

SECRET RECORDINGS WON'T FLY: BC COURT OF APPEAL RULES ON SURREPTITIOUS RECORDINGS BY EMPLOYEES IN THE WORKPLACE

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In *Shalagin v. Mercer Celgar Limited Partnership*^[1], the British Columbia Court of Appeal confirmed that an employee's conduct of surreptitiously recording confidential conversations between colleagues was cause for dismissal. The court further held that a post-termination finding of employee misconduct can act as a defence to a wrongful dismissal claim based on the principle of after-acquired cause.

Background

The employee began his employment with Mercer Celgar Limited Partnership ("**Mercer**"), a large BC-based pulp and paper producer, in January 2010. During the course of his employment, the employee encountered numerous issues with his colleagues, including apparent threats of litigation, which made working with him difficult.

In March 2020, Mercer terminated the employee's employment without cause. Subsequently, the employee filed a series of claims before the Employment Standards Branch, Human Rights Tribunal, and Supreme Court of British Columbia alleging discrimination based on his ethnicity and national origin and claiming wrongful dismissal. During these proceedings, evidence surfaced that the employee surreptitiously recorded over 130 conversations with colleagues, supervisors and human resources personnel during his tenure at Mercer. The employee claimed that the recordings were meant to improve his English; however, the conversations were recorded without consent and were often regarding matters of a confidential and sensitive nature.

Although Mercer initially terminated the employee without cause, it later took the position, due to this new evidence, that it had cause to terminate the employee based on the principle of after-acquired cause.

Trial Decision

The central issue at trial was whether Mercer had just cause for terminating the employee.^[2] The trial judge noted the following considerations, which weighed in favour of termination for cause:

- The employee knew that his colleagues would be uncomfortable with the recordings and that it was unethical to make them. The employee's behaviour in this regard was contrary to his confidentiality obligations to Mercer and his professional obligations as an accountant.
- The nature of sensitive information recorded was serious and included personal details about the employee's co-workers.
- The employee could not support his claim that the recording of conversations was justified due to concerns of discrimination, financial improprieties or fears of under-compensation.
- Although the employee was not acting with malice in making the recordings, the recordings were all unnecessary or ill-founded and were designed only to benefit the employee.
- The employee recorded a significant number of conversations over a lengthy period.
- Acceptance of the employee's conduct may encourage other employees who feel mistreated at work to secretly record their co-workers, which would be a negative development from a policy perspective in light of the courts' growing recognition of the importance of privacy concerns.

Based on these factors, the lower court found that the employee's actions "fundamentally struck" at the employment relationship and undermined the relationship of trust between the employee and Mercer. With respect to Mercer's use of after-acquired cause as grounds for the employee's dismissal, the court explained that, although allegations of after-acquired cause must be examined carefully, it was justified in this case because the recordings were clandestine and could not have been discovered until after termination.

The employee appealed the trial judge's decision on the basis that the court misapplied the just cause test and improperly found that the employee offered no evidence to support his discrimination claim.

Court of Appeal Decision

The court began its analysis by going through the test for just cause dismissal set out by the Supreme Court of Canada.^[3] It found that the trial judge properly adopted a contextual analysis and determination of whether the nature and degree of the employee's misconduct warranted dismissal. Specifically, it noted that the trial judge considered the "difficulties" experienced by the employee in his relationship with supervisors and colleagues, as well as the purpose of making the recordings. Ultimately, the court found that the employee's conduct would be regarded by most employers as undermining the trust relationship between the employer and employee, as well as the privacy interests of its employees.

Further, the court agreed that there was no rational connection between the employee's recordings and any alleged discriminatory conduct. Even if there was an initial basis for recording workplace conversations due to concerns about discrimination, the court noted that the employee recorded conversations for nearly ten years – far longer than any alleged discriminatory interaction.

Key Takeaways for Employers

Employee misconduct that undermines the relationship of trust between an employee and employer may justify termination for cause at common law. In assessing whether termination for cause is justified, an employer should consider the circumstances and severity of the misconduct. For example, in *Shalagin*, the sensitive nature of the recordings, the lack of legitimate reasons for recording and the employee's breach of his confidentiality obligations to the company all weighed in favour of a finding that Mercer had after-acquired cause to dismiss the employee.

Employers who initially terminate their employees without cause and later discover information that justifies their dismissal for cause may also find helpful guidance in this decision. Although reliance on after-acquired cause will be closely scrutinized by the courts, this decision confirms that it can be successfully relied upon in cases where the employer did not know of the misconduct and did not expressly or implicitly condone it. After-acquired cause has also been used to set aside settlement agreements that were negotiated between an employee and employer based on an initial understanding that the employee would be terminated without cause.^[4]

To effectively navigate concerns about the misuse of workplace confidential information (e.g. through surreptitious recordings in the workplace), employers should draft codes of conduct that clearly outline an employee's confidentiality and privacy obligations to their employer. Please reach out to the lawyers at McMillan for guidance in navigating these multifaceted issues.

[1] [2023 BCCA 373](#).

[2] *Shalagin v. Mercer Celgar Limited Partnership*, [2022 BCSC 112](#).

[3] *McKinley v. BC Tel*, [2001 SCC 38](#).

[4] See e.g., *Ruder v. 1049077 Ontario Ltd.*, [2014 ONSC 4389](#).

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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