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EMPLOYEE'S SECRET RECORDINGS OF EMPLOYER CAUSE FOR DISMISSAL, BC SUPREME COURT RULES

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A. INTRODUCTION

SECRETLY RECORDING an employer can be just cause for termination, and could even provide just cause retroactively if the secret recordings are discovered after an employee has been terminated.[1] The British Columbia Supreme Court ruled that the plaintiff employee in *Shalagin v Mercer Celgar Limited Partnership*[2] breached not only the defendant employer's code of conduct and confidentiality policies by making surreptitious workplace recordings, but also his own professional obligations, and the requirements of the employment relationship itself, in a January 25, 2022 judgment. Judge Ward K. Branch's reasoning about the significance of mutual trust and ethical conduct between an employee and employer in this case are important for charities and not-for-profits in Canada to consider in managing their own workplace relationships with employees. This *Bulletin* describes the key background facts and overall legal analysis from the judgment.

B. BACKGROUND

MR. ROMAN SHALAGIN had immigrated to Canada from Russia, and he obtained a Bachelor of Commerce degree, then later became a Certified Professional Accountant (CPA). In January 2010, Shalagin began working for Mercer Celgar Limited Partnership (the "Company"), which operates a pulp mill near Castlegar, B.C., as a financial analyst. While there was actually no written employment contract, Shalagin

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[1] "Secret" or "surreptitious" recordings referred to in this *Bulletin* are understood to be primarily audio recordings made of which only the person making the recording is aware.
[2] 2022 BCSC 112 ["*Shalagin*"], online: CanLII https://www.canlii.org/en/bc/bcsc/doc/2022/2022bcsc112/2022bcsc112.html.

was bound by Company policies, including a Code of Business and Ethics policy, and confidentiality policy.[3] The Company eventually promoted Shalagin to Senior Financial Analyst in 2016, and placed him on the manager's incentive bonus plan ("Bonus Plan") in 2019, which was paid annually at the Company's discretion. Shalagin's position carried management responsibilities and he received compensation of $123,000 per year, plus benefits including the Bonus Plan, a cell phone, as well as payment for his professional dues and professional development courses. Still, Shalagin did not entirely trust the Company and felt he was being treated unfairly.

1. Termination without cause

Shalagin believed that he was being discriminated against by his supervisor because of his ethnic background.[4] The Company terminated a supervisor in 2019 and Shalagin was tasked with reviewing documents in his office to determine what could be shredded. In the course of that review, Shalagin came across documents related to his own performance appraisal and the Bonus Plan, including bonuses for senior and mid-level managers. He also testified that he found documents revealing that the supervisor had lied to him about his prospects for promotion.[5]

Two factors led to his termination on March 25, 2020: (1) Two meetings on March 23, 2020 complaining to his new supervisor, Lori Ketchuk, and the Company's Human Resources Manager, Andrew East, about fair compensation involving the Bonus Plan structure and "a consistent pattern of concern about human rights", for both himself and co-workers; and (2) an e-mail Shalagin sent in which he offered to resolve the matter "without litigation". Ketchuk and East were so troubled by the apparent threat of litigation that they felt they could no longer work with Shalagin, and terminated his employment on a without-cause basis.[6] In addition to a complaint under B.C.'s *Employment Standards Act*[7] and a human rights complaint, Shalagin filed a wrongful dismissal proceeding on June 2, 2020.

2. Just cause after-the-fact

Unbeknownst to the Company at the time, Shalagin had been making surreptitious recordings (the "Recordings") of training sessions and meetings involving co-workers and supervisors from the start of

[3] *Ibid* at paras 1–4.
[4] *Ibid* at para 9.
[5] *Ibid* at para 12.
[6] *Ibid* at paras 15–21.
[7] R.S.B.C. 1996, c. 113.

his employment in 2010. He later admitted that he did not disclose these Recordings because he knew they would make others uncomfortable.[8] Initially the reason for the Recordings was so that Shalagin could improve his English; however, he later continued to make Recordings in meetings with supervisors and human resources staff for a different purpose, in order to:

> […] create a record of interactions that I thought might relate to my rights, such as conversations about my contractual entitlement to a bonus and conversations related to discriminatory or bullying treatment of me or colleagues.[9]

The fact of these Recordings came to light as a result of the litigation process, during examination for discovery, and consequently in its defence, the Company relied on just cause for termination.[10]

C. ANALYSIS

JUDGE BRANCH ("Branch J") cited the precedent from *Van den Boogaard v. Vancouver Pile Driving Ltd.* that misconduct discovered after termination can constitute just cause for termination, so-called "after-acquired cause".[11] The court must determine whether the misconduct "was something a reasonable employer could not be expected to overlook, having regard to the nature and circumstances of his employment".[12] In this case, the question was whether the surreptitious Recordings that Shalagin made "fundamentally struck at the plaintiff's employment relationship."[13]

Although the Recordings were not, in and of themselves, illegal, under the *Criminal Code*,[14] as Shalagin himself was a consenting party to them, at least some of them were unethical by his own admission. For example, one of the Recordings included personal family information shared with Shalagin by Ketchuk.[15]

Branch J cited a number of precedent cases establishing that surreptitious recordings made by an employee "cause material damage to the relationship of trust between employee and employer."[16] In *Hart v. Parrish & Heimbecker Ltd*[17] the Manitoba Court of Queen's Bench noted how an employee's use of a company

[8] *Ibid* at para 25.
[9] *Ibid* at para 27.
[10] *Ibid* at para 39.
[11] 2014 BCCA 168 at paras. 34–36.
[12] *Shalagin* at paras 45–47.
[13] *Ibid* at para 50.
[14] R.S.C. 1985, c. C-46, s. 184; also *Goldman v. R., 1979*, [1980] 1 S.C.R. 976.
[15] *Shalagin* at para 53.
[16] *Ibid* at para 56.
[17] 2017 MBQB 68.

cell phone to make surreptitious recordings "was a deliberate violation of his duty of confidentiality and a breach of trust and loyalty" to the employer.[18]

In *Schaer v. Yukon (Department of Economic Development)*[19] the Court of Appeal of Yukon commented that an employee's conduct:

> […] in secretly recording conversations and meetings from the commencement of his employment provided the Government of Yukon with a legitimate performance-related reason to reject him on probation. His actions resulted in the complete breakdown in trust in the employment relationship.[20]

Branch J ruled in favour of the Company, and held there was after-acquired cause for the Company to terminate Shalagin's employment.

D. CONCLUSION

SECRET RECORDINGS may not necessarily be illegal in Canada if a person is making a recording of themselves and others, but they are unethical when made in the workplace without consent, and can provide just cause to an employer for termination of the employment relationship. *Shalagin* demonstrates the importance of workplace codes of conduct and confidentiality policies for any employer, including charities and not-for-profits. Even beyond any policy in place, however, a secret recording without consent goes to the root of the employment contract, destroys trust, and fundamentally strikes at the heart of the employment relationship.

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[18] *Ibid* at para 59; cited in *Shalagin* at para 57.
[19] 2019 YKCA 11.
[20] *Ibid* at para 38; cited in *Shalagin* at para 60.