



RECORDING CONVERSATIONS AT WORK

WORDS BY LAWRENCE ANDERSON

ANDERSON EMPLOYMENT LAW ADVOCACY, NO WIN NO FEE KIWI, EMPLOYER HELP

I'm regularly asked by employees who are facing trouble at work whether they can record their disciplinary meetings or conversations with their boss at work. The answer to this is that, of course, you can record a conversation you are party to. It's just the consequences of this that may be faced later if conversations are recorded without permission.

If a case goes to the Employment Relations Authority or later to the Employment Court, generally speaking, recorded conversations

can be admitted into evidence. This is because the Employment Relations Act 2000 permits the Authority and Court to exercise a wide discretion and is entitled to take into account such evidence and information in equity and good conscience that it thinks fit, whether strictly legal evidence or not (sections 160(2) and 189).

It has been held that the unfairness to the employer of being recorded without their knowledge can be outweighed by the unfairness to an employee if the employee

cannot use the recording to prove that their story was true (Simms v Santos Mount Eden Ltd ERA AA254/03, 21 August 2003).

How recordings are used in the authority and court

An authority member or judge is not going to spend hours listening to recordings, instead, it's expected that written transcriptions are used and specifically referred to where relevant in written witness statements. When the evidence of the case is

tested, the witnesses are referred to the written transcriptions on paper.

You can't transcribe your own recordings; they have to be done independently. We often have to get a professional audio transcription company to produce the written transcriptions for us. The recordings, therefore, need to be of reasonable quality and the recording should be clear enough to distinguish different participants talking in the recording. It costs around \$75 per hour of transcription time, and typically speaking, one hour of recording can take four hours to transcribe where there are two to three participants in a recording. This is something that our client will have to pay for.

Coming up with recordings that others were not previously made aware of is not always a good look. While audio recordings can be helpful to prove what happened in a meeting and what was said, it's not always necessary to use them.

The evidential standard is the balance of probabilities, which is whether the evidence established that facts alleged by a party or witness were more likely than not to be true. If there's little dispute as to what was said or if there are credibility issues that we can use to our advantage, then I prefer to attack it from that angle to prove what happened rather than to rely on recordings.

The adverse consequences of recording without permission

There have been decisions where employees have recorded conversations without their employer knowing have gone

against the employee later. One was an unsuccessful bid to be reinstated after having been dismissed. In Milham v Chief Executive of Waikato Institute of Technology [2016] NZERA Auckland 259, the conversation being recorded had taken a path about rebuilding trust in the employment relationship. It was found that this would have been an opportunity for the employee to disclose that they were recording. The authority found that if there was trust in the relationship, it was severely damaged when the employee's manager discovered the employee had recorded the meeting without the manager's knowledge. This went against the practicability of reinstatement.

An employee recording without first seeking permission can be considered to have breached the duty of good faith. The duty of good faith requires both parties to not mislead or deceive or do anything that's likely to do so and to be responsive and communicative. As illustrated in Nicol v Canterbury Concrete Cutting NZ Ltd [2018] NZERA Christchurch 180, in this case, the employer dismissed the employee over a secret recording of a disciplinary meeting. Although the employee was found to be unfairly dismissed for recording the meeting and had success on that front, the employee was still penalised \$2000 for breaching the duty of good faith.

How to record

Here's what you need to do. You're either going to be using a recording app on your phone or a recording device. My advice is

“You don't need permission to record a conversation you are party to”

that you have two recorders, so if you're going to a disciplinary meeting, you have one recorder secretly recording in your pocket or bag, and when you enter the meeting, you present your other recorder and politely ask if you can record. If your employer declines your request, then at least you're already recording it, and as I mentioned above, we don't have to use the recording.

If you're using a phone recording app, make sure you know how to use it and test it to make sure that it will record without being interrupted. There are some apps that I have found will stop recording after about 10 minutes, so make sure you're using an app that works properly.

There are apps for recording phone calls as well. For that, we recommend Cube ACR. These kinds of apps may require a monthly or yearly subscription but they are typically cheap.

What we can do for employers and employees

We represent our clients in direct negotiations, the Employment Mediation Service, the Employment Relations Authority, and the Employment Court.

Whether you're an employee or employer and you need assistance with any employment issue, we are here to help.

No matter the situation we recommend, you speak to us for professional advice before you take action. ■

For more details, contact Lawrence Anderson on 0800 946 549 or 0276 529 529 or Lawrence@AndersonLaw.nz or visit AndersonLaw.nz.

