Employment Court of New Zealand

Ravnjak v Wellington International Airport Limited [2011] NZEmpC 31; (2011) 9 NZELC 93,810 (11 April 2011)

Last Updated: 28 November 2011

IN THE EMPLOYMENT COURT WELLINGTON

[2011] NZEmpC 31

WRC 12/11

IN THE MATTER OF proceedings removed in part from the

Employment Relations Authority

BETWEEN DIETER RAVNJAK Plaintiff

AND WELLINGTON INTERNATIONAL AIRPORT LIMITED

Defendant

Hearing: 31 March 2011

(Heard at Wellington)

Counsel: Paul McBride, counsel for plaintiff

David Burton and Charles McGuinness, counsel for defendant

Judgment: 11 April 2011

A. The "video" recordings made and which the defendant seeks to introduce in evidence in the Employment Relations Authority are inadmissible under s 52(2) of the Private Investigators and Security Guards Act 1974.

B. Whether information that emanates from these inadmissible recordings is itself admissible in the Employment Relations Authority and whether the defendant was entitled to rely upon the recordings and information that emanated from them in reaching its decision to dismiss the plaintiff, will need to be the subject of a balancing exercise by the Employment Relations Authority pursuant of ss 160(2) and 103A of the Employment Relations Act 2000 and include the factors identified in this judgment.

C. Costs are reserved

DIETER RAVNJAK V WELLINGTON INTERNATIONAL AIRPORT LIMITED NZEmpC WN [2011] NZEmpC 31 [11 April 2011]

REASONS FOR JUDGMENT OF CHIEF JUDGE G L COLGAN

Background

[1] This judgment decides, as a matter of urgency, the admissibility in evidence of what I will refer to non-technically as a video recording, in personal grievance proceedings currently being investigated by the Employment Relations Authority. The case also raises the broader important question whether, if the video recording was made unlawfully, the employer was entitled to consider and rely on its contents in deciding to dismiss the plaintiff from employment. Also at issue is whether the Authority can consider evidence that is connected to the recording.

[2] These questions need to be heard and decided promptly for several reasons. First, Dieter Ravnjak seeks reinstatement to his former position with Wellington International Airport Limited (WIAL). The Authority's investigation of his personal grievance of unjustified dismissal was to have begun on 25 March 2011, but has been stalled by the referral of these questions to the Court under s 178 of the Employment Relations Act 2000 (the Employment Relations Act). Next, the plaintiff has asked the Authority to reopen its investigation into Mr Ravnjak's application for an order for interim reinstatement which the Authority dismissed in February. The grounds of the application to reopen that investigation are based on the alleged inadmissibility of the video recording which I am told the Authority Member viewed and in reliance upon which the Authority declined interim reinstatement.

[3] For the purposes of determining these evidence admissibility and associated issues, the following is a brief account of the relevant facts.

[4] Until his dismissal in late 2010, Mr Ravnjak was a duty manager and had for a time been the Terminal Services Manager at Wellington Airport. Unbeknown to him, WIAL arranged for the installation of a covert surveillance camera in a room of its Emergency Operations Centre (EOC), to which it said Mr Ravnjak should not have had access in the normal course of his duties. As a result of observations and

analysis of recordings of Mr Ravnjak taken from the camera in the room, WIAL launched an investigation into his alleged misconduct as a result of which he was dismissed. WIAL relied substantially on observations and analysis of the recordings in making its decision to dismiss Mr Ravnjak. In opposing his application for interim reinstatement in employment before the Employment Relations Authority, it again relied on the contents of the video.

[5] Shortly before the Authority's substantive investigation meeting was to commence, counsel for Mr Ravnjak's received a signed WIAL witness statement of Cedric Hardiman dated 15 March 2011, dealing with the manner in which the surveillance camera and associated equipment were installed and monitored. As a result of receiving Mr Hardiman's brief of evidence, counsel, Mr McBride, objected to the admissibility of the video recordings pursuant to s 52 of the Private Investigators and Security Guards Act 1974 (the PISG Act) which provides as follows:

52 Private investigator not to take photographs or make recordings without consent

(1) Every person who, in the course of or in connection with the business of a private investigator,—

(a) Takes or causes to be taken, or uses or accepts for use, any photograph, cinematographic picture, or videotape recording of another person; or

(b) By any mechanical device records or causes to be recorded the voice or speech of another person,—

without the prior consent in writing of that other person, commits an offence [against this Act]:

Provided that nothing in this subsection shall apply to the taking or using by any person of any photograph for the purposes of identifying any other person on whom any legal process is to be or has been served.

(2) No photograph or cinematographic film, or videotape recording taken, or other recording made, in contravention of subsection (1) of this section shall be admissible as evidence in any civil proceedings.

[6] Although this provision has been repealed with effect from 1 April 2011, it was in force at the time concerned. Mr Hardiman was, at relevant times, a licensed private investigator and security guard.

[7] On 25 March 2011, the Authority removed that part of Mr Ravnjak's personal grievance affecting these evidence admissibility issues to the Court for decision under s 178 of the Employment Relations Act.

[8] By consent, I have taken account of a number of documents as well as legal submissions made by counsel. In addition I received (without objection) the affidavit evidence of an expert witness for the plaintiff relevant to the surveillance question. The documents considered include the statement of problem and statement in reply in the Employment Relations Authority, the witness statement of Mr Hardiman dated 15 March 2011, and an affidavit filed subsequently by him in the Authority sworn on 23 March 2011, and the witness statements of other witnesses intending to give evidence to the Authority. I have not viewed the video recordings or any parts of them and have not taken account of summaries of their contents in those documents before the Court. Finally, and significantly, I heard evidence from Mr Hardiman who was cross-examined by Mr McBride.

Relevant facts

[9] The relevant background evidence concerning the surveillance camera, its use and the storage and retrieval of "footage", is as follows. Mr Hardiman manages the airport's parking facilities and taxis. This is a part-time position of about 30 hours per week. He is also the owner and operator of a longstanding business known as Private Eye Investigations Ltd (Private Eye). In that connection, Mr Hardiman is a registered and licensed private investigator and a licensed security guard under the

PISG Act. Private Eye is a member of the New Zealand Institute of Professional Investigators and has several employees working for it. One aspect of its work is to manufacture or assemble hidden camera systems for particular uses.

[10] On a number of occasions the airport's General Manager, John Fuller, has engaged Mr Hardiman's business to provide advice about matters that may require investigation and, in this connection, Mr Hardiman has installed a number of covert surveillance cameras which have resulted in the apprehension of a number of people at the airport. When he was approached by the airport's Chief Fire Officer, John Barnden, to install a surveillance camera in the EOC room, Mr Hardiman agreed to

do so, but at no cost, in consideration of the volume and/or value of similar work that he receives from the airport.

[11] Mr Hardiman will tell the Authority that after checking the camera and recording equipment on 23 November 2010, he was asked by Mr Barnden to review the footage and did so. As a result of his observations he drew some incidents to Mr Barnden's attention and subsequently, at Mr Barnden's request, viewed further video footage and saved it to a hard drive. Mr Hardiman will say that he showed Mr Fuller the footage. As a result of its enquiries, prompted by the retrieved images, WIAL dismissed Mr Ravnjak.

[12] As already noted, after having been alerted to the challenge to the admissibility of the video evidence, Mr Hardiman then swore an affidavit which was filed in the Authority by WIAL. In this, Mr Hardiman now claims that when he installed the camera he was working for the airport company and was paid his usual wages or salary for that time. He reiterates that he received no payment to install the camera and recording equipment or to review the footage and did not expect anything in return. He says that when he reviewed the recorded footage and "logged it", he was also "on airport time", what I infer to mean, in his position as Car Park/Traffic Management Officer. Mr Hardiman says he reviewed the footage at the airport premises and did not use his company's equipment including letterhead. Finally, he claims that when he installed the camera he did so as a licensed security guard rather than as a private investigator.

[13] Having observed Mr Hardiman give evidence and cross-checking this against arguable inconsistencies between his signed witness statement when this admissibility issue had not arisen, and his affidavit sworn after it had, I regret to conclude that I cannot reliably accept much of his more recent evidence. It appears to have been prepared with a view to attempting to persuade the Authority or the Court of some inherently improbable propositions which, if accepted, might excuse him and, thereby, the defendant from provisions of the PISG Act. Mr Hardiman was distinctly vague and unconvincing when cross-examined, for example about his company's website and the information contained on this. He sought to distance

himself from a number of now inconvenient claims made on the website about his company.

[14] Mr Hardiman purported to portray a surprising level of ignorance about the legal obligations of licensed private investigators and security guards. For these and other reasons which must be and were sufficiently compelling to disbelieve him, I find his original signed witness statement for the Authority to be a more credible account of relevant events than his subsequent affidavit. Having so assessed Mr Hardiman's current and proposed evidence, I make the following factual findings.

[15] The purpose of having Mr Hardiman install and monitor the surveillance camera was to investigate who was using the EOC room and the purpose of that use. It was not, or at least not predominantly, to ensure the security of the room, that is to ensure that it remained secure against those not permitted to be there. In this sense, therefore, Mr Hardiman's role was as an investigator and not as a security guard.

[16] It does not change Mr Hardiman's role, that he did not render an invoice to WIAL for the work performed by him. Although he and his company usually charge customers for work performed, including the installation and monitoring of covert surveillance cameras, the absence of a charge for the work performed for WIAL does not mean that what would otherwise have been the work of a licensed private investigator is not so.

[17] Even accepting Mr Hardiman's enigmatic evidence that he was at work on parking and taxi issues in the early hours of the morning when he also installed the surveillance equipment, it does not affect the nature of the work performed by Mr Hardiman that he may have undertaken it during periods when he was paid by WIAL as an employee. It was not a part of his usual duties of managing vehicle parking at the airport and taxis to install surveillance equipment. Mr Hardiman was asked to advise on, and then install and monitor, the surveillance camera and recording equipment because of his expertise as a licensed private investigator rather than because of any expertise in his management of parking and taxis.

[18] I find, on the evidence to be put forward by the defendant at the Authority's investigation, that Mr Hardiman was performing work of the nature of that performed by a private investigator.

[19] It is common ground, also, that this was a covert surveillance operation in the sense that the camera and recording equipment were concealed and no one, including in particular the plaintiff, was told of the installation and operation of this equipment, let alone asked for their consent to be filmed. To have done so would, of course, have been self-defeating in the

sense that any wrongdoers whom WIAL hoped to catch out would be alerted to the company's plan and would modify their behaviour accordingly. Nor, of course, was it known who was entering and using the room under surveillance so this person's consent could not have been sought in any event.

WIAL's case for admissibility

[20] The defendant's assertion that s 52 of the PISG Act is inapplicable to the present case is multi-faceted and each of the points made by counsel in support of that broad submission must be dealt with. That is because if any one of them is right, then there can be no question of inadmissibility or unlawfulness under s 52.

[21] First, Mr Burton submitted that the recordings made by Mr Hardiman were none of the three described in s 52(1)(a) being a "photograph", "cinematographic picture", or "videotape recording". Counsel submitted, using the *Concise Oxford Dictionary*1 that a "video tape" is a "magnetic tape for recording television pictures and sound", that a "cinematograph" is "an apparatus for showing motion picture films" and that "photograph" is "a picture taken by means of the chemical action of light or other radiation on a sensitive film".

[22] As to whether the records obtained from the surveillance camera and relied upon by the defendant amount to "any photograph, cinematographic picture, or video tape recording ...", there is some but not a lot of evidence about the technology from Mr Hardiman. He describes the surveillance camera as "a video camera". He

describes the storage device as a "Digital Video Recorder (DVR)". He says that the

1 RE Allen (ed) (8th ed, Clarendon Press, Oxford, 1990).

camera is motion activated so that when someone walks into its coverage area it will be activated. As I understand Mr Hardiman's intended evidence, the camera is set to record constantly but, once activated, records what is described as "a signal track" which then commences retrospectively by several seconds so that whatever is captured includes the immediate pre-movement scenes. Mr Hardiman says that this "track" that is recorded is "watermarked" so that it cannot be changed or deleted. He says that the DVR used will record three months of footage before then deleting its oldest footage at the same rate as it creates new footage.

[23] Mr Hardiman says that after viewing some of the footage, he saved this to the "hard drive". He then says he made up a time log, which consisted of his writing what the person shown on the video appeared to be doing, with dates and times that corresponded to the time of the recording. At paragraph 22 of his intended evidence, Mr Hardiman says:

Every time I do work I give the people the evidence, normally it's the police, then the customer deals with it. As long as everything is logged correctly and the video footage is correct with the report I have hands off.

[24] Counsel submitted that what the evidence discloses are digital images produced, stored and retrieved by electronic processes, are very different from the three media described above. Counsel submits that these digital images are therefore not covered by s 52 as enacted in 1974 when, as a matter of judicial notice, I find such digital/electronic technologies were still to be invented or at least not yet in use. Mr Burton submitted that if Parliament had intended s 52 to extend to other forms of record gathering and record keeping, it would have used phrases of more general expression. Counsel pointed to s 4 of the PISG Act which uses the catch-all "or similar device[s]" in relation to cameras so that the use of digital recording is specifically authorised for security guards under s 4(1)(c) and (e) of the PISG Act but outside the scope of s 52.

[25] When I raised with Mr Burton whether his submission meant that the products of digital still cameras, which are now in use almost universally, did not meet the definition of "photograph" under s 52, counsel had to concede that as a matter of logic and consistency, they would not. That is despite the fact that the images from digital still cameras, that most people still refer to as "photographs", are

produced by a device that looks little different from many still cameras used in 1974 and produce results in the form of "photographs" that are essentially little different from photographs of that era taken by means of the chemical action of light on a sensitive film. I imagine that most private investigators now use digital still cameras for the purpose of taking "photographs" in the course of their work, rather than film still cameras as they were in pre-digital 1970s days. This pertinent example reflects the challenges that new technologies throw down to old legislation. To limit s 52 to

1974-era technology would be to emasculate its effect in 2010 when it was in force.

[26] Section 5 of the Interpretation Act 1999 requires that the text of a statute be interpreted and applied not merely according to the words and phrases used but in the context of the legislative purpose. That enables courts, in appropriate cases, to continue to give life to statutes passed at times when there could have been no contemplation of future ways of doing the same things or where inventions or technological developments were such remote possibilities that they could not be expressed adequately in the statute of the time. That is especially so in respect of rapid technological development of which the general field of photography, both still and moving, is a prime example.

[27] As Mr McBride submitted, courts take account of these realities. In *Frucor*

*Beverages Ltd v Rio Beverages Ltd*2 the Court of Appeal noted:

... the Court should strive to arrive at a meaning which gives effect to [Parliament's] intention. The principles of interpretation which assist the Courts in that exercise are well established. They reflect commonsense propositions and should, therefore, be applied sensibly. Thus, it would be less than sensible to presume that Parliament intended to legislate in a manner which is absurd. Indeed, it would be uncharitable, if not presumptuous, for the Courts to approach the task of interpreting Parliament's legislation on any other basis. Thus, the Courts have come to give the concept of "absurdity" a wide meaning, using it to include virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief.

[28] In this connection, Mr McBride pointed to the long title to the PISG Act

which is "... to provide for the licensing of private investigators as a means of

2 [2001] 2 NZLR 604 at [28].

affording greater protection to the individual's right to privacy against possible invasion by private investigators, ...".

[29] Other examples of a dynamic approach to legislative interpretation include *Commerce Commission v Telecom Mobile Ltd*3 in which telemarketing activities were found to be covered by the Door to Door Sales Act 1967 and *R v Fellows*4 in which the English Court of Appeal considered that changes in recording technology were encompassed by an historical statute. Most recently the Court of Appeal has

reiterated that approach in the field of technology in *Tararo v R.*5 So, Mr McBride

submitted that, on a purposive approach to the interpretation and application of the statute, what is prohibited is private investigators taking any form of photographic or video imagery of persons without their consent to do so.

[30] In these circumstances I find that the recordings made and relied on in this case fall within the description of "video tape recording" or, if not, then the broader description of "photograph" or "cinematographic film".

[31] The next issue developed by Mr Burton that would preclude the application of s 52 of the PISG Act, was that Mr Ravnjak had given written consent to being recorded as he was by the covert surveillance equipment. This was through the indirect mechanism of the plaintiff's individual employment agreement to which it is said he was subject, and that agreement's incorporation of the defendant's employee handbook. The employee handbook states in its introduction to a section entitled "Control of information retained on video and audio recordings" that the defendant "records a significant quantity of audio, video and photographic data on a daily basis" and gives, as attachment A, some detail of the defendant's "Digital video storage system" including the recording of "digital camera images" on the airport's premises.

[32] In addition, Mr Burton submitted that Mr Ravnjak had it drawn to his attention specifically that his employer would and could record him whilst he was

3 [2005] NZCA 218; [2006] 1 NZLR 190 (CA).

4 [1997] 2 All ER 548.

5 [2010] NZCA 287, (2010) 24 CRNZ 888.

employed by it and that, together, these satisfied the requirement for prior written consent in terms of s 52(1).

[33] Finally, in this regard, Mr Burton submitted that the company's employee handbook purports to reserve to the company the right to conduct its own investigation and to take disciplinary action and, in particular, provides that employees "are obliged to co-operate fully in any investigation made by the company". Mr Burton submitted that this obligation extends to an agreement that the company can use cameras where and when necessary to detect potential misconduct or breaches of safety or security.

[34] I do not agree that, either individually or collectively, these matters constitute the written consent contemplated by s 52. To be true consent to a private investigator recording personal images, the consent must be to a known occasion(s) and/or place(s), and include other such particulars of the intended surveillance and recording. True informed consent given in writing cannot be achieved by the several side-winds of very generalised advice in an employee handbook. I do not accept that Mr Ravnjak's signature on his individual employment agreement constitutes written consent to what occurred in this case in terms of s 52 of the PISG Act.

[35] Mr Hardiman claims that he performed the work in question for WIAL as a licensed security guard and not as a licensed private investigator. He held dual licences under the Act, that is as a private investigator and a security guard. He asserts that

the Act allowed security guards to install surveillance equipment but that the provisions of s 52 of the PISG Act do not apply to such work performed by a security guard.

[36] Mr Burton relied on s 4(1)(c) of the PISG Act which defines “security guard”

as:

... a person who carries on any business, either by himself or in partnership

with any other person, whereby ... for valuable consideration he—

...

(c) Installs on, operates on, causes to be operated on, repairs on, or removes from any part of any premises that are not owned or

occupied by himself or his firm or any of his partners, for the

purpose of detecting the commission of an offence by any person on

those premises, any camera or similar device; ...

[37] The flaw in this argument is that Mr Hardiman’s purpose was not to detect the commission of an offence. Rather, his purpose was to assist WIAL to determine who may have been using the EOC room, potentially, contrary to his or her employment entitlement to do so. Nor, for the sake of completeness, could Mr Hardiman’s installation of the camera and recording equipment have come within s 4(1)(e) which includes, within the definition of security guard, a person who “[m]onitors any ... camera or similar device, that is on any premises that are not owned or occupied by himself or his firm or any of his partners.” The monitoring of a camera is not the same as its installation or operation covered by s 4(1)(c) and the monitoring under s 4(1)(e) deals with a camera or similar device put there for the purposes for which it was installed, to detect the commission of an offence by any person on those premises.

[38] This confirms my broader finding that Mr Hardiman’s relevant activities

were in the nature of private investigation as opposed to security guarding.

[39] Next, Mr Burton argued that s 51 of the PISG Act means that Mr Hardiman was not acting in the course of business as a private investigator because he did not render an account for his services. It follows, in counsel’s submission, that because Mr Hardiman did not charge WIAL for his services in installing and monitoring the surveillance camera and associated recording equipment, s 52 of the PISG Act is not applicable to his activities.

[40] Section 51 of the PISG Act provides:

51. Private investigator to render account to principal

(1) Every holder of a private investigator's licence—

(a) Within 7 days after being requested to do so by any person for whom the licensee or his firm is acting in the course of the business of a private investigator; or

(b) If no request is made, then within 28 days after the licensee or the firm ceases to act for that person—

shall render to that person an account in writing setting out full particulars of all money that has been received by the licensee or the

firm for or on behalf of that person, and the application of that money.

(2) Any licensee who has rendered an account in accordance with subsection (1) of this section in respect of any money expended by him or by his firm in the course of acting for any person may appropriate any money standing in his account to the credit of that person in satisfaction of the account rendered.

(3) Except as provided in subsection (2) of this section, every licensee shall—

(a) Within 7 days after being requested to do so by any person for whom the licensee or his firm is acting in the course of

the business of a private investigator; or

(b) If no such request is made, then within 28 days after the licensee or firm ceases to act for that person—

pay to that person all money held for that person ....

(4) Every licensee who contravenes subsection (1) or subsection (3) of this section commits an offence and is liable on summary conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding $500 or to both.

[41] Counsel's submissions misinterpret the purpose and effect of s 51. In essence, it requires a private investigator to render a fully particularised written account of all money received and its application either within seven days of being requested to do so or within 28 days after ceasing to act. It is a provision for the protection of customers of private investigators to whom money has been paid. The section does not have the consequences contended for by the defendant.

[42] Next, Mr Burton argued that Mr Hardiman was not acting as a private investigator because, pursuant to s 3 of the PISG Act, he did not carry on business at WIAL's request as a client of the airport for valuable consideration. This submission invokes s 3(1) of the PISG Act which is as follows:

In this Act, **private investigator** means a person who carries on any business, either by himself or in partnership with any other person, whereby—

(a) At the request of any person as a client of the business and not as a member of the public or of any section of the public; and

(b) For valuable consideration—

he seeks or obtains for any person or supplies to any person any information described in subsection (2) of this section.

[43] The evidence establishes that, on occasions, Mr Hardiman has performed similar work for WIAL as a client of his business and for valuable consideration. Section 3(1) does not mean that if a private investigator does not charge a client or business for a particular job, he or she ceases to act as a private investigator in respect of that work. Rather, s 3(1) defines, in part, a private investigator by

reference to the nature of the business carried on. It is clear that Mr Hardiman's business (Private Eye) met the definition in s 3(1) including, on occasions, in its business dealings with WIAL. Simply because, on this occasion, Mr Hardiman agreed not to charge WIAL for his services as a private investigator, does not mean that the other provisions of the Act did not apply to his activities.

[44] For the foregoing reasons, I conclude that s 52 of the PISG Act applied to the installation, monitoring and recording of the covert surveillance equipment in this case.

Evidence admissibility – Decision

[45] I am satisfied that when Mr Hardiman installed and used the covert surveillance camera and associated recording equipment, he did so in the course of or in connection with the business of a private investigator pursuant to s 52(1) of the PISG Act. He did not have the prior consent in writing of Mr Ravnjak to do so.

[46] Because it is not the function of this Court to determine such issues, I expressly do not find whether Mr Hardiman may have committed an offence against the Act. My concern is only with the admissibility of evidence under subs (2), although this requires the Court to be satisfied of proof of the elements in subs (1). I also make no finding as to criminality because there are or may be criminal law principles that I have not applied to this analysis and because the onus and burden of proof in determining the commission of offences are significantly different from those applied by this Court in civil proceedings. Finally, I make no such finding because neither Mr Hardiman nor WIAL is on trial or has otherwise had an opportunity to exercise the legal protections available to defendants in such proceedings.

[47] Alternatively, if it was WIAL which took or caused to be taken or used or accepted for us, the surveillance camera recordings, I find this was in connection with the business of a private investigator. That is because WIAL did so through Mr Hardiman in his role as a private investigator. Similarly, I do not determine whether WIAL may have committed an offence against the PISG Act.

[48] I conclude that the phrase in s 52 of the PISG Act, "civil proceedings", includes an investigation of a personal grievance by the Employment Relations Authority at which evidence is to be heard by the Authority. The prohibition upon using evidence obtained unlawfully under s 52 therefore applies to the Authority's investigation meeting.

[49] Section 160(2) of the Employment Relations Act gives the Employment Relations Authority a very broad discretion to take into account evidence, including evidence which is described as "strictly legal evidence or not". However, this power is subject to the express and absolute inadmissibility prescribed by s 52(2) of the PISG Act.

[50] Although the Authority was not made aware of this at the time it investigated Mr Ravnjak's application for interim reinstatement, the prohibition against the use of the recordings would logically have extended also to that inquiry and it follows that the Authority was and remains prohibited by s 52 from viewing the recording or parts of it, as I am told it did, for the purpose of determining that aspect of Mr Ravnjak's case. The recordings are and were inadmissible in evidence in the

Authority.

“Fruit of the poisonous tree” - Discussion

[51] It is an altogether different and more difficult question to determine whether, as Mr Ravnjak contends, the employer should be unable to use any information obtained by it as a result of its recourse to the illegally obtained video recordings. Such an example would include the information gained from the defendant’s interviews of the plaintiff in the course of which he was asked questions by the employer’s representatives which relied on information revealed by the unlawfully recorded footage. And finally, the Court must consider whether the Authority should be prohibited from taking and acting on evidence that is traceable to the unlawful recordings.

[52] Evidence given to the Employment Relations Authority is not governed by the provisions of the Evidence Act 2006. Rather, s 160(2) of the Employment

Relations Act provides that “[t]he Authority may take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.”

[53] As in the case of admissibility of evidence in this Court, it is useful to examine how the courts of general jurisdiction deal with such an issue and, in particular, what, if anything, the Evidence Act says about it. The admissibility of illegally obtained evidence in civil proceedings is generally not addressed under the Evidence Act.6 Such matters are, however, the subject of provisions in that legislation relating to criminal trials but even then, there is no presumptive or absolute doctrine prohibiting consumption of the fruit of a poisonous tree as Mr

McBride has categorised his argument in this case. Even in criminal proceedings in which it might be thought that more strict and more strictly enforced rules against the admission of unfairly or unlawfully obtained evidence might apply, courts are required to perform a balancing exercise weighing, among other considerations, the nature and extent of the impropriety in obtaining the evidence, its probative value, the seriousness of the subject matter and other like considerations.

[54] Section 30 of the Evidence Act (“Improperly obtained evidence”) relates to criminal proceedings in which the prosecution offers or proposes to offer evidence alleged to be improperly obtained. Subsection 2 requires the trial Judge to find, on the balance of probabilities, whether the evidence was improperly obtained and then:

(b) if the Judge finds that the evidence has been improperly obtained, determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety but also takes proper account of the need for an effective and credible system of justice.

[55] Subsection 3 sets out some, but not all, of the matters to which the Court may have regard in that exercise. These include:

(a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it:

(b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith:

(c) the nature and quality of the improperly obtained evidence:

6 However, see Evidence Act s 90.

(d) the seriousness of the offence with which the defendant is charged:

(e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used:

(f) whether there are alternative remedies to exclusion of the evidence which can adequately provide redress to the defendant:

(g) whether the impropriety was necessary to avoid apprehended physical danger to the police or others:

(h) whether there was any urgency in obtaining the improperly obtained evidence.

[56] Subsection 4 provides that the Judge must exclude any improperly obtained evidence if, in accordance with subs 2, the Judge determines that its exclusion is proportionate to the impropriety.

[57] Subsection 5 defines improperly obtained evidence as including evidence obtained in breach of any enactment or rule of law by a person to whom s 3 of the New Zealand Bill of Rights Act 1990 applies or unfairly.

[58] Finally, subs 6 requires in criminal proceedings the Judge to take into account the Chief Justice’s practice note guidelines which effectively now apply what were formerly known as the Judges’ Rules.

[59] In addition to the Authority’s broad powers to admit evidence, it is necessary also to consider the effect of s 103A of the

Employment Relations Act which sets out the criteria by which the Authority will determine the justification for Mr Ravnjak's dismissal. So, in the context of this issue, one of the questions that the Authority will need to consider, if the employer relied in its inquiries that led to dismissal upon an unlawfully obtained recording, is whether a fair and reasonable employer would have done so in all the circumstances at the time.

[60] There is apparently no suggestion that the WIAL managers who investigated Mr Ravnjak's alleged misconduct and made the decision to dismiss him, were aware or suspected that the recording on which they relied may have been obtained unlawfully. The position is arguably different in respect of Mr Hardiman who, as a licensed private investigator and security guard, would be at least more likely to be aware of his legal obligations under that legislation. In this context, consideration of

the seriousness of the illegality may be appropriate. The offence created by s 52 is only punishable by relatively modest fine and the primary remedy of exclusion of the recording has already occurred.

[61] Other relevant factors will include that an international airport is an area in which it is likely that there will be significant covert surveillance of persons, including airport employees, because of the greater emphasis upon security than in many other workplaces. Although it is a contentious issue whether Mr Ravnjak was entitled to have access to the EOC room, it seems beyond doubt that access to it was limited and controlled for good reasons and so it is natural that the defendant would wish to both ensure this and to be able to monitor possible breaches of the room's security.

"Fruit of Poisonous Tree" - Decision

[62] For the foregoing reasons I decide that although the recorded surveillance material is inadmissible in evidence in the Employment Relations Authority, the defendant is not necessarily prohibited from adducing evidence in justification of Mr Ravnjak's dismissal that was obtained as a result of, or is otherwise connected with, the surveillance records.

[63] Whether and to what extent the Authority may admit evidence that emanates from them is a question to be determined by the Authority under s 160(2) of the Employment Relations Act. Such information and evidence is not necessarily excluded from consideration by the Authority.

[64] Nor will the unlawfulness of the obtaining of the recordings necessarily cause the plaintiff's dismissal to have been unjustified. Although it may be said, even convincingly, that a fair and reasonable employer will not act unlawfully in respect of its employees, that alone is too simplistic an analysis and does not provide a properly considered and balanced decision under s 103A. Again, this will need to be assessed by the Authority in light of all relevant and admissible evidence and s

103A.

[65] These are questions for the exercise of the Authority's discretion under these sections and in light of the guidance provided by this judgment about factors that will be relevant to those discretions.

GL Colgan
Chief Judge

Judgment signed at 3 pm on Monday 11 April 2011