing legal proceedings.
- From a policy perspective, employment relationships would not benefit from the Court encouraging employees to routinely and secretly record their colleagues.

The Court found that the Plaintiff's misconduct of surreptitiously recording his colleagues constituted cause and therefore dismissed his wrongful dismissal claim.

## **Key Takeaways**

Secretly recording colleagues without a legitimate reason to do so may be grounds for termination for cause. As well, if an employer learns of misconduct that it could not have discovered during the employment relationship, it may still be able to assert termination for cause even if it originally terminated employment on a without cause basis (after-acquired cause).

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