Video surveillance

This paper is part 2 of the series: Electronic surveillance, email and documentary evidence by Arthur Moses, a barrister with Frederick Jordan Chambers in Sydney NSW.

General

Employers often state that recording an employee's performance in writing is very difficult and that it does not really capture the essence of the employee's work performance. In the past, video evidence has proven critical in establishing misconduct by an employee. See for example, the decisions of *Wang & Ors v. Crestell Industries Pty Limited* and Anor (1996) 73 IR 454 and brambles Security Services Limited v. The Transport Workers Union (unreported judgement of the Full Bench of the Industrial Relations Commission of NSW on 20.12.96 in Matter No. IRC 1772 of 1996).

However, since the passage of the Workplace Video Surveillance Act 1998 (NSW) (*Video Surveillance Act)* which commenced operation on 1 February 1999, there is strict regulation of workplace video monitoring of employees in New South Wales. There is no such legislation in the Northern Territory.

Section 7(1) of the *Video Surveillance Act* prohibits an employer from carrying out covert video surveillance of an employee in the workplace unless:

"(a) it is carried out, or caused to be carried out, solely for the purpose of establishing whether or not the employee is involved in any unlawful activity in the workplace; and

(b) it is authorised by a covert surveillance authority."

The Video Surveillance Act defines "workplace" as:

> *"Premises, or any other places, where persons work, or any part of such premises or place." (s3)*

Thus it is important to note that covert video surveillance of an employee outside of the "workplace" is not the subject of regulation by the *Video Surveillance Act.* Accordingly an employer is not prevented from placing an employee under video surveillance in order to establish, for example, whether or not an employee is involved in physical activities outside the workplace inconsistent with an assertion that he or she is unable to carry out his or her normal duties. An example of where video surveillance of an employee was guilty of serious and wilful misconduct by misleading the employer about his physical incapacity is the decision of the Full Bench of the Industrial relations Commission of NSW in *Mason v Electricity Commission of NSW t/as Pacific Power* (1995) 62 IR 436.

Section 4 of the *Video Surveillance Act* provides that all video surveillance of employees in the workplace is covert unless:

"(a) *the employee has been notified in writing of the intended video surveillance at least 14 days (or, if the employer has obtained the agreement of the employee to a lesser period of notice, that period) before the intended surveillance; and*

(b) cameras used for surveillance of any part of the workplace (or camera casings or other equipment that would generally indicate the presence of a camera) are clearly visible in that part of the workplace; and

(c) signs notify people that they may be under video surveillance in the workplace, and are clearly visible at each entrance to that part of the workplace in which surveillance is taking place."

Section 4(2) provides that video surveillance will not be covert where an employee has consented to video surveillance in the workplace for a purpose other than surveillance of the activities of the employee. In effect, s4(2) does not allow an employee to consent to surveillance for the purpose of monitoring their work performance. The employer cannot therefore suggest video surveillance otherwise prohibited by the Video Surveillance Act was permissible by virtue of an employee's consent.

Suspicion of unlawful activity in the workplace

Section 9(1) of the *Video Surveillance Act* provides that a covert surveillance authority issued to an employer authorises the employer to undertake covert video surveillance generally "*for the purpose of establishing whether or not one or more particular employees are involved in any unlawful activity in the workplace*".

Section 9 (3)(a) provides that such authority does not authorise the employer to carry out covert surveillance or the purpose of monitoring work performance. In short, the *Video Surveillance Act* prohibits all attempts to rely upon covert video surveillance to monitor employee's work performance.

Given this strict prohibition, the definition of "unlawful activity" is of critical importance as it is the gateway to obtaining a covert surveillance authority. Interestingly, the Video Surveillance Act does not define "unlawful activity". It seems Parliament's intention was that "unlawful activity" refer to an "illegal activity", that is, the commission of some criminal offence, rather than a breach of the terms of the employment contract. Support for this interpretation can be found in the second reading speech of the New South Wales Attorney General, Minister for Industrial Relations and Minister for Fair Trading, the Honourable JW Shaw QC MLC when he stated:

> *"Part 3 contains the provisions which allow an employer with reasonable grounds to suspect that employees are involved in unlawful activities - for example, theft or assault - to apply to a Magistrate for the issue of a covert video surveillance authority." (Hansard, Legislative Council, Tuesday 26 May 1998, p5089)*

In my opinion, it is only employees' conduct which may involve some criminal offence which will fall within the parameters of the "unlawful activity" envisaged by Parliament.

Assuming an Employer has suspicions of unlawful activity, how does it obtain a covert surveillance authority?

Section 10(1) provides that an application for a covert surveillance authority is to be made to a magistrate. Section 10(2) provides details of

information to be contained in such an application. These are:

"(a) the grounds the employer or the employers' representative has for suspecting that a particular employee is or employees are involved in an unlawful activity;

(b) whether other managerial or investigative procedures have been undertaken to detect the unlawful activity and what had been the outcome;

(c) who and what will regularly or ordinarily be in view of the cameras;

(d) the dates and times during which the covert video surveillance is proposed to be conducted; and

(e) in the case of an application made by an employer's representative, verification acceptable to the Magistrate of the employer's authority for the person to act as an employer's representative for the purposes for the covert surveillance operation."

The Magistrate may require any other information to be supplied by the employer (s.10(6)). The application must also nominate each licensed operator who will oversee the conduct of the covert video surveillance (s.10(3)).

Once obtained, a covert surveillance authority remains in force for a period specified in the authority but not in excess of 30 days (s.16). In addition, s23 of the *Video Surveillance Act* requires an employer to whom a covert surveillance authority is issued to furnish a written report to the Magistrate setting out briefly the result of the surveillance carried out. Such report must be furnished within 30 days after the expiry of the authority.

What is the standard of proof required in an application for a covert surveillance authority?

In order to issue a covert surveillance authority, the Magistrate must be "satisfied that the application for authority shows that reasonable grounds exist to justify its issue" (s.1391)). Further, the Magistrate must have particular regard to whether the covert video surveillance "might unduly intrude on their privacy or the privacy of any other person" (s14).

There is little guidance as to the standard of proof that is required in the exercise of the direction in s.13(1) as it is conferred in very general terms. Section 10(2) provides that there must be established by the employer a "suspicion" that a particular employee or employees are involved in unlawful activity.

Exactly what is meant by a "suspicion" is unclear. However, it seems to me that an employer must establish that it had reasonable grounds on which to sustain that suspicion and it carried out as much investigation into the matter as was reasonable in all the circumstances.

It would appear from the terms of s.13(1) that a Magistrate in determining an application will be required to make findings on the quality of an employer's evidence. It is my opinion that in order for a Magistrate to satisfy his/her obligation in s.13(1), the evidence before him/her must disclose adequate material sufficient for them to be reasonably satisfied that there is unlawful activity by an employee occurring in the workplace, that is, to the standard of proof set out in Briginshaw v. Briginshaw (1938) 60 CLR 336 at 351-362 per Dixon J.

In my opinion, the weight of authorities would be against the Magistrate making a finding on the balance of possibilities which may be based on inappropriately vague or general information. This is illustrated by the High Court cases in TNT Management Pty Limited v. Brooks (1979 53 ALJR 267 and West v. Government Insurance Office of NSW (1981) 148 CLR 62.

Essentially, it is my view that where an employer makes an application based on the most general, scanty and unreliable material, it would be unsafe for the magistrate to grant the application particularly as the employer bears the onus of making out it's case for a covert surveillance authority pursuant to s.10(1).

Prohibition against the misuse of covert surveillance authority

Section 8(1) renders it an offence for a person to use the recording of the activities of an employee or any other person obtained as a consequence of covert surveillance in the workplace for an irrelevant purpose. Section 8(3) provides that an "irrelevant purpose" means a purpose that is not directly or indirectly related:

"(a) to establishing whether or not an employee is involved in unlawful activity in the workplace in accordance with the authority conferred by a covert surveillance authority; or

(b) to taking disciplinary action or legal proceedings against an employee as a consequence of any alleged unlawful activity in the workplace so established; or

(c) to establishing security arrangements or taking other measures to prevent or minimise the opportunity for unlawful activity of a kind identified by the recording to occur in the workplace; or

(d) to taking any other action authorised or required by or under this Act."

Common law issues concerning covert video surveillance by employers in the NT

Despite the Territory not having legislation that deals with covert video surveillance in the workplace, that does not mean employers have an unrestricted right to use such surveillance.

Employers must be cautioned against using covert video surveillance to "entrap" employees they suspect of "unlawful activity". Such conduct could lead to an employer committing a criminal offence in circumstances where the employer's conduct is itself the principal offence to which the employee's conduct is ancillary, or creates or itself constitutes an essential ingredient of the employee's unlawful activity: see for example Ridgeway v. The Queen (1995) 184 19 at p.36-37) per Mason, CJ, Deane and Dawson, JJ.

Furthermore, I am of the opinion that an employer who in effect attempts to "set up" an employee following a covert surveillance, would risk that video surveillance not being admitted into evidence. That could arise by the tribunal exercising a discretion that having regard to the circumstances it would be unfair to an employee to use the evidence or, in accordance with the common law rules, rejecting evidence improperly or illegally obtained as stated by the High Court of Australia in cases such as Bunning v. Cross (1978) 141 CLR 54, Cleland v. The Queen (1982) 151 CLR 1 and Pollard v. The Queen (1992) 176 CLR 177.