

## Member's Quarterly

Summer 2021 Edition

## Feature

# I Spy: Dismissal for Surreptitious Video Recording Upheld

*Employee terminated with cause for taking secret videos of customer*

Technological advancements have allowed us to capture and broadcast moments in time easier than ever before. Cameras in computers and cellphones are the norm and can be useful tools in many workplaces. What happens when those tools are used for other purposes? What kind of expectation of privacy do we have? The Court of Queen's Bench in New Brunswick shed some light on these issues in the context of a wrongful dismissal claim in *Durant v Aviation A. Auto Inc. (Audi Moncton)*, 2019 NBQB 214 (CanLII).

Robert Durant, former service advisor with Audi Moncton, brought an action for damages for wrongful dismissal against Audi Moncton following the termination of his employment for cause. Mr. Durant's employment of 34 years was terminated for cause following an incident in which Mr. Durant took video and a photo of a female client at the workplace using an employer-issued tablet without the client's knowledge or consent and showed the video and photo to coworkers.

A female client attended the dealership to have the oil change indicator light on her vehicle reset. Mr. Durant's coworker was assisting the female client when Mr. Durant used his work-supplied tablet to take a photo and two (2) videos of the female client. Mr. Durant subsequently made another video using his personal cellphone of the video he had taken using the tablet. Mr. Durant proceeded to show the video to a number of his coworkers at work while making inappropriate references to the client and sent the photo to one of his coworkers.

The incident was reported to senior management and human resources. Audi investigated the incident, interviewing Mr. Durant and his colleagues. During the investigation, the two videos and the photo were found on Mr. Durant's company tablet in the "recycle bin". Mr. Durant admitted to making the video and explained that he took the video as a joke because the client was dressed inappropriately and that he did not feel he did anything wrong as the video was no different than the security cameras present in the workplace. The investigation further revealed that Mr. Durant had taken photos of female clients without their knowledge or consent in the past by placing his cellphone in the breast pocket of his shirt with the camera facing outward and showing the photos to his coworkers. Mr. Durant was disciplined in the past for this misconduct as well as making an inappropriate comment to a female client on another occasion. Following the investigation, Audi terminated Mr. Durant's employment for cause for taking the videos and photo, sharing them with coworkers and for past misconduct.

Mr. Durant commenced a claim against Audi for damages for wrongful dismissal. Both parties sought summary judgment. In the proceedings, Mr. Durant alleged that he took the videos and photo of the female client because he was concerned that the female client was intoxicated by drugs or alcohol because she moved rapidly, appeared animated and was dressed in an inappropriate manner. He also said that he made the video as a precautionary measure in order to protect Audi employees from any potential unfounded claims of inappropriate behaviour by the client.



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After determining that the matter could be properly decided by way of summary judgment, Justice LeBlanc considered whether Audi had established just cause to terminate Mr. Durant's employment. In doing so, Justice LeBlanc considered the nature and extent of the misconduct, the surrounding circumstances and whether dismissal was warranted. Justice LeBlanc found that there was no evidence that the female client was intoxicated or behaving as Mr. Durant alleged; that the video was taken for improper, non-work related purposes; Mr. Durant was a first point of contact for clients; and he did not accept any responsibility for this behaviour. Justice LeBlanc also found that Audi had placed a high level of trust in Mr. Durant in this role as a "customer touchpoint"; his behaviour would have harmed Audi; and the misconduct in question was very serious, striking at the heart of the employment relationship. Justice LeBlanc also rejected Mr. Durant's argument that his taking of the video was no different than security cameras in the workplace, noting that Audi's clients don't expect to be surreptitiously filmed. As a result, Justice LeBlanc found that Audi had just cause to terminate Mr. Durant's employment and dismissed his claim.

This case demonstrates the kind of conduct that may establish just cause in relation to privacy issues and showcases the importance of progressive discipline in establishing just cause.

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