

September 2019

Covert Recording: Is it gross misconduct?

Summary

The EAT ruled in its recent decision of *Phoenix House v Stockman*, that if an employee takes a covert recording this conduct will often – but not always – justify their dismissal. The purpose of the recording and nature of the footage recorded are relevant to assessing whether it is an act of gross misconduct. The case also highlights the practical issues that employers face in a smartphone dominated society, particularly as Employment Tribunals will often permit covert recordings to be relied on as evidence in any related hearing.

Facts

Ms Stockman's unfair dismissal claim was successful in the Employment Tribunal and on appeal her employer, Phoenix House, argued that her compensation should be reduced on the basis that she secretly recorded a meeting prior to her dismissal – which would have entitled it to dismiss her for misconduct.

Decision

The EAT dismissed the appeal, ruling that it was unlikely Phoenix could have fairly dismissed Ms Stockman in circumstances where:

- The one meeting she recorded was personal to her and didn't concern confidential business matters;
- She was flustered and unsure if the device would record; and
- She didn't ask any questions to entrap her employer.

Where employees record meetings for valid reasons such as keeping a record, protecting themselves from misrepresentation or threatening circumstances and/or for the purpose of obtaining subsequent advice, doing so is unlikely to justify a misconduct dismissal. However, if the recording is intended to entrap the

employer or records sensitive confidential matters, then a dismissal may in fact be justified. This is particularly so if an employee has been told not to record, or lied about whether they are recording.

Top tips

Regardless of the nature and purpose of any recording, it will be admissible as evidence in the Tribunal if it is relevant to the issues in the case. Employers should exercise caution in meetings and in managing employee issues, as follows:

- Before a meeting starts, state that recording is not permitted and ask the employee to confirm that they are not recording. If there is reason to allow it, record the meeting too and take a copy of the employee's recording to avoid the risk of tampering.
- During breaks and once the meeting concludes, do not hold private discussions in the same meeting room.
- If a covert recording is discovered, consider the employee's rationale for taking it and the extent to which it genuinely gives rise to a trust issue. A subsequent dismissal may be an unhelpful knee-jerk reaction, particularly if the recording contains inappropriate comments that can be relied on to support a claim.
- List covert recording as an example of misconduct in disciplinary policies to justify refusing permission to record and taking action if a recording is taken.
- Be vigilant - ensure anything from routine interactions with employees to formal meetings are handled appropriately.
- Train line managers on best practice.

We would be delighted to advise you on any policy updates or live issues in this area, or assist with delivering appropriate training to help you mitigate risks. We are seeing an increase in smartphone-related incidents including covert recordings of meetings, and a demand for this type of support from our team. Please contact Kate Brearley, Laura Anderson or your usual Stephenson Harwood contact for further assistance.

Key contacts



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