COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Shalagin v. Mercer Celgar Limited Partnership,* 2023 BCCA 373

Date: 20231006
Docket: CA48101

Between:

Roman Shalagin

Appellant
(Plaintiff)

And

Mercer Celgar Limited Partnership

Respondent
(Defendant)

Before: The Honourable Madam Justice Newbury
The Honourable Justice Dickson
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated January 25, 2022 (*Shalagin v. Mercer Celgar Limited Partnership*, 2022 BCSC 112, Vancouver Docket S205783).

Counsel for the Appellant:	M. Nied
Counsel for the Respondent:	N. Mitha, K.C. G.A Hooper
Place and Date of Hearing:	Vancouver, British Columbia September 5, 2023
Place and Date of Judgment:	Vancouver, British Columbia October 6, 2023

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Justice Dickson
The Honourable Justice Skolrood

Summary:

Appellant's employment as a financial analyst was terminated without cause by respondent company; he sued in the SCBC, the Human Rights Tribunal ("HRT") and under the Employment Standards Act. Proceedings in the HRT revealed appellant had surreptitiously recorded many conversations with supervisors and others during his ten years of employment. Upon learning of this, respondent amended its pleadings to plead just cause for termination. Trial judge found employer had established just cause.

Held: Appeal dismissed. Although appellant tried to assert he had been discriminated against by reason of his national origin, those complaints were not pleaded in the trial court and presumably had been or would be pursued in the HRT. Trial judge had correctly considered the surreptitious recordings in the context of the case as pleaded, and had not erred in applying the law of just cause or failing to consider relevant factors.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] The appellant Mr. Shalagin was employed by the respondent Mercer Celgar Limited Partnership ("Mercer") from January 6, 2010 until his employment was terminated on March 25, 2020. Mercer did not assert any "cause" at the time of termination. Mr. Shalagin filed a complaint under the *Employment Standards Act*, R.S.B.C. 1996, c. 113, a complaint to the Human Rights Tribunal, and sued in the Supreme Court for wrongful dismissal, alleging that he had been treated "rudely" and "abruptly" and that Mercer had been "dishonest" with him about its management bonus plan. These allegations were later withdrawn. No reference was made in the appellant's Notice of Civil Claim to "discrimination" based on his ethnicity, national origin, or any of the other grounds protected in the *Human Rights Code*, R.S.B.C. 1996, c. 210. Nevertheless, Mr. Shalagin advanced allegations of discrimination at trial that assumed a central role in his case — even though (as he told the trial judge, Mr. Justice Branch), they were intended only to provide "context".

[2] In the course of the hearing at the Human Rights Tribunal, Mr. Shalagin disclosed that he had surreptitiously recorded several one-on-one training sessions in the course of his work between 2010 and 2014; over 100 "Toolbox Talk" meetings (at which he often presented personally); and in later years, at least 30 meetings with supervisors and human resources ("HR") personnel at Mercer regarding

compensation and related employment matters. Evidently, he also 'picked up' other conversations with co-workers, which he says occurred by accident when he forgot to turn off the recording function on his phone.

[3] Upon learning of the recordings, Mercer amended its Response to Mr. Shalagin's pleading in the Supreme Court to assert that his surreptitious recording activity "reveal[ed] a character of untrustworthiness, incompatible with continued employment and constitute[ed] cause for the Plaintiff's summary dismissal. The Plaintiff has no entitlement to reasonable notice or pay in lieu of notice."

[4] We were not informed of the outcome of the human rights complaint; as the trial judge observed, it was "based on a different record and statutory scheme". (At para. 71(e).) The primary issue for the Court was whether Mr. Shalagin's making the recordings constituted cause for his dismissal. Still, the question of discrimination contrary to the *Human Rights Code* was relevant, since the recording of his conversations with supervisors and HR personnel *might* have been justified if the appellant had had reason to believe he was being discriminated against on the basis of a protected ground *and* if the recordings had borne some relationship to the protection of his legal position. On this point, the appellant relied on a line of cases involving employees who, in the belief that they were not being fairly treated, had removed confidential information or photocopied documents to which they did not have access, in order to support their positions in post-termination proceedings: see *Partridge v*. *Botony Dental Corporation* 2015 ONSC 343, *aff'd* 2015 ONCA 836; *Smith v. Dalcan Constructors* (1989) B.C.J. No. 73.

[5] In *Partridge*, the plaintiff was a dental hygienist who had removed "day sheets" in order to show that her hours had been reduced, contrary to her employer's claim. The Court of Appeal agreed with the trial court that this did not amount to just cause for her dismissal, reasoning that:

> With respect to the patients' records, the trial judge correctly determined that, while the respondent's removal of the records was a breach of her employment obligations, the respondent's removal of one or two day sheets

> was not for the purpose of setting up a competing business. The trial judge accepted that the respondent's motivation in taking these records was to secure evidence of the respondent's reduced hours in response to the appellant's reprisals.
>
> The trial judge found that there was no evidence that any confidential information was disclosed to third parties. There was no evidence of harm to patients or to the appellant. There was no evidence at trial that the respondent still retained these documents and they were not listed in her affidavit of documents. The appellant did not question her about them. In these circumstances, the trial judge made no error in concluding that this isolated incident did not amount to just cause, and in not ordering the return of these documents to the appellant. [At paras. 10–11.]

[6] Even if cases such as *Partridge* and *Dalcan* could properly be broadened to apply to surreptitious recording (as to which I express no opinion), Mr. Shalagin's motivation for making the recordings in the case at bar was not to protect his rights in a relationship that was already headed to termination, but the hope he might 'catch' a superior or colleague saying something that would provide the basis for a *future* complaint. In a period spanning almost ten years, no such complaint materialized. The trigger for his dismissal in 2020 was not a human rights matter at all, but his insistence that Mercer's management bonus policy was not discretionary — which it clearly was.

[7] For reasons indexed as 2022 BCSC 112, Branch J. ruled that Mr. Shalagin's surreptitious recordings constituted just cause for his dismissal "given the effect [on] the relationship of trust" between employer and employee. He dismissed the action. Mr. Shalagin now appeals.

Factual Background

[8] The appellant emigrated from Russia in approximately 2002. He learned English in Canada, and obtained a Bachelor of Commerce degree from the University of Northern British Columbia. He became a Chartered Professional Accountant ("CPA") and worked in the pulp and paper industry. At the age of 28, he began his employment with Mercer as a financial analyst in 2010. (Mercer operates a large pulp and paper mill in Castlegar, B.C.) This job was not considered a management position, but in the course of his duties he received information

confidential to Mercer and played a role in the preparation of its financial statements and had access to other sensitive information. In May 2016, he was promoted to "senior financial analyst" and his salary was raised to $100,005 per annum. In May 2019, he received another increase in salary and the right to participate in the company's bonus plan for management personnel.

[9] Mr. Shalagin was not asked to sign a written employment contract but agrees that he was bound by Mercer's policies, which included a Code of Business Conduct and Ethics, and a confidentiality policy. The trial judge described this Code and policy as follows:

> The Code of Business Conduct required the plaintiff to conduct himself with honesty and integrity and to adhere to the highest ethical standards in carrying out his duties on behalf of the defendant. In addition, it required him to be honest and ethical in dealing with other employees, customers, suppliers, vendors, and other third parties.
>
> The confidentiality policy in place from April 2018 provided that the plaintiff was required to keep all confidential information strictly confidential and not directly or indirectly:
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> a) use or disclose any confidential information outside of the company;
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> b) use any confidential information <u>for any purpose other than those of the company</u>; or
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> c) remove from the premises of the company any confidential information.
>
> without the prior written consent of the company.
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> The confidentiality obligations also required the plaintiff to make all reasonable, necessary, and appropriate efforts to safeguard the confidential information of the company. The plaintiff accepted that this policy meant that he was required to either return or destroy any confidential information in his possession after any departure from the company. [At paras. 5–7; emphasis added.]

In 2017, the company also adopted a "Respectful Workplace Policy", of which Mr. Shalagin was aware. He did not advance any complaint under it.

[10] The appellant was also subject to the Chartered Professional Accountants of British Columbia Code of Conduct, which the judge described at para. 8:

> The plaintiff also accepts that while he was employed by Mercer, he was bound by the CPA's Code of Conduct (the "CPA Code"), which requires that registrants:
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> a) conduct themselves ethically;
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> b) conduct themselves with integrity in the conduct of all professional services;
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> c) not make or associate themselves with any representations which they know or should know are false or misleading; and
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> d) not disclose confidential information concerning the affairs of their employer. Specifically, the CPA Code provides as follows:
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> "confidential information" means information acquired in the course of a professional services relationship with a party. Such information is confidential to the party regardless of the nature or source of the information or the fact that others may share the knowledge. Such information remains confidential until the party expressly or impliedly authorizes it to be divulged. In the case of an employee-employer relationship, a member or student has legal obligations to the employer that include a duty of confidentiality. The CPA Code imposes a duty of confidentiality as a professional obligation, which is in addition to the member's or student's legal obligation to the employer.
>
> […]
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> Rule 202.1 Integrity and due care
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> A registrant shall perform professional services with integrity and due care.
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> […]
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> Rule 208.2
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> A registrant shall not use confidential information of any client, former client, employer or former employer, as the case may be, obtained in the course of professional work for such client or employer:
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> for the advantage of the registrant;
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> for the advantage of a third party; or
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> to the disadvantage of such client or employer without the consent of the client, former client, employer or former employer. [Emphasis added.]

[11] As I understand it, Mr. Shalagin began making recordings of training sessions and "Toolbox Talks" soon after he began work at Mercer. The trial judge

commented that although his ostensible purpose in doing so — to improve his English — may not have constituted cause, Mr. Shalagin "knew it was wrong, if not legally, at least ethically." (At para. 71(b).) But as the recordings continued, Mr. Shalagin became less sensitive to how his co-workers might feel about them and, in the judge's words, began to go "down a problematic path." (At para. 71(c).)

[12] During much of his time at Mercer, the appellant's supervisor was a Mr. Marshall. The relationship between the two was evidently not a good one and Mr. Shalagin suggested at trial that Mr. Marshall had discriminated against him because of his ethnic background. (As noted earlier, this was *not* pleaded — presumably because the issue was pursued in the Human Rights Tribunal.) Mr. Shalagin testified at trial to the following incidents involving Mr. Marshall:

a) the "cap" incident:

> Our real interactions that happened we started was -- it was around 2012, and I believe at the time, Mr. Marshall made a reference about me coming to work in my Team Russia cap and -- because the Russians won the hockey championship. And he made a reference that "You shouldn't wear a cap," and I said, "No problem." It's not professional, but it's -- I didn't think of anything negative about it.

b) the "Russian idiom" incidents:

> Then he also -- just later on, he also made some reference about my -- when I used, like, a Russian idiom in my -- in the presentation, like, I said -- well, I remember one was a specific inference where I said, "I [indiscernible] dog on something," on this program, which means I'd done a lot of it, and quite a few people laughed about it. But he didn't like it. He actually was very negative about it, told me not to use any kind of Russian in conversations with people.
>
> And after that, I had one other presentation where I used, like, another Russian sign -- like, a Russian idiom which was ... "keep your feet warm and your head cold," and he also -- he didn't directly say I shouldn't use them, but he said "People don't understand you."
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> And after that, I decided, well, if he -- I'm not going to be expressing my background anymore, like, you know, talk about using the kind of -- or wearing Team Russia. I felt that -- at the time I felt that it's normal. I mean, I live in Canada now. I should try to become part of this country, rather than keep up to my -- where I'm from.

c) linguistic difficulties:

> And in 2013, in November, Mr. -- like, even before that, before that November, Mr. Marshall was making, like -- you know, he was -- I felt that he was not treating me the same. He would ask my -- he would give my co-workers an opportunity to present, yet he would tell me, like, you know, "Put it in writing. Create a binder for me to review, and I'll give you an opportunity to present."
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> And in 20 -- and that -- I mean, I did have a much stronger accent than I have now at the time, and I felt that, you know, his request was justified there. I mean, I didn't want to argue with him, and I didn't know that it's not reasonable for a boss to -- like, you know, to discriminate against a person because he's from a different country.

Although Mr. Shalagin's testimony seemed to imply he began some years later to regard these incidents as constituting discrimination on the basis of his nationality, he did not make any formal complaint at the time about Mr. Marshall's behaviour, whether under the Safe Workplace Policy or otherwise.

[13] Mr. Shalagin also described an incident in which Mr. Marshall had reminded him 'who he worked for' several times after Mr. Shalagin had been asked by a person in head office to provide information on a project she was working on. Mr. Marshall told Mr. Shalagin that if anyone outside his department contacted him for assistance, he should check with Mr. Marshall before responding. Mr. Shalagin found Mr. Marshall to be "intimidating" on this occasion.

[14] Mr. Shalagin testified that it was after these incidents in 2012–13 that he began to record conversations with management personnel — not to improve his English, but "because I felt that maybe something like that would happen again and I would be able to do something about it and file a complaint or do something." In other words, he said, he hoped:

> … to create a record of interactions that I thought might relate to my rights, such as conversations about my contractual entitlement to a bonus and conversations related to discriminatory or bullying treatment of me or colleagues. [Reasons at para. 27.]

[15] He recorded a conversation in 2017 in which Mr. Marshall berated him for being late for a meeting (a meeting Mr. Shalagin had arranged.) When Mr. Shalagin later approached Mr. Marshall to say he had been embarrassed in front of his

co-workers and felt he was not being treated fairly, Mr. Marshall "basically threw a paper at [him] and said, 'You should learn to live up to your mistakes, and learn not to complain --' sorry, not to complain but -- 'All you do is complain. You have to learn to live up to your mistakes.'"

[16] Mr. Shalagin went on to testify how, in late 2018, he became concerned about problems in the reconciliation of Mercer's financial statements. He recorded one or possibly two conversations with the accounting manager, Mr. Dunlop, and "asked him to correct [the problems]". In Mr. Shalagin's view, the errors added up to a "significant" amount. He received no satisfaction from the manager, so decided to approach Mr. Marshall and emailed him about various discrepancies. Mr. Marshall seemed to want Mr. Shalagin to assist with the problem, despite Mr. Shalagin's comment that the preparation of the financial statements was not his responsibility. Mr. Marshall said he would discuss them with the accounting manager. When Mr. Shalagin followed up in January 2019, Mr. Marshall said that he believed the company should fix the errors and that they would "get to it." According to Mr. Shalagin, when the final financial statements (audited by an outside firm) were released in February 2019, they still contained the errors. He complained to a Mr. Short in head office and followed up with an email.

[17] Having described all these "issues", Mr. Shalagin acknowledged at trial that they were not "relevant to this litigation". He explained that he was "just providing you [the trial judge] with the context of what's been happening." This may mean that he did not regard the early incidents described above as constituting discrimination on the basis of his original nationality, but as reflecting that he had some work to do in making himself understood and in presenting in a professional manner. In any event, he did not plead such discrimination in his notice of claim, and indeed amended his pleading to delete the allegations that Mercer had treated him "rudely" and "abruptly".

[18] In early 2019, Mr. Shalagin learned that everyone in his department had received a raise except himself. He decided to speak to Mr. East, an HR manager,

and recorded the conversation. In response to Mr. Shalagin's question of whether this constituted discrimination, Mr. East told him he could not complain of "discrimination" based on the fact he had not received a raise.

[19] Mr. Shalagin also became concerned about a co-worker, Ms. Ingham, who had taken a maternity leave. Mr. Shalagin suspected she had not received all the pay she was entitled to during her leave. Mr. Marshall told him to speak about it to Ms. Ketchuk; she asked him to leave the problem with her. He was not content with this and testified that he became worried not only for himself but for Ms. Ingham. (He was not asked to elaborate on this statement.) He decided to mention the matter to Mr. Belland, the most senior HR person. Mr. Belland told him about an employee who had been fired because he was regarded as a "ticking time-bomb" who would have mounted either a harassment claim or discrimination complaint against Mercer — an allegation denied at trial by counsel for Mercer.

[20] Evidently Mr. Shalagin wrote some emails about the matter and finally broached the subject again with Ms. Ketchuk. In a recorded conversation, she explained that she had investigated Ms. Ingham's pay and that she, Ms. Ingham, *had* indeed received the required increase. Ms. Ketchuk told Mr. Shalagin he "shouldn't be bringing that up because you don't know everything."

[21] Mr. Shalagin testified that 2019 and 2020 had been a "very stressful time" for him but that he continued to "do good work". He worked a considerable amount of what he called "overtime" and asked to be paid for it. Although there was no evidence that the company normally paid overtime to professionals such as himself or that an hourly rate had been agreed to by Mercer, he continued to 'push' the matter. However, in May 2019 he received an increase in salary and the right to participate in the company's management incentive bonus plan. Bonuses under that plan were discretionary and could range *from 0% to 150%* of 12.5% of the employee's base salary per annum. The written notification he received stated that the "Key result areas and weightings will change from year to year, based on the

needs of the operation". He was told he would not be entitled to payment for overtime.

[22] Later in 2019, Mercer terminated Mr. Marshall's employment. There is no evidence as to the reason for this termination, but one would have thought it would be good news to Mr. Shalagin. He and a colleague were asked to review various documents in Mr. Marshall's office to determine if they needed to be retained. He testified that in the course of doing so, he found documents that showed Mr. Marshall had been lying to him about certain issues, including his prospects for promotion. He testified that he made notes about some of these documents, including one entitled "Sr. & Mid-Management Performance Bonus 2017" which showed the bonuses of senior and mid-level managers for that year.

[23] For some time after Mr. Marshall's termination, Mr. Shalagin reported to Mr. MacPherson, the head of the entire mill, and to Mr. Dunlop, the accounting manager. Mr. Shalagin told Mr. MacPherson about the documents he had found in Mr. Marshall's office, his exclusion from the pay raise, and his exclusion from Mr. Marshall's recommended succession list. He did not record the conversations with Mr. MacPherson, since others were involved in them and Mr. Shalagin believed that fact would "nullify" the conversation.

[24] Mr. Marshall's former position as "Director of Business Excellence" was eventually assumed by Ms. Ketchuk, who is a Chartered Professional Accountant.

[25] Despite Mr. Marshall's departure and despite Mr. Shalagin's having aired his complaints regarding Mr. Marshall to Mr. MacPherson, the appellant continued to record meetings with senior staff, including Mr. East and Ms. Ketchuk. In March 2020 when Mercer's 2019 bonuses were soon to be announced, Mr. Shalagin taped a conversation with Mr. East about the bonuses and in particular about the role of "personal performance" in the determination thereof. Mr. East explained that another major factor in determining bonuses was the Mercer mill's performance, which had not been good in 2019. When Mr. Shalagin refused to accept that this

should affect his bonus, Mr. East suggested Mr. Shalagin should speak to his own supervisor, Ms. Ketchuk.

[26] On the same day, Mr. Shalagin also taped a lengthy conversation with Ms. Ketchuk, taking issue with the notion that the bonuses were “discretionary”, demanding repeatedly to know exactly how his personal performance was being assessed and objecting to the fact that the company’s overall performance should be considered. Despite Ms. Ketchuk’s assurances that he was doing “some great things”, he demanded to know why his performance was not regarded as “exceptional” and what exactly “exceptional” meant. Ms. Ketchuk was suspicious that he had seen the new bonus list, but she was reluctant to disclose information that had not yet been released. She said he had “development areas” that he should work on, and when pressed for details, pointed out that he had missed a deadline and was sometimes “difficult to work with.”

[27] Mr. Shalagin refused to accept that bonuses were “discretionary”. He had in his possession a description of the bonuses of the previous year, which surprised Ms. Ketchuk, who said it “look[ed] like it was taken out of context.” When she told him the bonuses were being calculated in a different way in 2019 than in previous years, he said he did not “agree with that”. Ms. Ketchuk suggested that the fact he was even getting a bonus in a year like 2019 was “surprising”. Mr. Shalagin continued to press on the meaning of “discretionary” in this context and the conversation ended with Ms. Ketchuk’s assuring Mr. Shalagin that he was not being ‘singled out’ and that he had “met the standard.”

[28] Mr. Shalagin then sent an email to Ms. Ketchuk and Mr. East in which he continued to challenge the company’s view of the bonus determination formula. Importantly, the email ended with the comment that he was “open to resolve this disagreement in timely manner and internally, *without litigation.*” (My emphasis.)

[29] The trial judge recounted the events that followed:

> Upon receiving this email, Ms. Ketchuk and Mr. East were so troubled by the apparent threat of litigation that they decided they could no longer work with

> the plaintiff. In response, they had discussions with others on the senior management team and decided to terminate the plaintiff's employment on a "without cause" basis.
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> On March 25, 2020, Mercer terminated the plaintiff's employment (the "Termination"). At the time of his Termination, the plaintiff was 38 years old. Mercer paid the plaintiff the amount which it calculated was owing under the *Employment Standards Act*, R.S.B.C. 1996, c. 113. He had also already been paid $6,925 on account of his 2019 bonus on March 23, 2020. [At paras. 21–22; emphasis added.]

Trial Judge's Reasons

Factual Findings

[30] The judge described the appellant's evidence with respect to the types of conversations he recorded and the various reasons he had given for doing so:

> a) He recorded conversations he had with Mr. Marshall from 2014 to 2019 "to protect [him]self from future harassment, including allegations that [he] was responsible for errors" that Mr. Marshall failed to address. He says he recorded conversations about significant misstatements in financial data because he wanted to protect himself from Mr. Marshall's possible retaliation, as the plaintiff claims that Mr. Marshall had a history of harshly criticizing him for pointing out the mistakes of others. He agreed that these conversations included confidential company information.
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> b) He recorded conversations he had with the human resources director, John Belland, because Mr. Belland allegedly told him that another employee had been terminated because she might bring a harassment complaint. He acknowledged that this recording included confidential human resources information about that ex-employee. His motivation to make the recordings was all the result of the fact that he was distressed by a meeting with Mr. MacPherson and Mr. Belland, where Mr. MacPherson allegedly intimidated him, and Mr. Belland did not intervene.
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> c) He recorded conversations he had with Ms. Ketchuk following her failure to properly address prior poor treatment. The plaintiff also justified the recording on the basis that Ms. Ketchuk failed to properly address the situation of his subordinate. Following Ms. Ketchuk's criticism of an email where he sought to defend the human rights of his subordinate, he started to regularly record conversations with Ms. Ketchuk. [At para. 28; emphasis added.]

[31] The judge added that there was no evidence that any of the surreptitious recordings had been "shared" with anyone other than the Human Rights Tribunal and Mercer; nor had Mr. Shalagin sought to obtain a financial benefit "except insofar

as [the recordings] advanced his position in relation to the various proceedings he has filed." (At para. 31.)

Trial Judge's Analysis

[32] The trial judge turned at para. 44 to the central issue of whether Mercer had had just cause for terminating Mr. Shalagin's employment. He quoted from his own reasons in *Scorpio Security Inc. v. Jain* 2018 BCSC 978, including the following passages:

> Just cause is behaviour that is seriously incompatible with the employee's duties. It is conduct which goes to the root of the contract, and fundamentally strikes at the heart of the employment relationship. The test is an objective one, viewed through the lens of a reasonable employer taking account of all relevant circumstances: *Roe v. British Columbia Ferry Services Ltd.*, 2015 BCCA 1 at para. 35.
>
> Both the circumstances surrounding the alleged misconduct and the degree of misconduct must be carefully examined. The analysis requires a contextual approach including an examination of the category of misconduct and its possible consequences, all of the circumstances surrounding the misconduct, the nature of the particular employment contract, and the status of the employee: *McKinley v. BC Tel*, 2001 SCC 38 at paras. 33-34, 51. [At paras. 49–50.]

The judge also described the question before him as whether the employee's alleged misconduct "was something a reasonable employer could not be expected to overlook, having regard to the nature and circumstances of his employment" (at para. 47 citing *Van den Boogaard v. Vancouver Pile Driving Ltd.* 2014 BCCA 168 at para. 36); "whether the fact of the recordings goes to the root of the plaintiff's contract and fundamentally struck at the plaintiff's employment relationship" (at para. 50); and whether Mr. Shalagin's actions "ruptured the relationship, such that the mutual trust between the parties is broken." (At para. 52.) All of these formulations are in my view correct, and counsel for the appellant did not suggest otherwise.

[33] Although acknowledging that conduct discovered post-termination may constitute just cause, the judge added that such allegations should be approached with caution. As stated in *Van den Boogaard*:

> Regardless of whether dismissal for after-acquired cause or for cause is being argued, the issue is whether the employer can establish that, at the time of dismissal, there were facts sufficient in law to warrant a dismissal. If an employer knew of the misconduct and had expressly or implicitly condoned it, then claims of after-acquired cause will be defeated. [At para. 34; quoted by the trial judge at para. 46; emphasis added.]

Condonation was not alleged in this case.

[34] As mentioned earlier, Mr. Shalagin acknowledged that he had not asked his co-workers or superiors for permission to record because he had understood it would make them "uncomfortable". He also acknowledged that at least some of his recordings were unethical, though not illegal. (At para. 53; see *Criminal Code*, R.S.C., 1985, c. C-46, s. 184.)

[35] The judge reviewed cases in which the appropriateness of surreptitious recordings in an employment context was considered. In *Fredrickson v. Newtech Dental Laboratory Inc.* 2015 BCCA 357, the fact that an employer had made surreptitious recordings of the plaintiff was regarded as having broken any chance of repairing the employment relationship. Thus the employee had not failed to mitigate her damages when she refused to resume employment with the employer after termination. (At para. 35.) In *Hart v. Parrish & Heimbecker, Limited* 2017 MBQB 68, the defendant, like Mr. Shalagin, had surreptitiously recorded meetings with senior management. The Court ruled:

> The plaintiff's inappropriate use of his cell phone in secretly recording meetings with his superiors does amount to a breach of his confidentiality and privacy obligations to the defendant. The plaintiff admitted on examination for discovery that he knew a breach of the confidentiality obligations could result in termination …
>
> The misuse of his cell phone was also a breach of his personal code of conduct[…]. In conducting the contextual analysis and assessing the severity of the misconduct, the plaintiff did not disclose the recordings to third parties outside of the defendant other than to his legal counsel and for the purpose of these proceedings. [At paras. 97–8; quoted by the trial judge at para. 57.]

The judge also referred to *Schaer v. Yukon (Department of Economic Development)* 2019 YKCA 11, where the Court accepted that an employee's surreptitious recording of all co-workers and some external stakeholders had resulted in "the complete breakdown of trust in that relationship" (at para. 34) and therefore constituted cause for dismissal. (See also para. 38; *Sankreacha v. Cameron J. and Beach Sales Ltd.* 2018 ONSC 7216 at paras. 155–8.)

[36] In response, Mr. Shalagin cited *Kerr v. Arpac Storage Systems Corporation* 2018 BCSC 704, where an employee's medical condition had been taken into consideration in assessing his uncharacteristic conduct. However, the trial judge found no medical condition that would explain Mr. Shalagin's conduct, although he observed that one might have inferred some "paranoid tendencies" at some points. In any event, he did not rely on any such tendencies as the appellant had "continued to advance the view that his concerns were justified through to the conclusion of trial." (At para. 65.)

[37] In light of the guidance provided by the case law and his findings, the judge concluded that the surreptitious recordings did constitute 'just cause' for Mercer's termination of Mr. Shalagin's employment. He explained his conclusion in greater detail at para. 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.
>
> As such, I find that the plaintiff's conduct in surreptitiously recording his colleagues constitutes just cause given the effect [on] the relationship of trust. As such, the claim must be dismissed on this basis alone. [At paras. 71–2; emphasis added.]

On the other hand, the judge rejected Mercer's assertions that Mr. Shalagin's creation of a database on his personal computer constituted a breach of duty on his part. Nor had Mercer established that the plaintiff had had improper access to the "Bonus Spreadsheet" for 2020.

[38] The judge went on in his reasons to consider what would have been an appropriate notice period in the event his conclusion concerning "just cause" was wrong. I do not find it necessary to review those findings for purposes of this appeal.

On Appeal

[39] I begin by noting parenthetically that in the factual portion of his factum, the appellant simply repeated or reproduced much of his testimony given at trial, regardless of whether the trial judge accepted that testimony. This approach is

seldom helpful to an appellate court, which must defer to factual findings of the trial court unless they are shown to be clearly and palpably wrong. It should not be necessary to say that an appeal is not a re-trial.

[40] The first relevant ground of appeal stated in the appellant's factum is that:

> The trial judge erred in law by misapplying the just cause test, namely by failing to consider relevant context and by relying on irrelevant factors.

In his reply factum, the appellant also asserted that the trial judge erred in stating that Mr. Shalagin had "simply offered no evidence [my emphasis] that supported" his allegations of discrimination on the basis of ethnicity or nationality and that indeed, the evidence suggested to the contrary. In his submission, there *was* such evidence and the trial judge's failure to recognize that fact was an error of law. (Citing *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.* 2011 SCC 23 at para. 98.)

McKinley

[41] The appellant correctly began the analysis portion of his factum by referring to the 'watershed' decision of the Supreme Court of Canada in *McKinley v. BC Tel* 2001 SCC 38, where the Court rejected the argument that dishonest conduct on the part of an employee, irrespective of its degree, is *always* cause for dismissal. (See *McPhillips v. British Columbia Ferry Corporation* (1994) 94 B.C.L.R. (2d) 1 (C.A.), *lve to SCC dism'd* [1995] 1 S.C.R. ix.) Instead, the Court ruled that the question of whether an employer is justified in dismissing an employee on the grounds of dishonesty "is a question that requires an assessment of the context of the alleged misconduct." (At para. 48.) The Court continued:

> ... More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.
>
> In accordance with this test, a trial judge must instruct the jury to determine: (1) whether the evidence established the employee's deceitful conduct on a balance of probabilities; and (2) if so, whether the nature and degree of the dishonesty warranted dismissal. In my view, the second branch of this test

> does not blend questions of fact and law. Rather, assessing the seriousness of the misconduct requires the facts established at trial to be carefully considered and balanced. As such, it is a factual inquiry for the jury to undertake.
>
> ...
>
> ... I have serious difficulty with the absolute, unqualified rule that the Court of Appeal endorsed in this case. Pursuant to its reasoning, an employer would be entitled to dismiss an employee for just cause for a single act of dishonesty, however minor. As a result, the consequences of dishonesty would remain the same, irrespective of whether the impugned behaviour was sufficiently egregious to violate or undermine the obligations and faith inherent to the employment relationship.
>
> Such an approach could foster results that are both unreasonable and unjust. Absent an analysis of the surrounding circumstances of the alleged misconduct, its level of seriousness, and the extent to which it impacted upon the employment relationship, dismissal on a ground as morally disreputable as "dishonesty" might well have an overly harsh and far-reaching impact for employees. In addition, allowing termination for cause wherever an employee's conduct can be labelled "dishonest" would further unjustly augment the power employers wield within the employment relationship.
>
> Based on the foregoing considerations, I favour an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship. Such an approach mitigates the possibility that an employee will be unduly punished by the strict application of an unequivocal rule that equates all forms of dishonest behaviour with just cause for dismissal. At the same time, it would properly emphasize that dishonesty going to the core of the employment relationship carries the potential to warrant dismissal for just cause. [At paras. 48–9, 55–7; emphasis added.]

[42] I do not necessarily equate Mr. Shalagin's surreptitious recording of his colleagues and supervisors with expressly misleading one's employer or telling lies to someone in the course of one's duties. However, the recording activity was underhanded and would be regarded by most employers as misconduct undermining the trust relationship between employer and employee. It also violated the privacy interests of persons who were recorded, as well as those who were discussed in the recordings. In any event, it is my view that *McKinley* applies to this case, requiring a "contextual approach" and a determination of whether the nature and degree of the dishonesty warranted dismissal — a factual question. (*McKinley* at para. 49.) As part of this contextual approach, the court should bear in mind the "sense of identity and self-worth individuals frequently derive from their

employment". It should strike an effective balance between terminating that sense of identity and self-worth with the severity of the employee's misconduct. (At para. 53.)

[43] It is clear from the judge's reasons in the case at bar that he did not apply an "absolute" or "strict" rule of the kind that was overturned in *McKinley*. Instead, he addressed the issue of cause "through an analysis of the particular circumstances surrounding the employee's behaviour." (*McKinley* at para. 39.) He reviewed the "difficulties" experienced by Mr. Shalagin in his relationship with Mr. Marshall, noting the appellant's acknowledgement that he knew it would make people uncomfortable if he were recording them and that at least some of the recordings were "unethical, even if not illegal." (Reasons at para. 53.) He noted the change in Mr. Shalagin's purpose in making the recordings — from hoping to improve his English skills in the early years, to hoping to 'catch out' one of his superiors exhibiting discriminatory or bullying behaviour and then to make a complaint of some kind.

[44] The appellant objects strenuously to the trial judge's statement at para. 71(e) that he "simply offered *no evidence*" (my emphasis) that supported the allegations of discrimination asserted by the appellant. In his submission, the judge must be taken to have ignored or forgotten the evidence of Mr. Marshall's "harsh reprimands" in 2012–13. With respect, the judge did not forget or ignore this, i.e., the evidence given by Mr. Shalagin concerning the cap incident, the Russian idiom incidents, the fact he did not receive a raise when others did, etc. (See para. 10 above.) Rather, the judge found that these were not incidents *of discrimination based on Mr. Shalagin's ethnicity or nationality*. Indeed, as noted earlier, Mr. Shalagin testified that he "understood" it was "unprofessional" to wear a cap (referred to by counsel as a baseball cap) in the office; and that he realized he should not use Russian idioms unknown to his audience, but should become part of Canada now. With respect to Mr. Marshall's request that he put something in writing, Mr. Shalagin again readily conceded he had a very strong accent at the time and that Mr. Marshall had difficulty understanding him. Mr. Shalagin did not contend that his employer did not have to understand what its employees said. The 'accent' issue did not recur in later years. The judge's conclusion that, setting aside the merits of

Mr. Shalagin's human rights complaints made to the Tribunal, this evidence did not support the allegation of discrimination was one of mixed fact and law, such that the appellant had to show that the conclusion was clearly and palpably wrong. In my view, he has not done so. Further, since "discrimination" was not pleaded, such a finding would have been outside the scope of the litigation.

[45] The recording continued for nearly ten years and did not stop once Mr. Marshall left Mercer. Indeed, Mr. Shalagin admitted that it became his "practice to record … any conversation with HR or Ms. Ketchuk." None of these conversations had any relationship to his place of origin or other protected grounds of alleged discrimination. Instead they related to his complaints that the financial statements for 2018 were defective, that Ms. Ingham should have higher pay for her maternity leave, and that the bonus program was not "discretionary". He made his feelings known on each of these matters, but evidently his superiors did not agree. The point is that they did not involve the protected grounds of discrimination; nor could they be said to involve bullying or harassment.

[46] The appellant also asserts a point of law — that the trial judge erred in "relying on public policy" — a reference to the judge's comment at para. 71(k), which I repeat here for convenience:

> 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.

The appellant insists that the "contextual analysis" mandated by *McKinley* is a "micro-level analysis" that "should not be influenced by macro-level factors such as public policy considerations."

[47] Again, I cannot agree. Just as the Supreme Court of Canada in *McKinley* considered at para. 56 that dismissal of an employee on the ground of dishonesty

without an analysis of the surrounding circumstances "might well have an overly harsh and far-reaching impact for employees" and might "further unjustly augment the power employers wield within the employment relationship" — a policy matter — so too did the trial judge considered the fact that if the plaintiff's argument were accepted, other employees who feel mistreated at work might be encouraged to "routinely start secretly recording co-workers." The judge was not limited as a matter of law to the granular facts of the case in making the determination as to whether just cause had been shown. Nor in my opinion has the appellant shown that the trial judge relied on "irrelevant factors" in reaching that decision.

[48] In summary, I do not agree with the appellant that the trial judge committed a palpable and overriding error or somehow misapplied the law of wrongful dismissal to this case. Certainly Mr. Marshall was a difficult person to work with, and might well have been the subject of a bullying or harassment complaint, assuming Mr. Shalagin's recollections are correct. However, given Mr. Shalagin's own acknowledgement at trial concerning the incidents which he says led him to begin recording conversations, there is simply no rational connection between them and Mr. Shalagin's conduct — whether before or after Mr. Marshall left Mercer's employ.

[49] After Mr. Marshall's departure, it appears Mr. Shalagin became more and more concerned about his own remuneration and bonuses and in improving his own reputation by repeatedly pointing out the errors of others. His last recorded conversation with Ms. Ketchuk suggests that Mr. Shalagin had come to adopt an unrealistic view of his own abilities and an inflexible insistence that his own points of view should prevail. In all the circumstances, I am unable to agree that the trial judge erred in reaching the conclusions he did.

[50] In the result, I would dismiss the appeal.

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Justice Dickson"

I agree:

"The Honourable Justice Skolrood"