

Employers beware: covert recordings, 02 November 2016

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A recent decision of the Employment Relations Authority has addressed the issue of recording others covertly when the person recording is not even a party to the conversation. The Authority has confirmed that covert recordings, which relate to conversations between other employees to which the person recording was not a party, may be relied upon in Authority investigations.

This decision has potentially significant consequences and should prompt employers to consider how they can protect the privacy of both themselves and employees in the workplace.

Firman v Insyn Limited [2016] NZERA Christchurch 156

In this decision, the Authority addressed the admissibility of evidence from Ms Firman's recordings of conversations and meetings. The Authority considered two separate recordings made by Ms Firman on two different occasions to be admissible as evidence.

The first recording was of a conversation between Ms Firman and the general manager of the company. During that conversation, Ms Firman was provided with a letter advising her of a disciplinary investigation into her conduct and there was also a discussion about her suspension. The recording was covert and the general manager had no knowledge that the conversation was being recorded.

The Authority considered that, despite the fact that Ms Firman recorded the meeting without the employer's knowledge or consent, it was admissible evidence. This was because the information in the recording was relevant to her claim against the company in relation to her suspension.

The second recording was of a conversation between other staff members which Ms Firman intentionally recorded by leaving her cell phone when she was not present. Ms Firman claimed that she recorded the conversation in order to establish proof that she was subject to bullying and gossiping in the workplace. She later provided this recording to her manager as proof of her concerns.

The Authority found the recording to be admissible evidence in the circumstances. This was on the basis that the company and the recorded employees became aware of the recording not long after it was made and that there was a lot of evidence already before the Authority about staff being recorded on the particular date. However, the Authority acknowledged that its decision was not the general approach:

Recording others secretly when the person is not participating in a meeting or conversation with them is generally not admissible. It is not an action in good faith and the individuals are entitled to their privacy.

Milham v Chief Executive of Waikato Institute of Technology [2016] NZERA Auckland 259

This determination is a further example of the Authority addressing the issue of covert recordings. However, in this case the employee secretly recording the meeting was a party to the meeting.

Mr Smith, the centre manager, had a meeting with Dr Milham regarding his performance, which Dr Milham secretly recorded. During this meeting, Dr Milham sought information to help him understand why he had been rated as being not effective in the area of leadership and people management.

This discussion was about rebuilding trust between Dr Milham and Mr Smith. Therefore, this was the opportune time for Dr Milham to disclose to Mr Smith that he was recording their discussion. However, despite this criticism, the Authority admitted the transcript of the recording. The Authority considered this evidence was relevant in light of Dr Milham's claim that Mr Smith had ulterior motives for terminating his employment and the proposed restructure was not genuine.

Discussion

The Authority has the power to admit evidence in equity and good conscience including evidence which may not be admitted in courts of general jurisdiction. The Authority often takes a robust approach to the admission of evidence.

Both the cases of *Firman* and *Milham* illustrate that the Authority will likely admit evidence of covert recordings where a participant has recorded a conversation. Further, the Authority may even admit covert recordings not made in the presence of the participant if the information in the recording is relevant to the proceedings before the Authority.

It may be that an employee who covertly records a conversation will be seen as breaching the duty of good faith by failing to be "active and constructive in establishing and maintaining a productive employment relationship". However, the evidence may be still admissible as the "best evidence" where there is a dispute about what occurred.

The Authority's decision to admit a covert recording where the person recording the conversation was not party to the conversation is especially interesting given that recording a conversation without being party to the conversation is illegal under the Crimes Act 1961. Specifically, s 216B of the Act provides that it is an offence to record private communications. However, the section does not apply where the party who records the communication is party to the communication.

Conclusion

Practical guidance for employers:

- Employers should encourage an open and transparent working environment in order to minimise the risk of employees feeling the need to covertly record meetings.
- If the issue of recording a meeting arises, employers should openly discuss the issue of recording the meeting with the employee. If the employer agrees to the employee recording the meeting then the employer should also take its own recording to avoid any potential dispute down the track about what was said during that meeting. The alternative is for the employer to record the meeting and provide a copy to the employee.
- If an employee asks to record a meeting and the employer does not consent to this, then the employer should make it expressly clear (and record in its notes of the meeting) that it does not agree to the recording. This is to avoid a dispute down the track about whether the employer agreed to the employee making the recording. If, despite making this point clear, the employee nonetheless makes a covert recording, the employer may have a claim that the employee acted in breach of his or her good faith obligations.
- If employers have a particular view on prohibiting recording of conversations in the workplace, this position should be clearly outlined in a policy document. It is important that the policy outlines

that covert recording of meetings or discussions with other employees, whether they are party to that conversation or not, is strictly prohibited. Furthermore, given that most employees will have access to smart phones, employers should ensure that any policy extends to video recordings and filming in the workplace. Therefore, if an employee covertly records a discussion (party or not party to the discussion) then that employee could be subject to disciplinary action in accordance with the employer's policy.

- The employer may also wish to have a policy for it to record or not to record disciplinary or performance meetings. If this is the case, the employer should ensure that the policy is carried out consistently in practice.
- If an employer records a meeting even with the consent of the employee, the employer has an obligation under the Privacy Act 1993 to hold the recording securely and not to disclose it without good reason.
- Lastly, employers should always be mindful of what they say to employees given the risk that an employee may be covertly recording the interaction.