Candid camera

If covert surveillance is used in a workplace, employers had better be sure it’s done with the agreement of staff.

BY JOHN WILSON LEGAL DIRECTOR & KIERAN PENDER LAW CLERK, BRADLEY ALLEN LOVE

It is not uncommon for organisations to keep an eye on their employees via video cameras or internet monitoring. But beware the legal pitfalls.

The vexing topic of covert surveillance recently reared its ugly head in the Fair Work Commission. Nursing home provider Bupa had commenced an investigation into an employee after a colleague secretly recorded footage allegedly showing misconduct. Bupa claimed that Shahin Tavassoli had laughed during a conversation about the death of a resident and ignored residents’ calls for assistance. The latter is a serious breach of Bupa’s duty of care.

These allegations were put to Tavassoli who immediately resigned. Two days later, she sought to rescind her resignation, but Bupa refused. Tavassoli then commenced unfair dismissal proceedings, arguing that she had been constructively dismissed. The Fair Work Commission recently found in her favour, ordering that Tavassoli be reinstated. The decision raises three important issues, which we will consider in turn.

Procedural fairness

Firstly, commissioner Bernie Riordan found that Bupa’s approach to the alleged misconduct was lacking in procedural fairness. The allegations were first put to Tavassoli orally and she was not given a copy of relevant written correspondence. Nor was the video recording, the only evidence for the alleged misconduct, shown to Tavassoli. Even several months after she had commenced unfair dismissal proceedings, Bupa had still not disclosed either.

This, the commissioner held, fell considerably short of the standards required. “I struggle to see how the principles of procedural fairness can be satisfied,” the judgment reads.

“Employees have a right to know the case that they have to answer. Bupa had an obligation to show Tavassoli the video footage, particularly when it forms the sole foundation of the allegations. Simply making generalised accusations when specific information was available is a form of entrapment. The decision to terminate an employee should not be based on a memory test but rather the employee’s considered response to specific accusations.”

This passage is highly instructive. Employers must put particularised allegations to employees: “you were rude to clients” should be “on 1 October, you were disrespectful to John Smith by…”. When the employer has evidence to substantiate these claims – email logs, video footage, witness statements – they must also be provided to the employee (redacting names to protect privacy, where necessary). Anything less, and an organisation may fail to satisfy the Fair Work Act’s procedural fairness requirements.

Surveillance legislation compliance

Another issue concerned the video footage itself. In NSW, the ACT and (to a lesser extent) Victoria, legislation regulates the use of covert surveillance in the workplace. Broadly speaking, in NSW and the ACT employers can only monitor employees – via audio, visual or data-related means – if they provide notice and consult with employees.

Staff must be told not only that the employer
is undertaking surveillance, but also that such surveillance may be used against them. Failure to comply with the legislation can result in significant penalties, and the definitions are broadly worded. Any monitoring of internet usage, for example, may fall foul of the relevant statute in the absence of a properly drafted workplace policy.

While the Fair Work Commission does not have jurisdiction over such legislation, Riordan did highlight his concerns with the video evidence. He noted that raising the legality of the video at the conclusion of the proceedings was a classic case of “closing the gate after the horse has bolted.” In another case, an imprudent employer seeking to rely on evidence obtained through covert surveillance may find themselves in breach of workplace privacy laws.

Finally, Riordan delivered a stinging rebuke of Bupa’s approach. Tavassoli had been pulled out of a meeting, escorted from the premises and told without explanation to return two hours later, which the commissioner described as “unconscionable conduct.” Additionally, the failure to afford procedural fairness was exacerbated because the applicant was an Iranian refugee. While the investigation may have been unfair to anyone, its deficiencies were “amplified due to her language difficulties”.

**Tailored to individuals**

Such comments reiterate that employees should be treated as individuals, in disciplinary investigations and elsewhere. What constitutes a fair and reasonable process in one situation may not withstand scrutiny in another, so an approach sensitive to the particular circumstances is important. Otherwise, HR professionals risk the wrath of the commission, which described Bupa’s response as “unprofessional, discourteous and unfair”.

Tavassoli’s case offers a stark reminder that even “a dedicated and well-resourced HR team” can make mistakes. It also provides helpful reminders as to the right and wrong way to approach allegations of misconduct, particularly where covert surveillance is involved. Bupa has lodged an appeal. ***