MANAGEMENT COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

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Former employee ordered to pay back employer after time tracking software demonstrates time theft.

As remote work becomes more common, many employers have turned to time-tracking software to monitor employee productivity. In a recent decision of the British Columbia Civil Resolution Tribunal ("Tribunal")[1], an employer successfully defended a wrongful dismissal claim by using time-tracking data to demonstrate a former employee had committed time theft. Significantly, the Tribunal recognized the seriousness of time theft particularly in a remote-work environment when direct supervision is absent.

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While time-tracking software can be a useful tool, there are legal do's and don'ts, primarily regarding employee privacy. The rules differ across Canada, so before installing such software it is prudent to consult with an experienced employment lawyer.

What happened in the B.C. case?

Karlee Besse ("Besse") worked remotely as an accountant for Reach CPA Inc. ("Reach"). After approximately four months, with Besse's knowledge, Reach installed time-tracking software on her laptop to track productivity.

A discrepancy on one of Besse's timesheets prompted Reach to review the time-tracking data which revealed that Besse had submitted timesheets for more than 50 hours of work not tracked by the software. When Besse could not account for the hours, Reach terminated her employment for cause.

Besse filed a claim against Reach in which she alleged wrongful dismissal and sought to recover unpaid wages and severance pay. Reach counterclaimed for repayment of, among other things, wages it paid Besse for the 50 hours in dispute.

Just cause for termination upheld

Besse argued the discrepancy between the timesheet and time-tracking data was primarily because she spent significant time reading paper copies of documents - time not captured by the software. The Tribunal rejected this argument because the software also tracked printing activity and showed Besse did not print the volume of documents claimed.

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Noting the importance of trust and honesty in an employment relationship, the Tribunal upheld Besse's dismissal for cause and awarded damages to Reach:

> […] Time theft in the employment context is viewed as a very serious form of misconduct […] Given that trust and honesty are essential to an employment relationship, particularly in a remote-work environment where direct supervision is absent, I find Miss Besse's misconduct led to an irreparable breakdown in her employment relationship with Reach and that dismissal was proportionate in the circumstances. So, I find Reach had just cause to terminate Ms. Besse's employment.[2]

Lessons for employers

The *Besse* decision is a good example of how time-tracking software can be used to monitor employee productivity, especially if an employee works remotely under limited supervision. However, before installing monitoring software, it is important to consider legal do's and don'ts.

Ontario

Ontario is the only Canadian province that requires an employer to have a written electronic monitoring policy. Under the *Employment Standards Act, 2000*, every provincially regulated employer with 25 or more "employees"[3] as of January 1 is required to have a written policy on the electronic monitoring of employees in place as of March 1 of that year. The term "electronic monitoring" is not defined but is generally understood to be *all forms of employee and assignment employee monitoring that is done electronically*. Examples include:

- GPS
- Productivity software
- Software that monitors email, chats, and websites visited during working hours

The policy must describe:

1. The means through which the employer engages in electronic monitoring.
2. The circumstances in which the employer may monitor employees.
3. The purpose for which the information collected may be used.

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An electronic monitoring policy is required even if the employer does not electronically monitor its employees, in which case the policy may simply state the employer does not electronically monitor employees.

British Columbia and Alberta

In British Columbia and Alberta, privacy legislation governs the use of monitoring software in the workplace. Information collected, used, or disclosed by an employer must be reasonable for the purpose of establishing, managing, or terminating the employment relationship. While an employer does not need to obtain employee consent to collect, use or disclose the information, the employee must be notified before the information is collected.[4]

Quebec or Federally Regulated

A Quebec or federally regulated employer must comply with respective privacy legislation which requires an employer to obtain employee consent before it collects, uses or discloses an employee's personal information.[5] Furthermore, Quebec's legislation stipulates an employer may only collect personal information for a "serious and legitimate reason", and an employee must be told the reason for the collection, how the information will be used and who will have access to the information.[6]

To learn more and for assistance, contact your Sherrard Kuzz LLP lawyer or info@sherrardkuzz.com

[1] *Besse v Reach CPA Inc.*, 2023 BCCRT 27 (CanLII) (Stewart, Tribunal Member) [*Besse*].

[2] *Ibid* at para 26.

[3] As defined in Ontario's *Employment Standards Act*, 2000, SO 2000 c. 41, s.1.

[4] *Personal Information Protection Act*, SA 2003, c P-6.5 at s 15(1); *Personal Information Protection Act*, SBC 2003, c 63 at s. 13.

[5] *Personal Information Protection and Electronic Documents Act*, SC 2000, c. 5 at s. 4.3.1 of Schedule 1; *Act respecting the protection of personal information in the private sector*, CQLR c P-39.1 at s. 6.

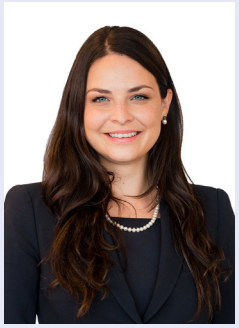
[6] *Act respecting the protection of personal information in the private sector*, CQLR c P-39.1 at s. 6 – 8.

DID YOU KNOW?

In March 2023, British Columbia passed into law a bill to recognize the **National Day for Truth and Reconciliation** ("NDTR"), as a public holiday under that province's *Employment Standards Act*. British Columbia joins Prince Edward Island, Yukon, Nunavut, and the Northwest Territories in recognizing NDTR as a statutory holiday.

New Brunswick, Manitoba, Newfoundland and Labrador, and Nova Scotia have not recognized NDTR as a statutory holiday, although schools and non-essential government services close on that day. Alberta has left NDTR as an optional holiday at an employer's discretion. Ontario, Quebec, and Saskatchewan have neither recognized NDTR as a statutory holiday nor ordered public closures.

The Government of Canada originally introduced NDTR as a statutory holiday for federally regulated employees in September 2021.



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Secret workplace recordings - revisiting the threshold to terminate for cause

In our August 2022 newsletter, we wrote about a decision of the Supreme Court of British Columbia in which an employee secretly recorded conversations with co-workers and was dismissed for cause because his actions fundamentally ruptured the mutual trust with his employer.[1] Recently, the Court of King's Bench of Alberta revisited the topic of secret workplace recordings but came to an opposite conclusion, finding the employer did not have just cause to dismiss the employee.[2]

Why did the court find just cause in one case but not the other? In short, in the second decision the court found the employment relationship had already been breached by the employer by way of a constructive dismissal, thus the employee was justified in secretly recording his supervisors.

The Alberta ruling, that *sometimes* it's okay to secretly record workplace conversations, may have muddied the waters for employers looking for direction. That said, there are lessons to be learned about the factors an employer should consider before disciplining an employee who secretly presses the record button.

The first decision

Readers may recall, the employee was upset about his bonus and complained, unsuccessfully, to his employer. Ultimately, his employment was terminated without cause and he sued alleging wrongful dismissal. During the litigation, the employer discovered that, while employed, the employee secretly recorded numerous work-related discussions, including one-on-one training sessions, more than 100 safety meetings, at least 30 one-on-one meetings between himself and management about compensation and recruitment, and several with co-workers that captured sensitive personal information unrelated to the workplace. Upon learning of the secret recordings, the employer changed its legal position to assert after-acquired cause for termination on the basis that, had it known of the secret recordings at the time of termination, it would have terminated the employee for cause.

At the outset of his employment, the employee had signed 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.

The court found in favour of the employer because of three key factors: (i) the significant volume of secret recordings, (ii) the lengthy time over which they took place, and (iii) the private communications between co-workers that had been captured without consent. The court also noted that permitting such conduct could encourage other employees who felt mistreated at work to secretly record co-workers, which would have a negative impact particularly given the growing recognition of privacy considerations in Canada.

The second decision

For 20 years, the employee worked as an electrical, air conditioning, and vehicle drivability technician, paid on a piecework basis (not time).

As a result of a corporate restructuring, the employee's workload and compensation were considerably reduced. The employee raised concerns with his employer, and when the matter could not be resolved, the employee's work performance began to decline to the point he was suspended without pay three times: first for "squealing tires" in the shop, then for arguing with a supervisor, and later for arguing with a fellow employee.

Suspicious that he was being falsely portrayed as a "problem employee", the employee began to secretly record discussions with his supervisors regarding his suspensions and the changes to his compensation. Ultimately, he alleged he had been constructively dismissed, and he sued his employer. When the employer learned of the recordings, it alleged after-acquired cause.

The trial judge confirmed that secret recordings in the workplace **can** amount to just cause for termination if they irreparably damage the trust between employee and employer. However, in this case the secret recordings did not amount to just cause for dismissal for two primary reasons: (i) the employer did not have a code of conduct or policy that might address workplace recordings, and (ii) at the time of the recordings the employment relationship had already broken down because the employee had been constructively dismissed. In the circumstances, the court found the employee was "justified" in making the secret recordings of conversations:

> [The employee's] actions in recording conversations with his supervisors were justified because [the employer] exerted its power over [the employee] by imposing unilateral changes on his employment terms and disciplined him contrary to his terms of employment.[3]

Lessons for employers

As these two decisions demonstrate, whether a secret recording in the workplace will amount to just cause to terminate is highly dependent on the circumstances. Relevant factors include:

- the existence of a workplace policy addressing privacy
- the number of recordings
- the period of time over which the recordings were made
- the reason(s) for the recordings
- the content of the recordings, including whether private conversations were captured, unrelated to the workplace
- whether the employee had signed or was aware of a relevant workplace policy
- the state of the employment relationship at the time the recordings were made

Particularly the last point – the state of the employment relationship – can be difficult to discern in real time when emotions may be running high and the employer does not have the benefit of time and perspective. This is when it's particularly important to seek the assistance of experienced employment counsel to help navigate the waters.

To learn more and for assistance contact any member of the team at Sherrard Kuzz LLP

[1] *Shalagin v Mercer Celgar Limited Partnership*, 2022 BCSC 112.

[2] *Rooney v GSL Chevrolet Cadillac*, 2022 ABKB 813.

[3] Ibid, at para 91.

Please join us at our next HReview Breakfast Seminar:

HReview
Seminar Series

The Future of Remote Work -
Practical Considerations for Employers

The COVID-19 pandemic continues to impact the way we live and work. Now, more than ever, employees work in a remote or hybrid work arrangement. However, with this shift comes new and altered legal risks and challenges for employers.

Join us as we discuss:

1. **Cross-Canada or International Relocation**
   - Legal risks if a remote worker relocates, temporarily or permanently (which laws apply).
   - How to prevent or manage employee relocation issues.
2. **Performance Management**
   - Use of electronic monitoring to manage employee performance.
   - Discipline and termination for time theft and other remote work performance issues.
3. **Health and Safety**
   - When will occupational health and safety and workers' compensation legislation apply to a remote worker?
   - Bullying and harassment in an online workplace.
4. **Employment Standards and Human Rights**
   - How to ensure a remote worker complies with employment standards requirements (e.g., hours of work, meal breaks, etc.).
   - Remote or hybrid work as a form of human rights accommodation.

DATE: **June 7, 2023, 9:00 a.m. – 10:30 a.m.**
WEBINAR: **Via Zoom** (registrants will receive a link the day before the webinar)
COST: Complimentary
REGISTER: **Here by Monday May 29, 2023.**

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