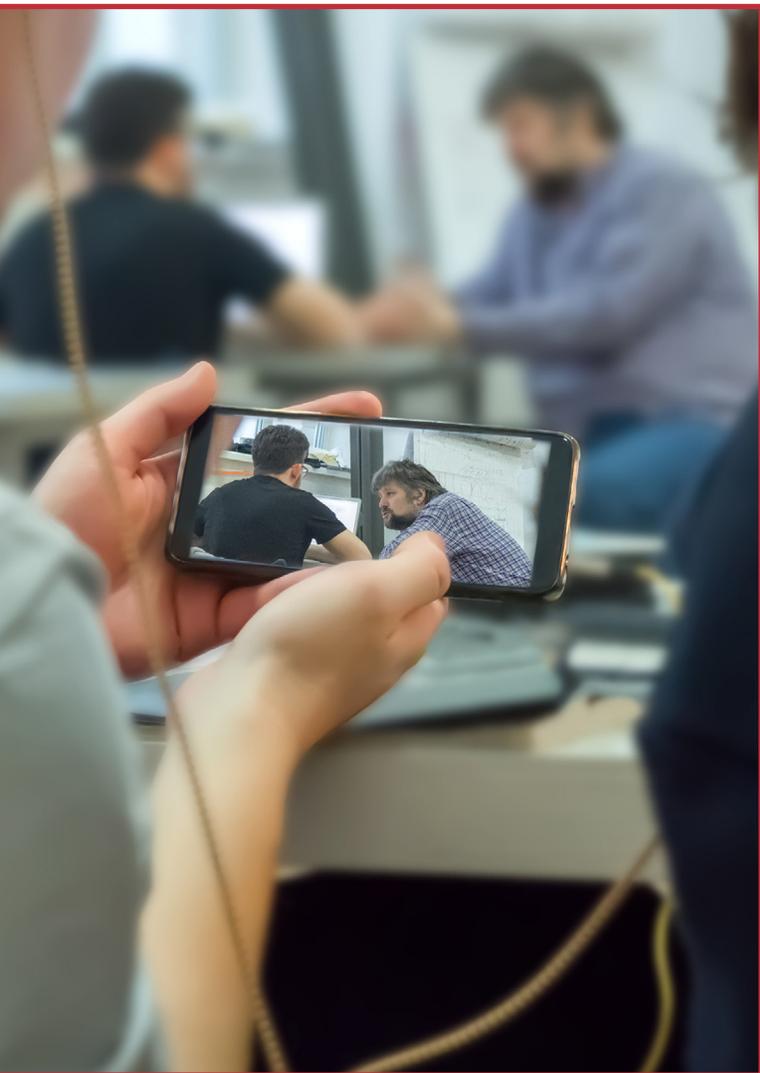


# MANAGEMENT COUNSEL

Employment and Labour Law Update



*Just because it's legal, doesn't mean  
it's conduct fit for the workplace:  
secret workplace recordings and  
cause for termination*

Earlier this year, the Supreme Court of British Columbia decided an employee who secretly recorded his co-workers could be dismissed for cause because his actions fundamentally ruptured the employment relationship such that the mutual trust between the parties had been broken.<sup>1</sup>

Significantly, under Canada's *Criminal Code*, an individual may record a conversation without the knowledge of the other party, so long as one party to the conversation consents to the recording. The decision reminds us that just because conduct is legal does not mean it will necessarily be acceptable in the workplace.



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## What happened?

After immigrating to Canada, Roman Shalagin became a Certified Professional Accountant (CPA) and worked as a senior financial analyst for Mercer Celgar Limited Partnership for 12 years. Shalagin did not sign an employment agreement. However, he acknowledged being bound by a code of business conduct and ethics which required him to be honest and ethical in dealing with other employees, customers, suppliers, vendors, and third parties. He was also bound by the CPA's code of conduct which stated, in part, that he would not disclose confidential information regarding his employer or use confidential information from any client, former client, employer, or former employer, to the disadvantage of such others, without consent.

In 2019, Shalagin was placed on a manager's incentive program and was eligible to receive his first bonus in the spring of 2020. He took issue with the fact the bonus amount was discretionary and argued the bonus should be based on a formula. He reiterated his views in an e-mail addressed to management in which he stated he was "open to resolve this disagreement in a timely manner and internally, without litigation". Uncomfortable with the prospect of litigation, Mercer terminated Shalagin's employment on a "without

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cause” basis and paid Shalagin his minimum entitlements under employment standards legislation. Not surprisingly, Shalagin commenced a lawsuit alleging wrongful dismissal.

## Secret recordings

During the litigation Mercer discovered that, while employed, Shalagin secretly recorded numerous work-related discussions, including one-on-one training sessions, more than 100 “Toolbox Talk” safety meetings, and at least 30 one-on-one meetings between himself and management about compensation and recruitment. Some of the recordings captured sensitive information regarding co-workers’ personal circumstances unrelated to the workplace.

Initially, Shalagin explained he recorded the workplace discussions to help himself learn English. Subsequently, he took the position he didn’t need permission from anyone because the recordings were legal and also because “people would feel uncomfortable if they knew” they were being recorded. In fact, co-workers who were recorded testified they felt violated by the recordings.

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Upon learning of the secret recordings, Mercer changed its legal position to assert just cause for termination. Specifically, Mercer argued that had it known of the secret recordings at the time of termination it would have terminated Shalagin’s employment for cause.



*It’s no secret; smartphones make it extremely easy to record others without their knowledge. While doing so may not be illegal, secretly recording in the workplace can amount to a fundamental breach of the employment relationship justifying termination with or without cause.*

## Just cause for termination upheld

The court agreed with Mercer’s position, dismissed Shalagin’s claim, and made three important findings:

1. Shalagin’s actions fundamentally ruptured the employment relationship such that he had broken the mutual trust between the parties.
2. While Shalagin did not act with malice when recording his colleagues and did not publish the recordings or use them for personal benefit, the volume of recordings and length of time over which they were made off-set any mitigating factors.
3. Permitting such conduct could encourage other employees who feel mistreated at work to secretly record co-workers. This would not be a positive development particularly given the growing recognition of privacy considerations in Canada.

## Lessons for employers

It’s no secret; smartphones make it extremely easy to record others without their knowledge. While doing so may not be illegal, secretly recording in the workplace can amount to a fundamental breach of the employment relationship justifying termination with or without cause.

To clarify expectations regarding the recording of workplace discussions, employers are encouraged to consult with employment counsel and properly implement a clearly worded policy.

*To learn more and for assistance, contact the team at Sherrard Kuzz LLP.*

<sup>1</sup>*Shalagin v. Mercer Celgar Limited Partnership, 2022 BCSC 112*

## DID YOU KNOW?

Effective October 11, 2022, an amendment to Ontario’s *Employment Standards Act, 2000* will make Ontario the only jurisdiction in Canada to require an employer (with 25 or more employees) to create and disclose an electronic monitoring policy. In British Columbia, Alberta, and Quebec, employee personal information, electronic or otherwise, is governed by privacy legislation.

To learn more or for assistance, contact Sherrard Kuzz LLP.



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## *Ontario Court Orders Specific Performance of Travel Benefits in Wrongful Dismissal Action*

When a court determines an employee has been wrongfully dismissed, there is a well-established rule that the sole remedy available is a monetary payment. Yet, for every rule, there is an exception. In a departure

from legal precedent, an Ontario court recently ordered<sup>1</sup> an employer to enroll an employee in a retiree benefit program, rather than order the employer to pay a seven-figure lump sum.

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### What happened?

Roland Ruel was an Air Canada employee. Due to workforce reductions necessitated by the COVID-19 pandemic, after 24.5 years' service Ruel's employment was terminated in the summer of 2020. Dissatisfied with the severance package offered to him, Ruel commenced legal proceedings in the Ontario Superior Court of Justice. He was successful in a motion for summary judgment and awarded 24 months' pay in lieu of notice, including compensation for base salary, bonus, loss of health insurance benefits, pension and stock.

However, one item in Ruel's claim was outside the norm. It was a retiree benefit which provided him with travel privileges for the balance of his lifetime on attaining 25 years' service ("Travel Benefit"). At the time his employment was terminated, Ruel was six months short of 25 years' service, but he would have achieved the required length of service early into his 24-month notice period had he been provided with working notice.

Air Canada defended the Travel Benefit claim arguing it was a "privilege" or "perk" and not an entitlement. As such, it should not form part of Ruel's severance compensation. The court rejected this argument on the basis Ruel would have received the Travel Benefit had he attained 25 years' service; the benefit was not discretionary.

### Appropriate legal remedy

In the lawsuit, Ruel claimed the monetary value of the Travel Benefit over the balance of his expected lifetime. He provided expert evidence that the value was \$1.8 million – an amount greater than the rest of his entire claim. In the alternative, Ruel claimed "specific performance".

Specific performance is a legal term which means the court orders performance of a specific contractual obligation (other than payment of a debt). In most cases, monetary damages are an adequate legal remedy, thus courts rarely order specific performance.

In addition, courts are concerned about the possibility of having ongoing supervisory obligations if specific performance is ordered but not complied with.

In Ruel's case, the judge made an exception to the rule. The judge noted a provision in the Travel Benefit document that allowed Air Canada to modify or cancel it. If that should occur, there was a possibility Ruel would not be entitled to the Travel Benefit for all or part of the rest of his lifetime, and the assumptions made by Ruel's expert to determine the value of the Travel Benefit could become inaccurate. Rather than speculate on an uncertain monetary value, the court decided that the goal of placing Ruel in the same position as other retirees was best achieved by ordering Air Canada to enroll Ruel in the retiree Travel Benefit.

*The consequence of this approach is that it could generate a monetary award that ends up being either too high or too low, when compared with what actually happens in an individual's life.*

### Takeaways for employers

This decision is important because it has implications for other benefits. For example, similar to the Travel Benefit, valuation of lost pension and/or retiree health benefits involve uncertain predictions. When these types of claims are compensated through a cash payment they are usually calculated using factors such as life expectancy, frequency of use and future interest rates, and then sometimes adjusted upwards due to income tax considerations, known as "gross-up".

*If the goal is to put an employee in the position they would have been had they been given working notice, this decision may open the door for a future court to consider specific performance as compensation for certain types of benefits.*

The consequence of this approach is that it could generate a monetary award that ends up being either too high or too low, when compared with what actually happens in an individual's life. Interestingly, these types of uncertain claims were compensated by a monetary award in the Ruel case, without further explanation from the judge.

If the goal is to put an employee in the position they would have been had they been given working notice, this decision may open the door for a future court to consider specific performance as compensation for certain types of benefits. Depending on the nature of the benefit at issue, this could be a win-win for both the employee and the employer.

*To learn more and for assistance, contact your Sherrard Kuzz LLP lawyer, or our firm at [info@sherrardkuzz.com](mailto:info@sherrardkuzz.com).*

<sup>1</sup>Ruel v. Air Canada 2022 ONSC 1779

## HReview Seminar Series

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Human rights law is constantly evolving, and keeping on top of developments can be a challenge for even the most seasoned HR professional. Join us as we discuss recent decisions and how they might impact your workplace.

### Topics include:

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- The impact of “social context” when evaluating a claim of race-based discrimination.
- Practical considerations when responding to and investigating a race-based allegation.

#### 2. Sexual Harassment

- When is sexual harassment just cause for termination?
- Damage awards in sexual harassment claims.

#### 3. Human Rights in the Unionized Workplace

- Can a unionized employee file a human rights complaint or is a grievance the only option?

#### 4. Accommodation Round-Up

- Recent developments in:
  - Family status and disability accommodation.
  - COVID-19-related religious accommodation cases.

**DATE:** September 21, 2022; 9:00 a.m. – 10:30 a.m.

**WEBINAR:** Via Zoom (registrants will receive a link the day before the webinar)

**COST:** Complimentary

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