Court of King's Bench of Alberta

Citation: Wan v. H&R Block Canada Inc., 2024 ABKB 734

Date: 20241210
Docket: 1901 09734
Registry: Calgary

Between:

Timothy Wan

Plaintiff

- and -

H&R Block Canada Inc.

Defendant

Reasons for Decision
of the
Honourable Applications Judge J.R. Farrington

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[1] I heard this matter as a special chambers application on November 14, 2024. The defendant employer moves for summary dismissal of the plaintiff's wrongful dismissal claim. The plaintiff held a relatively high level position with the defendant as Vice President of Product Development and Innovation.

[2] The plaintiff brings an action for wrongful dismissal and other relief arising from his termination, allegedly for cause. The defendant asserts that it had cause, but on this application for summary dismissal it relies primarily on after acquired cause.

[3] The materials and submissions of counsel were helpful, and I am grateful for them.

[4] While the defendant's application brief was fulsome, and it covered all issues, its oral submissions were primarily in relation to after-acquired cause. The defendant did not abandon its other assertions, but most of the focus was on whether or not the act of recording meetings without the knowledge or consent of the parties to meetings other than the plaintiff was in itself grounds for termination.

[5] The applicable employer code of conduct and confidentiality agreements do not expressly prohibit such recording. There is an accumulating body of case law in various settings arising from modern technology that deal with the consequences of recording when there is no consent. Some of those cases arise in a family law setting. Some of them arise in employment law situations, and there are also cases that arise in contractual dispute situations. Sometimes the recorder is simply trying to protect themselves from adverse action. Sometimes the recorder is engaging in "gotcha" tactics to try and enhance a cause of action. And many times, the conduct falls between those two ends of the spectrum.

[6] By way of illustration, there are two recent examples of cases where recording by the employee took place without consent. In ***Rooney v GSL Chevrolet Cadillac Ltd***, 2022 ABKB 813, Feasby, J. held at paragraph 91:

> [91] Perhaps a more significant difference from ***Shalagin*** is that by the time of the first recording by Mr. Rooney, the employer-employee relationship was already frayed by tensions between Mr. Rooney and his supervisors, Mr. Rooney had an emerging appreciation that there had been a fundamental change in his terms of employment, and a suspension without pay had been imposed on Mr. Rooney without any basis in the terms of employment. Mr. Rooney resorted to what, in ordinary times, is rightly viewed as an unethical tactic to deal with what the arbitrator described in British Columbia Government and Service Employees' Union as a "relationship power imbalance." Mr. Rooney's actions in recording conversations with his supervisors were justified because GSL exerted its power over Mr. Rooney by imposing unilateral changes on his employment terms and disciplined him contrary to his terms of employment.

[7] In ***Shalagin v Mercer Celgar Limited Partnership***, 2022 BCSC 112 (cited and considered by Feasby, J.) the Court undertook a broad review of the law and held at paragraph 71:

> [71] I find that Mercer has established just cause:
>
> a) As noted, I do not find any support for just cause in the allegations relating to the Database or the Bonus Spreadsheet. The allegation of just cause must stand or fall based on the surreptitious recordings.
>
> b) Although the initial recordings said to be for the plaintiff's own language training purposes may not, on their own, have supported just cause, they demonstrate how the plaintiff's sensitivities towards his colleagues' privacy began to loosen. He knew that his fellow employees would be uncomfortable with even these early recordings, yet he continued to make them. I find that he knew it was wrong, if not legally, at least ethically. The plaintiff's professional obligations provide additional support for a finding that he did not conduct himself as an employed CPA should have done. At least some of the recordings are properly viewed as being solely "for the advantage of the [plaintiff]", to use the words of the plaintiff's Code of Conduct. While the plaintiff's position did not

rise to the level of a fiduciary, I accept that professionals in positions of high accountability such as the plaintiff can be expected to respect the standards established by their profession: ***Hyland v. Royal Alexandra Hospital***, 2000 ABQB 458 at paras. 12 and 28.

c) There were clearly ways to improve his English without putting his colleagues in such a position. There was no need for the plaintiff to conduct himself in this manner, but these recordings set him down a problematic path.

d) With his sensitivities lowered, he carried on to record ever more sensitive conversations, including conversations that involved personal information on other employees. The conversations included personal details about his co-workers that had nothing to do with the workplace.

e) Although the plaintiff suggests that some of his conversations were justified because of concerns about discrimination, the plaintiff simply offered no evidence that supported such allegations. Indeed, the evidence suggests to the contrary—the plaintiff received substantial promotions. While I will not comment on the merits of the plaintiff's human rights complaint, which is based on a different record and statutory scheme, I must assess the plaintiff's explanation based on the record before me. I cannot find that there was a legitimate basis to make recordings based on a fear of discrimination.

f) The plaintiff suggests that certain recordings were justified because of a concern about financial improprieties. However, the plaintiff had access to the manager in order to raise those concerns. Further, those concerns should have been mitigated given that Mercer's books were regularly audited. Finally, the plaintiff offered no concrete evidence of such financial mismanagement requiring surreptitious recording in order to protect Mercer's best interests.

g) The plaintiff suggests that certain recordings were justified so that he could ensure that his own compensation was properly calculated. However, the fear of under-compensation on the plaintiff's part appears to have been based entirely on the plaintiff's own misapprehension that his bonus should have been calculated based on a strict formula, whereas it is clear that the bonus was discretionary. The plaintiff cannot invoke an irrational concern to support the reasonableness of surreptitious recordings that would otherwise be treated as destroying the trust between the plaintiff, his colleagues, and his employer.

h) I accept that the plaintiff was not acting with malice in making the recordings and that this is a mitigating factor. However, the fact that his stated bases for the recordings were all unnecessary or ill-founded, and several were designed to benefit him alone, weighs on the other side of the ledger. Likewise, the fact that the recordings captured personal information from his subordinates and colleagues and, thus, could not have supported his alleged purposes in any case, also weighs against his position.

i) I accept that the fact that the plaintiff did not publish the recordings and did not seek to make use of them for his own benefit outside of the ongoing legal proceedings is a mitigating factor as well. However, on the other side of the ledger, the sheer volume of recordings, and the length over which they occurred, generally offsets this factor.

j) I accept the evidence provided by Mr. East and Ms. Ketchuk that they felt violated by the recordings. I also accept that this reaction was reasonable in the circumstances. Ms. Ketchuk clearly treated the plaintiff as a protegée and felt that the trust she invested in him had been violated—a trust that included telling him about personal family matters, which were recorded.

k) Looking at the effect on employment relationships more broadly, accepting the plaintiff's argument may encourage other employees who feel mistreated at work to routinely start secretly recording co-workers. This would not be a positive development from a policy perspective, particularly given the growing recognition that the courts have given to the importance of privacy concerns. The Supreme Court of Canada has recognized the "quasi-constitutional status" of privacy issues and its role as a "fundamental value" of our society: ***Sherman Estate v. Donovan***, 2021 SCC 25 at paras. 50–51.

l) Although allegations of after-acquired grounds for dismissal must be carefully examined, this is not the type of case where the fact of the grounds being discovered after dismissal carries particular weight. The clandestine nature of the recordings necessarily meant Mercer had no real ability to discover their existence until after Termination.

[8] I have provided a lengthy extract from ***Shalagin*** because it illustrates the nuances and many factors that arise in considering the consequences of recording.

[9] Both of these cases were trial cases. That is important. Even ***Shalagin***, which is relied upon extensively by the moving defendant, suggests that some of the recording circumstances may not have been alone sufficient for after acquired cause dismissal. The result in ***Shalagin*** was cumulative. In other words, there is no general legal principle that secretive recording always equals grounds for dismissal.

[10] The case law generally would seem to reflect the following:

1. In the absence of a specific agreement, there is not an automatic consequence that comes with recording.

2. While recording may sometimes be referred to as unethical or distasteful, it is not in itself illegal.

3. The cases seem to distinguish between situations where an employee or recording party is using the recording process "offensively", in order to found new causes of action, and situations where an employee is using a recording "defensively" to protect themself from a feared action by the employer.

[11] The relief sought here is summary dismissal for after acquired cause. The recording incidents were not cited at the time of the dismissal because they were not then known. They were disclosed by the plaintiff during this litigation. The parties agree that the result sought is on the high end of the spectrum of actions which an employer may be able to take as against an employee.

[12] While modern summary judgement law as embodied in cases like ***Hryniak v. Mauldin***, 2014 SCC 7 and ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 encourages summary dispositions when they can be made fairly and proportionally

when the record is sufficient to give a judge confidence in the result, not every case can be determined by a summary judgement application.

[13] The other aspect of summary adjudication is that it is not a bilateral process. It is not like a summary or streamlined trial where a party can either win or lose and the matter will be determined finally. Summary judgement permits a party to apply for acceptance of its perspective on the case, but if it is unsuccessful, the matter moves on to trial. It is not a forum where the Court must accept the position of one or the other of the litigants. The moving party must prove its case even if it would not have the burden of proof at trial. The issues here are more fairly determined in a bilateral process.

[14] Dealing with the recording aspect, there are some important facts which provide nuance. Mr. Wan was told by a prior president of the moving defendant when he was having difficulty with an employee (Karen Wiwchar), that perhaps he ought to record their conversations. That is an import fact. While the discussion appears to have related to only one of the defendant's employees, Mr. Wan took things further and recorded conversations with other employees. In addition, internal emails for key witnesses were deleted after one year (and prior to the filing of this action) pursuant to what was said to be a standard practice. Formal spoliation is not pleaded or alleged, but the absence of the emails may have some bearing on the ultimate result. The lack of that evidence may entitle a trial judge to draw inferences, adverse or otherwise, during the course of a trial.

[15] The employer tries to simplify the analysis by arguing that the recording pertained to confidential matters and was therefore contrary to its code of conduct, but it is common ground that there was never any dissemination of confidential matters from the recordings.

[16] At the time of the actual dismissal for cause, Mr. Wan was not given an opportunity to respond to the allegations which at that time related to the alleged dissemination of confidential information at a conference. In fact, the evidence is that the allegations of the dissemination of confidential information gave the defendant a reason for termination at a time shortly after there had already been an incident in which Mr. Wan was accused of misleading the new corporate president on a compensation matter and arguably that may have influenced the preparedness to make the termination decision as much as the actual conduct regarding the alleged dissemination of information. There is much to unpack.

[17] I find that the issues in this action cannot be determined fairly and justly on the paper record alone here. Much of the result depends on subtleties and nuances as to Mr. Wan's motivations, the pressures that he may or may not have been under in relation to the workplace, and the workplace environment generally. All of that is in issue, and in my view, it is largely credibility dependent, and it must be determined at a trial.

[18] There is a counterclaim in this action. The defendant suggested that the counterclaim would be withdrawn if it was successful on its summary dismissal application. While that was helpful to know, the summary dismissal application must nevertheless stand on its own. I find that the summary dismissal application must be dismissed. There is simply too much in this case that is fact and context dependent in ways that will require a trial judge to hear from witnesses.

[19] Accordingly, the application for summary dismissal is dismissed. The plaintiff is entitled to costs related to the application. If the parties cannot agree on quantum, it can be addressed at the end of one of my morning chambers lists by appointment through the Applications Judges

Assistant within four months of release of these reasons. Thank you again to counsel for their helpful submissions.

Heard on the 14th day of November, 2024.
Dated at the City of Calgary, Alberta this 10th day of December, 2024.

J.R. Farrington
A.J.C.K.B.A.

Appearances:

De Waal Law
Luke Rasmussen
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Sean Fairhurst
Christy Lee
Dentons Canada LLP
for the Defendant