

[This Conversation Is \(Unknowingly\) On The Record: The Legal Implications Of Secret Workplace Recordings](#)



This blog was prepared with the assistance of summer law student Kendall Kleisinger.

In an age where smartphones are omnipresent and recording devices are easily concealed, the potential for covert capturing of workplace conversations is greater than ever.

Before pressing the record button, it is crucial to understand the legal implications of secretly capturing workplace conversations. Without a clear understanding of the legal landscape surrounding such recordings, individuals may face civil or criminal consequences. As an employer, you may also want to take steps to prevent employees from secretly recording conversations at all.

Is it illegal to secretly record workplace conversations?

In some circumstances, it is illegal to secretly record conversations. Section 184(1) of the *Criminal Code* stipulates that it is a criminal offence for any person to knowingly use a recording device to intercept a private communication. The key word in this provision is “private.” If the individual is not actively involved in the discussion, the communication is considered private, and the act of secretly recording the conversation is a criminal offence. However, it is not a crime for an individual to secretly record a discussion that they are a party to, even if the other person (or people) in the conversation is not aware it is being recorded.

Do secret recordings in the workplace amount to just cause for termination?

Even when the act of recording a conversation is not a crime, it can amount to just cause for termination in certain circumstances. Two recent cases from British Columbia and Alberta provide guidance on this issue.

In *Shalagin v Mercer Celgar Limited Partnership*, 2023 BCCA 373 [*Shalagin*], an individual’s employment was terminated without cause following a dispute with his employer over his bonus calculation. The employee sued for wrongful dismissal. The employer later discovered that the employee had secretly recorded several workplace

conversations and amended its defence to allege after-acquired cause for termination.

The British Columbia Court of Appeal (“BCCA”) found that since the employer had a code of conduct that required honesty and integrity, and a confidentiality policy that prohibited employees from using, disclosing or removing confidential information outside of the company, the secret recordings would have amounted to just cause for termination. Furthermore, the BCCA determined that the employee was aware that the recordings would cause discomfort if others were aware of the practice. The recordings captured sensitive, serious, and personal information about the employee’s co-workers. Lastly, the BCCA noted that such conduct undermined the relationship of trust between employer and employee and acknowledged that allowing the recordings would encourage the practice and lead to widespread privacy concerns.

Unlike in *Shalagin*, the Alberta Court of King’s Bench in *Rooney v GSL Chevrolet Cadillac*, 2022 ABKB 813 found that the secret recordings did not amount to after-acquired cause. In this case, an employer implemented changes that negatively impacted a 20-year employee. The employee began secretly recording discussions between himself and his supervisors relating to disciplinary action and the changes to his role. The employee eventually resigned, alleging constructive dismissal. Upon discovering the recordings, the employer amended the defense to claim after-acquired cause.

The Court noted that although recording private conversations is generally unethical, can damage the relationship of trust between employee and employer, and may be just cause for termination, the relationship between the employee and employer in this case was already “frayed.” The Court held that it was not the recordings that initially caused the breakdown in trust, but rather the employer’s imposition of changes. Lastly, the employer in this case could not point to any workplace policies that prohibited this type of recording.

Can a secret recording be used as evidence?

In *Teljeur v Aurora Hotel Group*, 2023 ONSC 1324, which was upheld on appeal, the Court awarded punitive damages against an employer based on a transcript of a recorded termination meeting. The employee, who was dismissed without cause, secretly recorded the termination meeting and sought to rely on the recording in his wrongful dismissal action. The transcript of the recording was not only admissible as evidence but was given considerable weight. The transcript revealed that the employer tried to entice the employee to resign and made certain representations to the employee that were not fulfilled. The Court held that the employer’s actions in dismissing the employee were a breach of the duty of good faith and fair dealing.

Key takeaways for employers

The consequences of secret recordings in the workplace will largely depend on an organization’s policies. If employers wish to protect themselves against surreptitious recordings, it is crucial to ensure that they have clear policies that set out employee obligations and prohibit the recording of workplace conversations without prior consent. Violations of these policies may lead to disciplinary actions or amount to just cause for termination, depending on the circumstances.

Employers may wish to update workplace privacy-related policies to explicitly prohibit recording of work-related conversations without prior consent of the organization. Confidentiality policies and employment contract terms can also be updated to ensure that recordings of confidential information are captured in the scope of prohibited practices. Finally, it is important that employers do not condone recording of workplace conversations.

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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