

Confidentiality and misconduct considerations related to employee workplace recordings

SEPTEMBER 29, 2017 5 MIN READ

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In this Update

- In *Hart v. Parrish & Heimbecker, Limited* [2017] MBQB 68 (*Hart*), the trial judge considered an employee's secret recordings with senior management in the context of a wrongful dismissal action
 - The trial judge held that the plaintiff's use of his cell phone to secretly record these meetings amounted to a breach of his confidentiality and privacy obligations to the employer
 - The decision in *Hart* appears to be the first reported decision in which a judge of a common law court in Canada has considered secret recordings of meetings by employees in the context of a wrongful dismissal case
 - It is important for employers to ensure that its confidentiality and privacy policies and procedures address the issues relevant to the workplace and are reviewed periodically
- In a recent decision of the Court of Queen's Bench of Manitoba, the trial judge in *Hart v. Parrish & Heimbecker, Limited* [2017] MBQB 68 (*Hart*) considered an employee's secret recordings of meetings with senior management in the context of a wrongful dismissal action.

In *Hart*, the employer dismissed the plaintiff as a result of four separate complaints by other employees of the defendant regarding the plaintiff's inappropriate and unprofessional behaviour. At the time of termination, the plaintiff was 42 years old, had 15 years of service, and held the position of merchandising manager.

The first three complaints occurred between 2008 and 2013, each of which were investigated by the employer. Corrective action was taken to address the plaintiff's behaviour, including the requirement that he attend career counselling to develop personal and career goals. In 2014, following completion of the career counselling, the defendant received a fourth complaint about the plaintiff's behaviour that it treated as a culminating incident that led to the termination of the plaintiff's employment for cause.

The plaintiff rejected the severance package that the employer had offered without prejudice to its position that it had cause to terminate his employment, and he sued for wrongful dismissal damages as well as aggravated and punitive damages.

During the litigation process, the employee disclosed that from October 16, 2013, up to and

including the date of his termination, he had secretly recorded conversations with senior management of the employer by placing his cell phone on the table during meetings with the recording function turned on.

At trial, the employer argued that had it known that the plaintiff was recording the meetings, which it considered to be a breach of his employment, it would have terminated the plaintiff's employment.

The trial judge held that the plaintiff's use of his cell phone to secretly record meetings with senior management was inappropriate and amounted to a breach of his confidentiality and privacy obligations to the employer. The trial judge also noted that the plaintiff had admitted on examination for discovery that he knew a breach of his confidentiality obligations could result in the termination of his employment.

While the trial judge held that the plaintiff's use of his cell phone to secretly record meetings with senior management was a factor in determining whether the employer had cause to terminate, it was unnecessary for the trial judge to determine whether the plaintiff's use of his cell phone to secretly record meetings with senior management, in and of itself, amounted to just cause for termination. The trial judge held that the plaintiff's conduct that gave rise to the four complaints provided just cause for termination.

The decision in *Hart* appears to be the first reported decision in which a judge of a common law court in Canada has considered secret recordings of meetings by employees in the context of a wrongful dismissal case. As noted above, although the trial judge concluded that it was unnecessary for the court to determine whether the plaintiff's use of his cell phone to secretly record meetings with senior management, in and of itself, amounted to just cause for termination, the trial judge was clear that such conduct was inappropriate and could be a factor in determining whether termination for cause is justified in a particular case.

It is worth noting that *Hart* was a case involving a claim of wrongful dismissal, where the terminated employee sought damages from his former employer. However, making secret recordings of meetings with other coworkers could constitute the tort of intrusion upon seclusion and make the recorder liable for damages.

The Ontario Court of Appeal recognized a claim for invasion of privacy in *Jones v. Tsige* 2012 ONCA 32 (*Jones*), where the Court of Appeal found that the tort of "intrusion upon seclusion" is a valid cause of action, and granted summary judgment in favour of the plaintiff employee against a defendant employee who had improperly accessed the plaintiff employee's personal banking records, contrary to the employer's policy. In *Jones*, the Court of Appeal awarded \$20,000 to the plaintiff, whose privacy had been invaded by the actions of the defendant employee, capping damages in that amount due to the fact that there was no pecuniary loss.

Similarly, in an arbitration case *Alberta v Alberta Union of Provincial Employees*, 2012 CanLII 47215 (AB GAA), Arbitrator Sims awarded \$1,250 to each of 26 government employees in a claim for damages against their employer due to an admitted breach of their right to privacy through an unjustified credit check on their personal affairs.

Given that smartphones and other personal devices allow employees to record workplace conversations, documents and information easily and without the employer's knowledge, it is important for employers to ensure that their confidentiality and privacy policies and procedures address the issues relevant to the workplace and are reviewed periodically, and that employees are made aware of the employer's expectations regarding the access and recording of workplace conversations, documents and information and the consequences for violating such policies and procedures.