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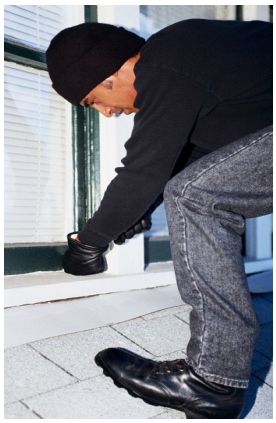
When Good Employees go Bad – Theft in the Workplace



Unfortunately, there have always been and will continue to be people who steal from their employers. Recently reported examples from this year include a 29-year-old administration manager at a Supermarket who stole $282,718 and an office manager from a digital printing company who took $1.04 million from his employer between 2004 and 2010.

Statistics show that the tough economic climate that has enveloped the world's economies over the last few years has given way to an alarming increase in employees stealing or manipulating situations fraudulently for personal gain. In late 2010, KPMG released its ninth biannual Fraud and Misconduct Survey. In its survey of 200 companies and organisations throughout New Zealand and Australia, 53% of respondents experienced at least one incident of fraud and the average loss rose from an average NZ$1.9 million in 2008, to NZ$3.8 million for the 2010 year.

For employers who may suspect that an employee is stealing from them, the first question that arises is "*How do I prove the employee is stealing from me and what steps need to be followed to ensure any action I take is lawful?"*

Mere Suspicion Is Not Enough – The Need For Evidence:

In recent the case of ***Christie v Browns Ltd*****,** the employer Ms Bilkey, the owner of the Remuera clothing store concerned, refused to pay her employee Ms Emma Christie a $1038 bonus owed to her because "*she had planned to steal a pair of jeans*" and had a "*suspicious intention*".

Ms Christie, a university student, was working on a fixed-term contract between November and February as a sales assistant. Ms Christie had taken a pair of jeans from stock in December and filled in an invoice in the store's appropriation book saying she was allowed to take them "*on approval*". The employer noted that this was not standard procedure, and on her last day management asked her if she had paid for jeans. Ms Christie said that she had forgotten to pay for the jeans and settled the $99 account. The employer did not include the required bonus in the final payment because it "*didn't think, morally, anyone deserves a bonus for acting dishonestly*". The employer argued that around the same time Ms Christie had been working it had noticed that stock was missing and magnetic tags had been removed from clothes before they were sold.

In ordering the employer to pay Ms Christie her bonus the Authority stated that, while the employer's security concerns were understandable, "*suspicion is one thing, proof entirely another*".

Confirming Suspicions – Using Video Surveillance:

In a number of cases, employers use video cameras to uncover suspected theft by employees or customers. While many businesses have video cameras operating which are visible and which the staff are aware of, in some circumstances notifying employees of the cameras' existence would prejudice the whole point of installing them in the first place – to catch a suspected thief. Obviously, having visible cameras or ones which staff are aware of may act as a deterrent to any would-be thief, but not always.

In New Zealand there are few legal controls on covert video or audio recording in the workplace, and the Privacy Commissioner has found it to be a permissible practice in situations where it is considered necessary in order to confirm an employee's unlawful behaviour. However, there is a prohibition against the surreptitious use of video cameras that also have audio recording capabilities under the Crimes Act. The Employment Court has stated that:

> In recent years it has become more common for employers to utilise covert video surveillance to detect crime occurring in the workplace... The use of such surveillance is an accepted practice provided the employer does not breach the privacy rights of individuals.

In several cases, employees have argued that their employer's use of video surveillance without their knowledge was both unlawful and unfair. Again, the Employment Court has held that *"the video surveillance of suspected employees is not in itself objectionable. Nor is it particularly novel".*

However, the courts have also stated that where a company has bound itself not to use video surveillance, either through express language or by necessary implication, such contractual obligations will bind and prevent it from utilising hidden cameras regardless of how inconvenient it may be for an employer. Many would think that once an employer has what they regard as compelling video evidence of employee's dishonesty they would be entitled to immediately dismiss the alleged offender, but such a view would be incorrect.

Requirement for a Procedurally Fair Dismissal – Relying on Video Footage:

Theft is a serious allegation and, having obtained material which may substantively justify terminating an employee who is alleged to have acted dishonestly, it is essential that a dismissal for theft follow the basic procedural standards to ensure the individual is treated fairly.

Regardless of how compelling footage may be, procedural defects can render a dismissal based on video footage unjustified, and care must be taken that the evidence is sufficient to prove that an act of dishonesty has in fact occurred and that the individual has been provided with an adequate opportunity to comment on it.

The Court of Appeal has stated that:

> It is well settled that the standard of proof which the employer must attain is the civil standard of balance of probabilities rather than the criminal standard of beyond reasonable doubt; however, where a serious charge is the basis of the justification for the dismissal, then the evidence in support of it must be as convincing in its nature as the charge is grave.

Just because an employer has footage of an employee looking like they are stealing, this does not necessarily mean that the burden of proof has been satisfied. In one case, a supermarket dismissed an employee because of the employer's conclusion, from video footage, that he was guilty of taking stock without authorisation (stealing sweets from the bulk bin). The Authority considered whether the evidence to support that allegation was sufficiently convincing that a fair and reasonable employer could conclude that it was made out.

While agreeing that the employee's actions were indeed suspicious, the Authority said that the video was "*jerky*", jumped a number of seconds at important times and that it was impossible to ascertain what the employee had in his hands, if he was placing anything in his mouth, or in his pockets. On this basis it was found that the video evidence was not sufficiently compelling and the dismissal was held to be unjustified. The employee was awarded $10,000 compensation, reimbursement for lost wages in the period since his dismissal, and was reinstated.

Another area in which some employers have been found to have fallen short in meeting their good faith obligations when dealing with suspected employee theft is failing to give the employee a proper opportunity to comment on the allegations as part of their investigation process. If video evidence forms the basis of an allegation of theft, then it would be wise to provide the employee with a copy of all footage (as well as any stills or photographs) that will be taken into consideration by the employer prior to the disciplinary meeting in order that they have an informed understanding of exactly what is being alleged. For example, if an employer has six separate pieces of footage from different times showing an employee repeating the same act dishonesty and the employer is going to take all six clips into account, it should provide the employee with a copy of all six instances. If it does not and only shows them one clip but are taking all of them into account, the employer will not be acting in a procedurally fair manner and will be running the risk of a dismissal being found to be unjustified – albeit that the contributory actions by the employee will reduce any award for compensation.

Put simply, you can use hidden cameras, but do not take shortcuts and put all material and relevant matters to the employee giving them an adequate opportunity to comment before making the decision to dismiss.

Sleepovers Case – Application for leave to the Supreme Court granted

The Supreme Court has granted the IHC (Idea Services) leave to appeal a controversial court ruling requiring staff to be paid the minimum wage for sleepover shifts. [See Issue 163, 173, 179 and 193 of "*The Advocate*"]

The Court of Appeal upheld an earlier Employment Court decision against an IHC provider, Idea Services, which had opposed paying for sleepover hours, arguing sleeping did not constitute "*work*" in terms of the Minimum Wage Act.
In a decision issued on 19 May 2011, the Supreme Court granted Idea Services leave to appeal on the following grounds:

1. whether sleepovers constitute "*work*" under section 6 of the Minimum Wage Act 1983; and if so,
2. whether the Act is complied with if an employee's average rate of pay over a pay period is not less than the prescribed minimum.

We will await a final outcome to this ongoing issue and report it as soon as the Supreme Court decision comes to hand.

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