Article Information

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Secret Surveillance: Fair Work Commission decides that employer can rely on recordings of internal employee telephone conversations to defend unfair dismissal claim

A recent decision highlights the circumstances in which an employer can legally record and use employee telephone conversations in Fair Work Commission (FWC) proceedings. The FWC found that the employer's evidence of "extremely offensive" conversations was admissible for the purpose of defending an unfair dismissal claim, because it held that using the recordings would not be inconsistent with any legislation or the worker's employment contract.

An issue that arises from time to time in employment-related litigation is whether a party can lawfully rely on a recording or similar "surveillance," particularly if such a recording was made without *express* consent at the time.

Mr McGlashan (**the Applicant**) commenced an unfair dismissal claim after his employment with MSS Security Limited (**the Respondent**) was terminated. The Respondent became aware of certain internal telephone recordings of conversations between the Applicant and other employees that were, in the Respondent's view, "extremely offensive" in nature. The Respondent uncovered these conversations during the course of an investigation unrelated to the Applicant.

The Applicant sought an advance ruling on the admissibility of the recordings, arguing that they were "illegally or improperly obtained."

However, the FWC dismissed this argument, finding that there was nothing illegal or improper about their acquisition. The FWC further stated that the recordings have probative value, and are relevant in determining whether the Applicant was unfairly dismissed.

This decision is an important consideration of the various different layers of legal regulation across Australia relating to workplace surveillance. Employers operating in different States and Territories need to understand *their* specific obligations. This decision involved an employee in the Australian Capital Territory (**ACT**).

Workplace framework

Employment contract

The Applicant did not dispute that after commencing employment with the Respondent in 2010, he signed a subsequent employment contract in 2014, which included a provision dealing with workplace surveillance.

The relevant clause in the contract provided that surveillance may occur in the workplace by various means, including monitoring of emails and "*telephone recordings for incoming and outgoing calls in some areas of the business*". The contract further specified that this "*surveillance will have commenced at the date of your employment on an ongoing and continuous daily basis*". By signing the contract, the Applicant had agreed that he had been given sufficient notice of the intended surveillance.

Workplace policy

In late 2021 or early 2022, the Respondent published a policy known as the Employee Standing Instructions 2022 (**the Policy**). One of the clauses within the Policy states that surveillance in the workplace included "*audio recording of*

telephones at some of the MSS Security work locations."

The Applicant accepted that he was aware that external calls were recorded, but denied knowing that internal telephone calls would be intercepted or recorded.

Legal framework

Telecommunications (Interception and Access) Act 1979 (Cth) (**TIA Act**)

Section 7 of the TIA Act states that telephone communications must not be intercepted. Further, section 6 makes it clear that the "interception" of a communication over the telephone by recording only occurs if it is **without the knowledge of the person making the communication**.

Listening Devices Act 1992 (ACT) (**LD Act**)

Section 14 of the LD Act provides that employers must not use a listening device with the intention of recording a private conversation unless each principal party to the conversation **consents to that use of the listening device**. The FWC noted that the Respondent fell within the definition of a "party" to a conversation.

FWC reasoning

In these circumstances, the FWC concluded that if the Applicant had knowledge that the communications were recorded then the recordings did not contravene the TIA Act. Similarly, if the FWC was satisfied that if the Applicant had consented to the listening device being used, then the Respondent would not have breached the LD Act.

The FWC was readily satisfied that the Applicant did have knowledge that his telephone calls were recorded. He admitted to knowing that external phone calls may be monitored and recorded by his employer, but stated that his understanding of the Policy was that it did not include internal phone calls. The Applicant gave evidence that he believed that his telephone calls, using an office landline owned by the Respondent, to other employees' office landlines, were *personal* telephone calls and not recorded.

However, the Policy simply stated that surveillance in the workplace includes "*audio recording of telephones at some of the MSS Security work locations*". The Policy was broad and made no such distinction between internal and external phone calls.

There was also evidence of an email exchange between the Applicant and one of the Respondent's IT Coordinators in 2019 where the Applicant confirmed that certain landline phone numbers, including his own, were still required to be recorded. The Applicant again confirmed in an email to the IT Coordinator in November 2021 that his number was "*still fine to be recorded*". Neither email exchange limited the recording of telephone calls to merely external rather than internal calls.

The FWC was therefore satisfied that the Applicant knew his phone line was being recorded, based on the Applicant's employment contract, the Policy, and the email exchanges. Further, by agreeing to the terms of his employment contract and the Policy, the Applicant had consented to the use of a listening device to record what would have otherwise been a private conversation.

Finally, the FWC acknowledged that it is not bound by the usual rules of a Court, and is vested with the discretion to inform itself, including permitting a party to adduce certain evidence. The FWC stated that the recordings clearly have probative value and are directly relevant as to whether there were lawful grounds for dismissal. There was no basis to exclude key evidence for the Respondent aimed at proving the conduct for which the Applicant was dismissed.

Accordingly, the Respondent will be able to rely on the recordings as evidence during the unfair dismissal proceedings, because there was no contravention of legislation, nor any other discretionary reason to exclude the evidence.

Interestingly, the FWC also dismissed the Applicant's arguments regarding the *Workplace Privacy Act 2011* (ACT), because the definition of "surveillance" in section 11 does not include surveillance in the nature of voice recordings. Rather, that legislation only regulates the use of data and optical surveillance in the workplace.

Considerations for Employers

- Each Australian State and Territory operates under different surveillance laws. Legislation in the ACT, Victoria and New South Wales expressly deal with surveillance in the workplace, but each State and Territory also has general surveillance legislation that is not workplace specific, but will have an impact upon an employer's ability to conduct surveillance of their employees or other persons in the workplace.
- As shown in this decision, which types of "surveillance" are permissible will depend upon the specific regulations in

the particular legislation. Whether your organisation implements (or intends to implement) audio, visual, GPS tracking, data, or general computer/email surveillance, you should seek specific legal advice to ensure you are compliant with the relevant legislative requirements.

In addition to ensuring compliance with your jurisdiction's surveillance legislation, if employers intend to conduct workplace surveillance or monitoring of employee's devices, they should consider:

- including a surveillance provision in employment contracts to evidence agreement to these terms when the employee signs the contract;
- requiring employees to only use employer-owned devices for work related purposes, because it is much easier to maintain effective control and access;
- having a clear policy in place that specifies what will be monitored, and how; and
- ensuring that employees are aware of the terms of the policy and arrangements in place, through regular circulation and updates when there are any changes.

[1]*Terrence McGlashan v MSS Security Pty Limited* [2022] FWC 3304