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Covertly recording conversations in the workplace

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In recent years, the issue of covertly recording conversations in the workplace has emerged as an important topic in employment law. Such secret recordings raise concerns about privacy, workplace rights and protections, and the issue of trust between employees and employers.

Covert recordings are sometimes made by employees who feel a need to gather evidence of, or protect themselves from unfair management practices. Employers, on the other hand, commonly view such recordings (by employees) as a serious breach of trust, potentially warranting disciplinary action.

This article examines the issue of covert recordings in the workplace and the employment consequences of making such recordings, as reflected in decisions of the Fair Work Commission (FWC) – see below.

The law in Australia regarding covert recordings

Australia's legal framework regarding the covert recording of conversations (not just limited to secret recordings in the workplace) is shaped by both state and federal legislation. Every state has its own rules. For the Queensland position, see our previous article, "Recording conversations in Queensland – is it legal?"

In short, a covert recording made by someone involved in a personal conversation is usually legal in Queensland, subject to strict rules around how that recording can be subsequently used and distributed.

Secret recordings in the workplace

Whilst it may be legal to record a conversation, that does not necessarily mean it is regarded as acceptable in the workplace.

The *Fair Work Act* 2009 (Cth) provides a framework for workplace rights and obligations, but it does not directly address the issue of covert recordings. Nevertheless, the FWC has dealt with several cases where employees have been disciplined or dismissed for secretly recording conversations at work.

Fair Work Commission cases related to covert/secret recordings

Decisions from the FWC illustrate that even where a secret recording in the workplace has been made legally, such conduct may nonetheless justify termination, even where the employer did not know about the recording at the time of dismissal.

In *Thomas v Newland Food Company Pty Ltd [2013] FWC 8220*, the FWC was dealing with a case in which an employee decided to record his conversations with management when he spoke to them about his leave and other entitlements. He claimed he wanted to protect himself against what the employer was saying, and in light of earlier legal threats against him.

In considering the validity of his dismissal, Deputy President Sams said this:

It was not suggested by the [employer] that the [employee's] secret recordings of their conversations was unlawful... However, there is a more serious issue to be considered in this respect.

In my view, there could hardly be an act which strikes at the heart of the employment relationship, such as to shatter any chance of re-establishing the trust and confidence necessary to maintain that relationship, than the secret recording by an employee of conversations he or she has with management. Although there may be sound reasons why an employee (or an employer for that matter) believes it is necessary to secretly tape workplace conversations, I consider such an act to be well outside the normal working environment and contrary to the well understood necessity for trust and fidelity in the relationship between employee and employer.

Similarly, in *Schwenke v Silcar Pty Ltd* [2013] FWCFB 9842, the Commission concluded that the employee's making of a recording in secret was:

… contrary to his duty of good faith and fidelity to the employer and undermined the trust and confidence required in the employment relationship. This action, in itself, was grounds for summary dismissal.

In *Gadzikwa v Australian Government Department of Human Services [2018] FWC 4878*, the employee made an application for unfair dismissal following a dispute about the adequacy of his sick leave certificates for a mental health condition. The employer did not consider the documentation provided to be satisfactory, and the employee was subsequently dismissed.

It emerged that the employee had a practice of covertly recording conversations with fellow employees, to “protect” himself. In considering the overall fairness of his dismissal, the FWC took into account the employee’s inappropriate secret recordings of conversations with co-workers. Deputy President Colman explained why the Commission generally regarded the covert recording of an employer as unfair:

The reason it is inappropriate is because it is unfair to those who are secretly recorded. They are unaware that a record of their exact words is being made. They have no opportunity to choose their words carefully, be guarded about revealing confidences or sensitive information concerning themselves or others, or to put their best foot forward in presenting an argument or a point of view. The surreptitious recorder, however, can do all of these things, and unfairly put himself at an advantage. Moreover, once it is known that a person has secretly recorded a conversation, this is apt to produce a sense of foreboding in others, an apprehension that they must be cautious and vigilant. This is potentially corrosive of a healthy and productive workplace environment. Generally speaking, the secret recording of conversations with colleagues in the workplace is to be deprecated.

Recent decisions of the FWC have maintained this position. In *Altham-Wooding v PKDK Adventures Pty Ltd* [2024] FWC 2753, Deputy President Saunders in the FWC was considering an unfair dismissal claim, in circumstances where the employee had made a secret recording of her employer in the course of a dispute about rostered casual work hours.

The Deputy President held that the recording was of itself a valid reason for the employee’s dismissal, even though the employer did not learn of the recording before the decision to terminate. The Deputy President noted:

I consider that, unless there is a justification, the secret recording of conversations in the workplace is highly inappropriate, irrespective of whether it constitutes an offence in the relevant jurisdiction.

Conclusion

The lawfulness and appropriateness of covertly recording workplace conversations in Australia is a complex issue. FWC cases have, for many years, reflected a real distaste for the practice, suggesting that it will only be a rare case where such conduct is regarded as justified.

The cases make clear that covert recordings can lead to disciplinary action or dismissal, particularly where they undermine the employment relationship, and can often be relied upon to justify a dismissal, even where the employer was unaware of the secret recordings at the time of dismissal.

Get help from an employment lawyer

If you’re facing disciplinary action or termination of employment, whether due to secret recordings in the workplace or any other issue, you should seek advice and assistance from an experienced employment lawyer. It’s important to be aware that strict time limits apply to unfair dismissal claims so immediate action is required if you wish to pursue a claim.

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