Appeal No. UKEATPA/0401/12/SM
UKEATPA/0861/12/SM
UKEATPA/1279/12/SM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal
On 25 October 2012

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MS A A VAUGHAN — APPELLANT

LONDON BOROUGH OF LEWISHAM & OTHERS — RESPONDENT

Transcript of Proceedings

JUDGMENT

RULE 3 (10) APPLICATION - APPELLANT ONLY

APPEARANCES

For the Appellant	MS A A VAUGHAN (The Appellant in Person)

UKEATPA/0401/12/SM
UKEATPA/0861/12/SM
UKEATPA/1279/12/SM

HIS HONOUR JUDGE PETER CLARK

1. Ms Vaughan, the Claimant before the London South Employment Tribunal is a black African woman who suffers from a medical condition; depression. She is and was at all material times disabled within the meaning of the **Disability Discrimination 1995** and the **Equality Act 2010**.

2. In January 2012 she was employed by the London Borough of Lewisham as a personal adviser providing support to young people seeking jobs and training. Her period of continuous employment with various successive employers began in January 2004. She has now brought a total of eight claims against the Respondent, various of its employees and other companies.

3. The first three claims were heard together by a Tribunal sitting at London South chaired by Employment Judge Balogun over 20 days between 9 January and 3 February 2012. Following some 5½ days deliberations in chambers, that Tribunal delivered itself of a Judgment with reasons on 2 March 2012. All the claims of race discrimination, disability discrimination, victimisation, harassment and public interest disclosure detriment were dismissed. Against that Judgment she has appealed (the first appeal, PA/0401/12/SM).

4. On 19 and 20 April 2012 a PHR/CMD hearing took place before the Balogun Tribunal. It is not clear from the subsequent decision at what point the Employment Judge sat with members and when she did not.

5. Two principal matters were considered; first whether in a fresh claim the claim against an individual, Marina Walters, a member of a separate occupational health provider to the

Respondent, should be struck out. It was and there is no appeal against that ruling. Secondly, the Tribunal considered the Respondent's costs application arising out of the first three claims and awarded the Respondent one-third of their costs in those proceedings to be assessed in the County Court. The Respondent's placed their costs bill at the time at about £260,000. The costs order is appealed in the Claimant's second appeal, PA/0861/12. Further, the question of whether Judge Balogun and her members should continue to deal with the case as brought by Ms Vaughan was considered and the regional Employment Judge directed that that Tribunal should continue to do so. There is no appeal against that ruling.

6. On 2 August 2012, a further PHR/CMD took place before Employment Judge Balogun sitting alone. By her Judgment with reasons dated 7 August, the Judge refused the Claimant's application to admit into evidence covert recordings made at meetings leading up to her eventual dismissal in April 2012; refused to permit the Claimant to refer to without prejudice communications between the parties and made further case management orders in relation to admissibility of evidence which post-dated February 2011 in relation to a stayed part of claim number three which was yet to be heard and also declined to order further and better particulars of the Respondent's amended response.

7. Against parts of that order, the Claimant brings her third appeal, PA/1279/12. All three appeals were considered on the paper sift. The first two were rejected by HHJ David Richardson under Employment Appeal Tribunal rule 3(7) and the third by HHJ McMullen QC also under the rule 3(7) procedure. Dissatisfied with those opinions, Ms Vaughan has exercised her right to an oral hearing under rule 3(10); that is the hearing now before me.

8. For the purpose of these three applications, I was provided with a total of some 2,700 documents; that was totally unnecessary and really must not happen again. Fortunately, I had a day when an appeal settled and I was able to read approximately 1,000 pages. In particular, the Judgments under appeal, the Notices of Appeal and the so called skeleton arguments. To give a flavour of the degree of detail and to which Ms Vaughan went in these appeals, her Notice of Appeal in the first appeal ran to 53 pages and her skeleton argument in that appeal alone ran to 116 pages.

9. Having read into the case as far as it seemed to me was necessary, there were two points which concerned me. The first was the one-third costs order which will translate into an order of approximately £92,000 against this Claimant who is presently not working and who tells me that she is unlikely to work, her working life having been spent in the public sector which, as is well known, is suffering from the cuts. She makes a number of points in relation to that order; first that no deposit order was made, secondly she never received a costs warning letter from the Respondent; she characterises this as a punitive award and she says no account was taken of her medical condition and the fact that she was unrepresented in dealing with this substantial case as a litigant in person.

10. Next are her means to which I have referred. She also refers to settlement offers made by the Respondent. That is a separate matter to which I must return but her point is that this was hardly a misconceived claim if the Respondent was prepared to make substantial offers in settlement. And particularly material in my view is the Tribunal's assessment of the Claimant's credibility at one of the paragraph 28s in the Tribunal's reasons following the substantive hearing. They say this:

> **"Whilst we are in no doubt that the Claimant genuinely believed in the truth of her allegations against the Respondents, that belief was borne out of an absolute refusal to countenance any other possible explanation of the events complained about."**

11. I bear in mind that this order for costs runs from the inception of proceedings. It must therefore follow that the Tribunal or the Judge alone, if she sat alone for the purposes of the cost application by the Respondent, appeared to take the view that the claim was misconceived; that is had no reasonable prospects of success and the Claimant knew that from the outset. All of these matters, it seems to me, ought to be considered at a full hearing in this Appeal Tribunal and I shall therefore permit the costs appeal in the second appeal to proceed to a full hearing.

12. The second matter which particularly concerned me on reading the papers arises under the third appeal and it is in relation to the Judge's finding at the hearing on 2 August 2012 that the Claimant should not be permitted to rely on covert recordings of meetings, telephone calls and one-to-one meetings which occurred during her employment up until its termination. The Claimant tells me that she recorded some 39 hours of conversation; how far that is potentially relevant is a matter for closer examination, but I am told that included amongst those recordings were meetings in the course of the disciplinary procedure which culminated in her dismissal and I bear in mind that she not only has an outstanding complaint of unfair dismissal but also complaints of discriminatory dismissal. She also tells me that the Respondent has disclosed its notes of the relevant meetings and there is or are disputes as to what was said during those meetings which the Claimant submits can only be resolved by an accurate recording.

13. I am again persuaded that this is an aspect which ought to proceed to a full hearing when the Respondent can be heard; this being an Appellant only hearing. Therefore, that ground of appeal in the third appeal will also be permitted to proceed to a full hearing.

14. I return to the first appeal against the substantive judgment dismissing her various claims in the first three claims on their merits. I have read the very lengthy grounds of appeal and skeleton argument and I was struck, as was HHJ David Richardson who dealt with this on the paper sift, with the feeling that this was really an appeal on fact dressed up as a perversity appeal. Having heard Ms Vaughan this morning develop that part of the case, I am even more convinced. I do not accept that the Tribunal ignored authorities, on the contrary, it seems to me that they set out the correct legal tests in the course of their reasons. Secondly, I refer back to the fact finding Tribunal's assessment of the Claimant. It is apparent to me from her submissions that she cannot accept that the Respondent's account is correct and hers is not. I understand that position but it is no basis for an appeal on a point of law to this Tribunal.

15. It seems to me that the Employment Tribunal carefully assessed the evidence over a long period of time, deliberated 5½ days on the detail of the matter, made clear findings of fact, correctly directed themselves as to the law and applied the law permissibly to their findings of fact. In short, I can see no basis in law for challenging the first substantive decision.

16. I have dealt with the costs aspect of the second appeal, which proceeds to a full hearing.

17. As to the third appeal, again I have dealt with the covert recording ground of appeal, which again will proceed to a full hearing.

18. Secondly, as to the without prejudice communications, some of which have been disclosed to me in skeleton arguments in these applications, I am entirely satisfied that the Employment Judge correctly identified and applied the law at paragraphs 10 to 16 of her reasons dated 7 August 2012. She was satisfied that the Respondent had not waived privilege.

In these circumstances it is well established law that no reference may be made to those without prejudice negotiations.

19. Next there is a challenge to the Judge's refusal to admit evidence relating to matters after February 2011 in relation to the stayed part of claim 3, which is to go to a full hearing at the Employment Tribunal. I accept the Judge's view that this is an attempt to re-litigate a case which has been concluded; that is the substantive hearing in relation to claims 1, 2 and part of claim 3, in respect of which the claim has failed and in respect of which I have dismissed the appeal. In these circumstances I see no grounds in law for interfering with that case management ruling any more than there is any basis for interfering with the Judge's ruling that no further and better particulars of the amended response would be ordered.

20. In those circumstances, two issues only will proceed to a full hearing; the remaining grounds of appeal are dismissed.