Appeal Nos. UKEAT/0534/12/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 1 February 2013

Before

THE HONOURABLE MR JUSTICE UNDERHILL

MR B BEYNON

MR J R RIVERS CBE

MS A A VAUGHAN — APPELLANT

LONDON BOROUGH OF LEWISHAM AND OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS A VAUGHAN (The Appellant in Person)
For the Respondents	MR STUART BRITTENDEN (of Counsel) Instructed by: London Borough of Lewisham Legal Services Lewisham Town Hall Catford London SE6 4RU

SUMMARY

PRACTICE AND PROCEDURE – Admissibility of Evidence

In support of a discrimination claim the Claimant sought permission to adduce in evidence 39 hours' worth of covert recordings which she had made of contacts between herself and her managers or colleagues. The Employment Judge refused the application.

HELD, dismissing the appeal, that the Judge had been plainly right to refuse the application as made, since neither the recordings themselves nor any transcripts had been made available. However, it was open to the Claimant to make a more focused application, properly supported by transcripts of the material sought to be relied on.

THE HONOURABLE MR JUSTICE UNDERHILL

1. Until her dismissal on 13 April 2012, the Claimant, who is the Appellant before us, was employed by the London Borough of Lewisham ("the Council"). She had previously been employed by a private-sector company but had become an employee of the Council by the operation of the **Transfer of Undertakings (Protection of Employment) Regulations 2006**.

2. This appeal arises out of a series of claims brought by the Claimant against the Council, her predecessor employer and various of its employees, both during her employment and following its termination. She has brought in all, we are told, nine claims in the Employment Tribunal, though we only have the papers before us relating to seven. The first three, save for one aspect of the third, were consolidated and heard together at London South before a Tribunal chaired by Employment Judge Balogun. The hearing lasted twenty days in January and February 2012 (though some of those were taken as reading days). By a Judgment with written Reasons sent to the parties on 2 March 2012, all of the Claimant's claims were dismissed. She subsequently appealed to this Tribunal, but her appeal was rejected under rule 3. She has sought permission to appeal to the Court of Appeal, but that application has not yet been determined.

3. On 19 April 2012 there was a hearing before the same Tribunal to consider an application on the part of the Respondents – that is, the Council and nine individual respondents – for an order in respect of the costs of those proceedings. By a Judgment signed on 23 April and sent to the parties on 24 April the Tribunal ordered that she pay one third of the Respondents' costs and ordered that the costs in question be assessed in the County Court. The amount for which the Claimant will be liable under that order is not yet known, but the Respondents' schedule

showed costs incurred by them in the sum of approximately £260,000, so that even if that amount is very substantially reduced on assessment her liability is likely on any view to be for a six-figure sum.

4. Three of the remaining claims, and the outstanding issue from the earlier claims to which we have referred, have also been ordered to be consolidated and are listed to be heard over 28 days in, we are told, September and October this year. (We understand that it has not yet been decided whether the two most recent claims will also be dealt with on that occasion.) In relation to those claims there was a hearing on 2 August 2012 before, again, Employment Judge Balogun. It was originally intended to be listed as a case management discussion: but the Judge indicated in correspondence that she would list it as a Pre-Hearing Review in case there were any substantive issues falling to be determined.

5. One of the questions for determination at the PHR on 2 August 2012 was whether the Claimant should be entitled to rely at the substantive hearing on recordings that she said she had made covertly, using a dictaphone, of a large number of interactions between herself and colleagues and managers which she said were relevant to her claim. Employment Judge Balogun decided that that evidence should not be admitted. The Judgment on the Pre-Hearing Review (as it is described, though formally speaking we do not believe it involved a Judgment within the meaning of the Rules), incorporating the Judge's Reasons on the covert recordings issue, was signed and sent to the parties on 7 August.

6. The Claimant has appealed against both the costs order and the decision in relation to the covert recordings. Both appeals were initially dismissed on the sift, but at a hearing before HHJ Peter Clark on 25 October under rule 3 (10) of the **Employment Appeal Tribunal Rules**

1993 (as amended) both appeals were permitted to proceed. We should add for completeness that appeals by her against other case management directions were not permitted to proceed.

7. On the costs appeal (UKEAT/0533/12) the Respondents have been represented by Mr Martin Palmer of counsel, who appeared for them in the earlier proceedings on the costs application. In relation to the covert recordings appeal (UKEAT/0534/12) they have been represented by Mr Stuart Brittenden of counsel, who is instructed in the ongoing proceedings. The Claimant has appeared in person, as she has at all stages in these proceedings. She suffers from depression which it is accepted constitutes a disability within the meaning of the **Equality Act 2010**. She made known to the Tribunal, as indeed she did to the Employment Tribunal in the original substantive hearing, that she might need breaks to help her by way of reasonable accommodation for that disability. We have made it plain that we were willing to accommodate her in that respect, but in the event that has not proved necessary. She likewise made it clear that although she would make, and did make, oral submissions – if we may say so, very clear and succinct submissions – she would rely to a greater extent than a person who is not disabled on the written submissions that she had already put in. Those took the form not only of her skeleton argument for this hearing but of the more extensive skeleton arguments that she had lodged for the purpose of the rule 3 (10) hearing and which we have also taken into account.

8. We propose to reserve our decision on the costs appeal, but we can deal with the appeal about the covert recordings now, and we think it better to do so, since it has an impact on the ongoing proceedings.

9. The relevant background can be sufficiently summarised as follows. The outstanding claims raise issues of disability discrimination, including victimisation and harassment, and, if we may use this shorthand, whistleblower detriment, as well as a claim of unfair dismissal. There are four, or arguably five, relevant sets of Particulars of Claim, in each case very lengthy and detailed. They rely, as is common in such cases, on a large number of interactions over a long period between the Claimant and her colleagues and managers, which are relied on either as actual acts complained of or as evidence of an unlawful motivation. We should say that we have not ourselves had to conduct an analysis of the pleadings to see which of the matters pleaded fall into which category, or, insofar as they are merely evidential, whether they are really relevant.

10. Claims of this kind are notorious as posing formidable problems both for the parties and for the Tribunal. Costs to a legally represented party will almost inevitably be very high and often out of proportion to the amounts at stake in the proceedings. Both this Tribunal and the Court of Appeal have repeatedly encouraged Employment Tribunals to adopt robust and effective case management in order to mitigate the burdens that such claims place both on its own resources and on those of the parties, but regrettably, however good the case management, the state of the substantive and procedural law in this field means that they remain very burdensome. That is indeed illustrated by the fact that Employment Judge Balogun appears, so far as we can see from the materials before us, and as Mr Palmer has confirmed, to have managed the proceedings in which she has been involved so far exemplarily, but the first tranche of these proceedings still involved a hearing of twenty days.

11. Turning from those more general observations to the particular problem, the Particulars of Claim in the five sets of proceedings with which we are concerned refer at several points to

the covert recordings that the Claimant says that she made. She gives in each case an account of a contact or meeting and says that that account is confirmed by the recording and also sometimes that it shows that the contemporary accounts made by the Respondents were inaccurate or indeed deliberately falsified. The recordings include recordings of disciplinary hearings of which official notes were made, but the Claimant says that her recordings show that the official notes were wrong in important respects.

12. We should say, in order to get this point out of the way, that the practice of making secret recordings in this way is, to put it no higher, very distasteful; but employees such as the Claimant will no doubt say that it is a necessary step in order to expose injustice. Perhaps they are sometimes right, but the Council has already made it clear that it will rely on the Claimant's conduct in making these covert recordings as illustrative of the way in which her conduct had destroyed any relationship of trust and confidence between her and it. It will also rely, as relevant to credibility, on the fact that, as it says, when asked whether she had made such recordings she has on several occasions denied it. However, those are not points that are relevant to the present appeal. The law is now established that covert recordings are not inadmissible simply because the way in which they were taken may be regarded as discreditable: see in particular the judgment of this Tribunal, Mr Recorder Luba QC presiding, in **Dogherty v Chairman and Governors of Amwell View School** UKEAT/0243/06. No doubt because of the effect of that authority, this aspect was not relied on by the Judge as a reason for ruling the evidence inadmissible.

13. On 20 April 2012 the Claimant made an application to the Employment Tribunal, copied to the Respondents, "to submit a number of recordings in relation to the above claims", and she gave brief reasons why the admission of those recordings was important. She did not supply

copies of the transcripts. Nor did she supply copies of what I will as a useful shorthand refer to as the "tapes", though as I understand what she says the original dictaphone tapes do not survive and she has transferred their contents to her iPod, so that they are available now only in digital form.

14. The Council's solicitor wrote on 26 April 2012 opposing that application, pointing out that the Claimant had not identified the recordings that she held nor which of them she wished to rely on as evidence or why. There was some further correspondence, of which we need not set out the details. We would only record that by an email dated 26 April the Claimant made it clear that she was not prepared to give further details at that stage. She said:

> **"I do not believe that it is just and equitable for the Respondents to know precisely what recordings I will be relying on ahead of disclosure. This will clearly prejudice my case and put me at a disadvantage. I believe that it is only necessary to advise how many recordings I wish to submit and possibly how long they are in total, and state the relevance of those recordings."**

15. The Claimant gave the limited details identified in that e-mail as part of her written submissions in advance of the Pre-Hearing Review. Those are available on the record, and we need not set them out in full, but so far as the details of the recordings are concerned she said this:

> **"I have dozens of recordings estimated to last around 39 hours in total. They feature all of the individuals that I have named in my claim, including [We will not read out all the names, but there are a large number]. The recordings date from 26 April 2011 to 6 March 2012. The recordings are on an iPod, and I am proposing to submit the iPod and transcripts as evidence. I will also provide the ET with quality speakers and a headset."**

She goes on to say, in general terms, why the tapes are relevant. Essentially, she says that they prove her case in relation to the pleaded contacts of which they are records and that they show that the Council and its staff have lied.

16. As we have said, the Claimant did not at that stage either actually supply all or any of the transcripts. She tells us now that she had not in fact completed making them. She does tell us that she had supplied some extracts already in correspondence to the Respondents' solicitors and had offered to provide the corresponding recordings, but nothing of that material was put before the Tribunal.

17. The Judge gave three reasons for her decision.

18. First, at paragraph 16 of the Reasons she said this:

> **"Given the clandestine nature by which the Claimant obtained the recordings, their credibility may be affected by the risk that they have been tampered with or that they are unreliable in technical terms. To mitigate against this, I informed the Claimant that if the recordings were to be admitted, she would at the very least have to arrange for them to be independently transcribed. The Claimant made clear that she was not willing or able to do this. However, since the hearing the Claimant has written to the Tribunal stating that she is prepared to arrange for the recordings to be transcribed subject to certain condition. Those conditions, set out in her email of 3 August 2012, are unacceptable."**

That email reiterated that the Claimant continued to dispute that it was appropriate for transcripts to be provided at that stage. The conditions referred to were:

> **"1. The ET can offer me the protection that the police have advised me to obtain [we interpose to say that that was there be an order so that no question of breach of the Data Protection Act occurred];**
>
> **2. I am permitted to scrutinise the accuracy of the transcription company's transcripts, like the Respondents would be; and**
>
> **3. I am permitted to submit my own transcripts as evidence in case there are any inaccuracies in the transcription company's transcripts, the transcription company has failed to transcribe any part of the recordings where I have been able to and/or there are discrepancies between my own transcripts/the recordings and the transcription company's transcripts."**

19. The second reason given by the Judge is at paragraph 7 of the Reasons. It reads as follows:

> **"Aside from the issue of transcription, there is also the question of relevance. In her submissions the Claimant described the relevance of the recordings by reference to general**

assertions she makes about the Respondents' case. For example, she says the recordings show:

> **'[…] that LBL lied in their ET3s and equality form response, and managers HR and the hearing officer openly lied during meetings in the SOSR interview statements, SOSR presentation and in the SOSR finding/dismissal letter.'**

When asked by me to me to be more specific about the content of the recordings, the Claimant was not prepared to elaborate but simply referred me back to her written submissions. I was therefore not satisfied that the recordings were of probative value."

20. Thirdly, the Judge said, at paragraph 8:

> **"In addition, given the extent of the recordings (apparently 39 hours' worth) the inevitable time and cost to the Respondent of reviewing them and the amount of Tribunal time that would be needed to consider them, admitting such evidence would be disproportionate."**

21. We think that the Judge unquestionably came to the right decision on the material before her, but we are not so sure about the entirety of her reasoning.

22. The essential reason why we think that the Judge was right was that it was plainly not possible for her to form any view on the relevance, and thus the admissibility, of the tapes on the material that the Claimant had produced. It was not enough to say simply that they all related to matters that were relied on in the pleadings. Relevance is not a black-and-white concept: see the recent review of the authorities by this Tribunal, myself presiding, in **HSBC Asia Holdings BV and Anor v Gillespie** [2011] IRLR 209, particularly at paragraph 13 (pages 213-215). It is necessary in the case of any piece of evidence to assess how relevant it is, and in what way, and also the extent to which the individual matters that may have been pleaded are themselves central to the allegations. This involves questions of degree and, to use the term with which we are all now familiar, proportionality. That being so, the Judge could get nowhere without sight of the transcripts of the recordings on which the Claimant sought to rely, so that an informed view could be taken whether it was indeed proportionate or, to put it another way, necessary in the interests of justice that the recordings be admitted in evidence.

The transcripts were not produced, and indeed when the Judge asked for more details even without the transcript the Claimant simply relied on generalities. (It is convenient to make clear at this stage that although the Claimant said that the Judge was plainly wrong to find that the recordings were not of probative value, that is not in fact what the Judge said. What she said at paragraph 7 of the Reasons was that "I was *therefore* [our emphasis] not satisfied that the recordings were of probative value". That meant that she had not been shown that they were; and the reason why she had not been shown that they were was that the transcripts themselves were not available and the Claimant was not willing to answer detailed questions about why she said they were relevant.) We therefore find that the Judge had no alternative but to make the order that she did in the circumstances that she made it.

23. The reasons why we are not entirely happy with the Judge's reasoning are really twofold.

24. First, we are not convinced, certainly on the material that we have seen, that it should have been treated as a precondition of admissibility that the recordings be independently transcribed in their entirety, which would of course involve very great cost for the Claimant. In our view, as a first step it should have been sufficient for the Claimant to serve on the Respondents her own transcripts with the underlying tapes. It is only at that point that a sensible view could be taken on whether the Council would need or wish to dispute the accuracy of the transcription, in whole or in part. There may be several reasons why it might not have done. It may, for example, be obvious that particular passages are simply irrelevant, so that it does not matter whether they are accurate or not. Or, whether accurate or not, they may not be in any way damaging to the Council. Or the transcription may be, on a sensible view, obviously accurate (or indeed possibly obviously inaccurate). We suspect, though of course we cannot know, that most of this material when produced will not be of such a

character that it is necessary to review it carefully for its accuracy. However, we do fully accept that if a passage is of real importance, the Respondents will wish to check its accuracy. They can do so in the first instance simply by listening to the tape themselves. If that does not make the position clear it is possible, if the point is really of sufficient importance, that a third-party independent expert might have to be instructed to listen and produce an authoritative view. But we take leave to doubt whether that is really likely to be necessary. In any event, no-one will know for certain until the material has been produced. The Judge referred to the possibility that the recordings had been tampered with. No doubt that is a possibility that has to be borne in mind, but unless there were particular reason to believe it had been the case it does not seem to us to be justifiable to insist that there be independent transcription from the start to guard against that possibility; indeed, independent transcription would not of itself address the risk of tampering in the more technical sense.

25. We accordingly have reservations about the first reason that the Judge gave. As regards the third, which related to proportionality, the Judge's reasoning is very short. If all she meant was that it is highly unlikely that 39 hours' worth of recordings would need to be referred to, she is no doubt right. We strongly suspect – though, to repeat myself for the second or third time, we cannot know until the material has been produced – that nothing like that amount will require to be referred to, if anything is; but that is not a decision that can safely be taken at this stage. If all the Judge meant was that, as with relevance, it had not been proved, so be it; but clearly a blanket ruling going further than that would not be justified.

26. It follows that, although we dismiss the appeal because the Judge's order was right in the circumstances in which it was made, we do not believe there is any absolute reason why none of these recordings should be admissible in evidence. It is not implausible – we can put it no

higher – that parts of this 39 hours of material will in fact be potentially relevant and ought to be admitted in the interests of justice. The question arises whether if the Claimant were now to make a fresh application to the Employment Tribunal, producing the transcripts and the tapes of the material on which she wishes to rely, and accompanying them with a clear explanation of why they are said to be relevant, she might get a different result. It is in our view highly unlikely that on such an application the Employment Judge would rule all 39 hours' worth of material relevant or admissible, but it might be another matter if the Claimant made a focused and selective application asking for permission only in relation to a much more limited quantity of material.

27. Mr Brittenden submitted that, whether that was so or not, it was too late for the Claimant to be permitted to make such an application; she should not have two bites of the cliché'd cherry, and, having once made an application on an inadequate basis, she should not be allowed to correct the mistake that she had made. We are not convinced that that is necessarily a knock-out answer. Although it is quite right that the general practice in the Employment Tribunal is that case management decisions should not be revisited unless there has been a material change of circumstances, but it was made clear by Elias J in **English Heritage v Hart** [2003] ICR 655 that there was no absolute rule to that effect, and that exceptionally a party might indeed be allowed a second bite of the cherry if that were in the interests of justice.

28. It is not within our power, and would not in any event be right, for us to direct that the Appellant be allowed to make a further application of the kind we have discussed above; but we do believe that it would be helpful and in the interests of justice if we were to indicate that in our view the Tribunal should at least consider such an application if made. We wish to make it quite clear that we express no view on whether it should be allowed if made; nor do we say

anything about the questions of costs that might arise on such an application. Further, although we have expressed the view that the "second bite of the cherry" point is not necessarily decisive, that issue is not before us today, and it will be open to the Council to object on those grounds if it chooses.

29. It may be helpful if we say one thing more. Even if such an application is made, and is made fairly soon, it does not follow that it needs to be determined at that stage. The Claimant herself pertinently referred to observations in the cases that questions of admissibility are generally best decided by the tribunal hearing the substantive case rather than on a preliminary application. As I discussed in **Gillespie**, sometimes that is not possible; but, other things being equal, one course that the Tribunal might wish to consider would be to postpone any final decision until the start of the hearing or at some point during it. It is common experience that issues can look very different once a case is underway to how they do in the preparatory stages. We say "other things being equal" because there may be good reasons why a policy of "wait and see" is not practicable or is not fair: the Council may, for example, need to have questions about independent transcription or authenticity decided in advance of the hearing. None of this can be known at this stage; we merely raise the possibility that even if an application is made early, as it should be, it does not necessarily have to be determined straightaway. The most important thing is that the Council receives at as early a stage as possible the materials on which the Claimant wishes to rely – with, as we have already said, the supporting tape and an explanation of its alleged relevance – so that it can consider what course to take. We have spoken of an application to the Tribunal; of course, we do not rule out the possibility that the matter can be dealt with by agreement.

30. We would mention, only because the Claimant raised it with us, that so far as we can see a question of admissibility of this sort is a case management question that would fall to be taken, if it had to be taken in advance of the hearing, by the Judge alone. Our provisional view is that a ruling of this kind would not constitute an issue of the kind referred to in rule 18 (3) (b), but we have not heard detailed argument on the point and should not be taken as having made a definitive ruling.

31. Mr Brittenden reminded us of the enormous burden that these claims are placing on the Council. We would not want it to be thought that we were unaware of that; but, as we have already said in our earlier remarks, regrettable though it may be, these burdens are inevitable when claims of this sort are brought, and it would not necessarily be right for the Tribunal, in order to mitigate what proportionately would only be a small part of that burden, to exclude evidence that was, if this were shown, of real importance.