

Covert Recordings: An employee's covert recording is not necessarily an act of gross misconduct

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THE FACTS

Ms Stockman was employed by Phoenix House Limited. She reported to the Head of the Finance Department, Mr Betha, who reported into the Director of Finance, Mr Lambis. As a result of a restructuring, Ms Stockman's role was made redundant, and she accepted an alternative role. However, she made a complaint about Mr Betha to Mr Lambis, who both investigated this by holding a meeting with a potential witness, Mr Mistry. Ms Stockman interrupted this meeting, forcefully demanding that she be told what the conversation was about. She was told to leave the meeting and refused to do so twice before she eventually left. She later met with HR, who told her that the action of interrupting a meeting and failing to leave would be made the subject of disciplinary action. Ms Stockman covertly recorded this meeting with HR. Phoenix did not find out about the recording until the tribunal proceedings.

The disciplinary offence against Ms Stockman was upheld and a written warning imposed. Ms Stockman had also submitted a grievance that Mr Lambis had harassed her and this was dismissed. Ms Stockman unsuccessfully appealed the disciplinary and grievance decisions. Following an unsuccessful mediation and a subsequent meeting with Ms Stockman, Phoenix summarily dismissed Ms Stockman on the basis that the working relationship had broken down to such an extent that it was irretrievable. This was in spite of the fact that Ms Stockman said she did not believe this to be the case.

Ms Stockman successfully claimed that she had been unfairly dismissed. During the tribunal proceedings, Phoenix found out that Ms Stockman had covertly recorded the meeting with HR. Phoenix argued that, had it found out about the covert recording earlier, it would have dismissed Ms Stockman for gross misconduct, and that she had breached the implied term of trust and confidence in making the recording. They said it was not just and equitable to make any award of compensation to Ms Stockman.

The tribunal considered that it was possible that, once Phoenix knew about the covert recording, there was a low percentage chance that Phoenix might have objectively and fairly considered this to be a misconduct matter fairly leading to dismissal. It awarded a 10% reduction to the basic and compensatory awards.

Phoenix unsuccessfully appealed to the EAT. The EAT considered that the tribunal had asked itself the right question, which was, weighing up all the circumstances, what the chance was of Ms Stockman being dismissed fairly had the employer known about it earlier. It also held that the tribunal had been entitled to find that Ms Stockman had not recorded the meeting with the intention of entrapment, or to misuse confidential information. Rather, she had recorded a single meeting concerned with her own position.

In dismissing the appeal, the EAT gave useful guidance on covert recordings by employees. An employee who makes a covert recording will not necessarily breach the implied term of trust and confidence. The EAT commented that, in the age of the smartphone, it is not uncommon to find that an employee has recorded a meeting without telling the employer and this is not necessarily to entrap or gain an unfair advantage. It may have been done to keep a record, to protect the employee from any risk of being misrepresented when faced with an accusation or an investigation, or to enable the employee to obtain advice from a union or elsewhere.

WHAT DOES THIS MEAN FOR EMPLOYERS?

It is good practice for employers and employees to let the other know if they are recording a meeting. However, this case makes it clear that an employee who fails to do so will not necessarily have committed gross misconduct (though it will usually be an act of misconduct). In considering whether to treat a covert recording as gross misconduct, employers should take the following into account:

- whether their disciplinary policy specifies that meetings should not be recorded and/or categorises covert recordings as gross misconduct;
- the purpose of the recording. This can vary from a manipulative employee seeking to entrap the employer to a confused and vulnerable employee trying to guard against misrepresentation;
- the extent of the employee's blameworthiness. This may vary from an employee who has specifically been told that a

recording must not be kept, or has lied about making a recording, to an inexperienced or distressed employee who has not considered the blameworthiness of making the recording;

- what is recorded. This may vary from a meeting of which a record would normally be kept and shared and a meeting where highly confidential and personal information relating to the employer or another employee has been discussed (in which case, other employee's rights, including data privacy rights, may have been breached).

Employers who consider covert recordings to be a serious issue should review their disciplinary policies to ensure that this is made clear.

Phoenix House Ltd v Stockman

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