COVERT RECORDING OF PERFORMANCE MANAGEMENT & DISCIPLINARY MEETINGS

Performance management and disciplinary meetings are often confronting for employees.

Unfortunately, they can become acrimonious affairs, and employees may lose trust in the managers or other personnel involved. To the employee, it may be important to have a "true" record of the meeting, either to vindicate their claims that the manager was bullying them or to prove that they raised an issue and the employer did not provide them with adequate supports to improve their performance.

Sometimes, an employee may decide to "*wear a wire*" to capture what they perceive as an exculpatory conversation with their employer. In an age when watches and mobile phones can be covert recording devices, there are a few things to be aware of if private meetings are recorded.

THE LAW

Laws exist in each state and territory to regulate the use of surveillance devices. These laws provide criminal offences for conducting surveillance and for related activities, in particular for communicating information obtained under surveillance.

In Western Australia, covert audio and video recording is governed by the *Surveillance Devices Act 1998* (WA) (the "Act"). Similar legislation exists in other Australian jurisdictions. The legislation in other states contain different defences. Other relevant State/Territory legislation is:

Australian Capital Territory	*Listening Devices Act 1992* (s 4(1)(b))
New South Wales	*Surveillance Devices Act 2007* (s 7(1)(b))
Northern Territory	*Surveillance Devices Act 2007* (s 11(1))
Queensland	*Invasion of Privacy Act 1971* (s 43(1))
South Australia	*Surveillance Devices Act 2016* (s 4(1))
Tasmania	*Listening Devices Act 1991* (s 5(1))
Victoria	*Surveillance Devices Act 1999**

* Note that unlike the other States and Territories, Victorian legislation does not prohibit recording of a private conversation by one party, but it restricts that recording being communicated or published.

The Act prohibits a person from using a listening device to record private conversation to which that person is a party. Quite apart from the recording possibly being inadmissible, this is an offence punishable by a **$5,000 fine and/or 12 months' imprisonment**.

There are exceptions (known as "*defences*"). If the employee wants to adduce the recording as evidence, they must prove one of the defences for the recording to be "*lawful*". The main ones are:

- **the recording was "*reasonably necessary* for the protection of the *lawful interests*"**

This defence is particularly relevant in relation to employment, as noted by Le Miere J in ***Channel Seven Perth Pty Ltd v "S" (A company)*** [2005] WASC 175 [9] (emphasis added):

> I note that during the committee stage of the Surveillance Devices Bill, Mr Kobelke MLA referred to a **situation where an employee used a tape recorder to record his conversation with his employer** when the employer abused him and told him the grounds on which he was to be sacked – which were not legal grounds for sacking. The Minister in charge of the bill, Mr Prince, said that the conversation and did not disclose this use to his employer, **he was protecting his lawful interest**…

That case concerned an employee who made a recording of their manager. The employee had a claim under equal opportunity legislation that the employer terminated her employment because she was pregnant. On appeal, the employer did not challenge that the recording was in the public interest and/or for the protection of the employee's lawful interests: ***Channel Seven Perth Pty Ltd v "S" (A company)*** [2007] WASCA 122 [9].

In a later decision, Allanson J listed a number of factors to consider whether a recording was in a party's "*lawful interests*" ***Georgiou Building Pty Ltd v Perrinepod Pty Ltd*** [2012] WASC 72 [16] (citations omitted, emphasis added):

1. The term 'necessary' is capable of a wide range of meanings. There is, in Australia, 'a long history of judicial and legislative use of the term "necessary", **not as meaning essential or indispensable** but as meaning **reasonably appropriate and adapted**'. In the context of s 5, particularly qualified by the word 'reasonably', it should be construed as meaning **appropriate, but not essential or unavoidable**.
2. The word 'reasonably' imports an **objective test**.
3. Whether the use of the device is reasonably necessary is to be **judged on the circumstances that existed at the time of the use**.
4. The ordinary meaning of 'protection' as shelter, defence or preservation from harm, danger, or evil is apt in the context of s 5.
5. Lawful interests may be distinguished from 'legal interests'. Section 5(3)(c) does not require a legal interest in the sense of a legal right, duty or liability. **A recording made where a serious dispute has erupted and there will be a dispute as to different versions of an arrangement may give rise to a lawful interest.** Generally, a finding depends on the circumstances of the particular case.

There are cases where the mere desire to have a reliable record of the conversation is not sufficient: ***Legal Profession Complaints Committee v Rayney [No 2]*** [2018] WASAT 5 [40]. In other cases, Courts have found it was "*reasonably necessary*" for someone to make a covert recording to protect their interests should something go "*wrong*": ***Navabi v Ghasemi*** [2019] WADC 1 at [22] – [25].

It will very much depend on the circumstances at the time of the recording. We suggest that if an employee is told they:

- are not to repeat what is said to them during the meeting because it is confidential and may adversely affect other persons mentioned;
- are allowed to take notes; and
- may have a support person take notes for them,

it may not be "*reasonably necessary*" for the employee to make a recording. Certainly, if the employee is told they cannot make a recording and the other persons present do not consent to them recording the meeting, it is unlikely to be "*appropriate*" and therefore objectively "*reasonable*".

- **if the recording was in the "*public interest*"**

If the employee reasonably believes (at the time they made the recording) that the recording is in the "*public interest*", they will have a full defence. The definition of "*public interest*" in the Act is not exhaustive, but indicates that Parliament intended for the term to mean something with far-reaching public consequences (s.24):

> … the interests of national security, public safety, the economic well being of Australia, the protection of public health and morals and the protection of the rights and freedoms of citizens.

The test for this defence was analysed in ***Pihema v The State of Western Australia*** [2017] WASC 282, where Jenkins J listed seven factors to consider. Importantly, it is not sufficient for the employee to say they believed the recording was in the public interest; they must have a basis for that belief, and the belief must be reasonable. If the employee only had a subjective belief that the recording was in the public interest, this defence will fail (at [29] (citations omitted, emphasis added)):

(a) the word 'reasonably' imports an objective test. That is, there must be objectively reasonable grounds for believing that the use of the listening device is in the public interest;

(b) for s 26(1) to apply there must be facts which are **sufficient to induce in a reasonable person a belief that the use of the listening device is in the public interest**;

(c) it must appear to the judge determining legality, **not merely to the person using the listening device, that reasonable grounds for believing** that the use of the listening device is in the public interest exist;

(d) it is not necessary that the judge holds that belief;

(e) the objective circumstances **do not need to establish** on the balance of probabilities that the use of the listening device is in the **public interest**. 'Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture';

(f) the determination of whether there are 'reasonable grounds for believing that the use of a listening device is in the public interest' is to be **undertaken by reference to the facts and circumstances existing at the time of the use of the listening device**; and

(g) what constitutes the 'public interest' must be ascertained by the application of the **statutory definition of that phrase to the facts and circumstances of the particular case**.

- **the hearing was "*unintentional*"**

If the employee demonstrates that they did not intend to record the conversation but the recording was made anyway, they will have a full defence. We have all experienced times where our mobile phones call somebody or do something seemingly of its own initiative. An employee may say that the recording was "*unintentional*". It will fall to the decision maker to find whether their account is plausible in the circumstances. If the employee only 'accidentally' recorded conversations with their manager and not other conversations, this may tend to disprove their contention that the recording was "*unintentional*". If the employee made a series of recordings unintentionally before the subject recording, this may tend

to support their argument. If other unintentional recordings only occur after the subject recording, this may tend to disprove the employee's defence.

- **each party consents to the conversation being recorded**

Consent can be express or implied. If consent is implied, a decision maker (such as the Fair Work Commission) will look at the circumstances and assess whether each party to the conversation gave consent. Obviously, if any party to the conversation says "*I do not consent to being recorded*" or words to that effect, consent is expressly refused and cannot be implied unless the person says something subsequently to give consent.

Is it admissible?

The Fair Work Commission is not bound by the rules of evidence and may exercise its discretion to receive or reject evidence: *Fair Work Act 2009* (Cth) s.591. However, the rules of evidence are observed by the Commission in appropriate cases. The Commission will often feel bound by s.138 of the *Evidence Act 1995* (Cth), which permits illegally obtained evidence in cases where the "*desirability of admitting the evidence outweighs the undesirability of admitting evidence*".

The starting point is that an illegal recording should not be admitted. Desirability of an illegal recording is unlikely to outweigh the undesirability unless the recording provides quite conclusive evidence in support of the party's case.

Parties should be very careful to rely on a covert recording because the Full Bench has noted that the making of a covert recording is itself a valid reason for dismissal: ***Schwenke v Silcar Energy Solutions*** [2013] FWCFB 9842 [3].

The Commission has made other, strong comments about covert recordings and their corrosive effect on the employment relationship ((***Gadzikwa v Department of Human Services*** [2018] FWC 4878 [83]) (emphasis added)):

> Unless there is a justification, **I consider the secret recording of conversations with co-workers to be highly inappropriate, regardless of whether it may also constitute a criminal offence in the relevant jurisdiction.** 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.**

Generally speaking, it is possible to rely on facts that come to light after a dismissal to justify the employer's decision to terminate. If faced with a covert recording in an unfair dismissal claim, it may be possible to rely on that as a reason for terminating the employment in any event.

COMMENTS

- Whilst this article covers the law in relation to WA, each state and territory has slightly different legislation that needs to be considered. Specific legislation regulating the use of surveillance devices in the workplace applies for the ACT, NSW and Victoria.
- Generally speaking, it will be the employee who makes a covert recording of a meeting. However, it will also be an offence for an employer or manager to make a covert recording of a meeting with an employee (unless they obtain consent). A covert recording may tend to validate an employee's claim of unfair treatment, as well as have other implications for the employer and manager.
- Ensure that your relevant policies say that performance management and disciplinary matters must be kept confidential, and that divulging what is discussed in these meetings is regarded as misconduct.
- At the beginning of a performance management meeting, tell the employee that the meeting should not be recorded, but you will be taking notes and they may take notes or have a support person to take notes.
- When a support person is present, if you believe it is relevant, tell them that they can make notes but are not to make a recording of the meeting because the issues are confidential and should not be discussed with anyone except for the person's union or legal representatives.
- Behave as though you are being recorded. Do not say anything in a disciplinary or performance management meeting that you do not want recorded.

This article was prepared by Kim Hodge, Partner and Tom Klaassen, Solicitor.

DISCLAIMER

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Should you require any further information relating to the above decision, please contact one of the following partners on telephone (08) 9221 3110.

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