IN THE EMPLOYMENT APPEAL TRIBUNAL **APPEAL NO: UKEAT/0534/12/SM**

BETWEEN:

MS A. A. VAUGHAN

Appellant

and

(1) LONDON BOROUGH OF LEWISHAM & ORS

Respondents

RESPONDENTS' SKELETON ARGUMENT: COVERT RECORDINGS

References to the Core Bundle are [CB##], LBL's supplementary bundle [RSB##], Appellant's supplementary bundle [ASB##].

1. This skeleton argument is provided on behalf of London Borough of Lewisham (hereafter 'LBL') and all named individual Respondents in respect of the Appellant's (A's) appeal concerning the issue of covert recordings. By reason of the EAT's order that skeleton arguments must not exceed 6 pages[1], these submissions should be read in conjunction with LBL's Answer [CB 72-82].

2. At a PHR/Case Management Hearing on 2 August 2012, the London South ET refused A's application to admit covert recordings. LBL relies upon the reasons contained in the judgment (promulgated on 7 August 2012) and/or for the reasons set out in its Answer [CB 72-82].

3. On 1 April 2011 A's employment transferred to LBL (by operation of TUPE). She has issued 9 Claim Forms against LBL and others. . A was dismissed on 13 April 2012 following a SOSR hearing arising out of a relationship breakdown [CB 572]. Claims 1-3 have been heard. The remainder are set down for a 28 day hearing late in 2013.

[1] See Order of HHJ Peter Clark sealed on 29 October 2012, @ para 8 [CB 71].

4. On 20 April 2012, A applied to adduce the recordings [RSB [2]. On 23 July 2012 A revealed that she had '... dozens of recordings estimated to last around 39 hours in total.' They are said to span between 26 April 2011 to 6 March 2012 (nearly 1 year). A had submitted detailed grievances pre-dismissal and had participated in a SOSR hearing. She never disclosed the existence of the recordings or relied upon them.

5. THE PHR JUDGMENT: 7 August 2012: The ET refused A's application to submit the covert recordings. The reasons are summarised at paragraphs 3 – 9 of the Judgment [CB 4][2]. The Tribunal's reasons fall into three categories (which must be considered cumulatively):

   (1) The need for the recordings to be independently transcribed (para 6).
   (2) The 'probative value'/relevance of the recordings (para 7).
   (3) The proportionality of adducing the evidence (para 8).

6. This appeal involves the exercise of discretion. The authorities are clear as to the limited extent to which an appellate court may interfere with an ET's exercise of discretion. It is well established that considerable latitude should be given to ET's in respect of case management matters of this type and/or the exercise of discretion[3]. Such decisions should not be disturbed, even if an appellate body might have chosen to exercise the discretion differently. The guidance in three key authorities should be borne in mind: ***Gayle v Sandwell & West Birmingham Hospital NHS Trust [2011] EWCA Civ 924, [2011] IRLR 810, [2012] ICR D3*** (per Mummery LJ @ paras 21 – 22); ***X v Z Ltd [1998] ICR 43*** (per Waite LJ at p 54D-E); and ***Noorani v Merseyside TEC Ltd [1999] IRLR 184*** (per Henry LJ @ paras 30 – 35).

7. In ***X v Z Ltd [1998] ICR 43*** Waite LJ said at pp 54D-E:

> "This case provides a salutary example of the value of the rule that the tribunals themselves are the best judges of the case management decisions which crop up every day as they perform the function, an important but seldom an easy one, of trying to do justice with the maximum of flexibility and the minimum of formality to the problems that arise from the employment relationship and its termination. Decisions

[2] For completeness, after the ET had given its ruling, following the hearing A emailed proposing that LBL bear the costs of transcription, and that she would pay 'after winning my case' [ASB p418].
[3] A acknowledges this point at paras 53 and 90 of her Notice of Appeal [CB 23, 36].

> of the kind that the Chairman is required to make in this case frequently call for a balance to be struck between considerations of time, cost and convenience as well as fairness to the parties. The vast majority of cases can and should be left to the tribunals to resolve for themselves without interruption from the appellate process."

8. These sentiments were echoed in the guidance of Henry LJ in ***Noorani v Merseyside TEC Ltd [1999] IRLR 184*** at paras 30 – 35[4] - given the page limit, the EAT is invited to read these paragraphs in full:

> 32 ... These decisions are entrusted to the discretion of the court at first instance. Appellate courts must recognise that in such decisions different courts may disagree without either being wrong, far less having made a mistake in law. Such decisions are, essentially, challengeable only on what loosely may be called *Wednesbury* grounds, when the court at first instance exercised the discretion under a mistake of law, or disregard of principle, or under a misapprehension as to the facts, where they took into account irrelevant matters or failed to take into account relevant matters, or **where the conclusion reached was 'outside the generous ambit within which a reasonable disagreement is possible'**, see *G v G [1985] 1 WLR* at 647.
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> ...
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> 35 Such proactive judicial case management in the law courts becomes more and more important now that it is generally recognised that, unless the judge takes on such a role, proceedings become overlong and over costly, and efforts must be made to prevent trials being disproportionate to the issue at stake, and thus doing justice neither to the parties, to the case at point or to other litigants.'

9. A'S NOTICE OF APPEAL: Many of the grounds of appeal remain unclear. A suggests that the ruling was unfair or unjust. This does not provide disclose any error of law. Adequate reasons were given. A may not agree with them, but this does not render them defective.

10. It is important to ensure that this appeal considers the interlocutory ruling on precisely the same footing that A presented her application below. A cannot be permitted to re-formulate her application in a way that was not advanced below. For example, A did not seek to advance her application on any alternate basis, namely that the ET should allowing recordings of specific conversations or incidents to be admitted[5].

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[4] Cf the more candid observations of Longmore LJ in ***Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA*** where he stated @ para 29: "I ... would only reiterate the importance that should be attached to the EJ's discretion. Appeals to the EAT should be rare; appeals to this court from a refusal to set aside the decision of the EJ should be rarer. Allowing such appeals should be rarer still." See also ***Adams v West Sussex County Council [1990] ICR 546*** @ 551-52;

[5] A's submissions for the PHR on this issue are at RSB pp28-36. LBL's submissions are at RSB pp 48-53.

11. PROBATIVE VALUE/RELEVANCE: (Judgment para 7): Simply because a covert recording might be relevant, does not, without more, mean that it must necessarily be admissible in proceedings.

12. One of LBL's objections to the recordings stemmed from the fact that A had not identified what recordings she wishes to rely upon and '... why they are required to prove her case' [RSB 26 April 2012 @ p4]. See also LBL's letter of 19 June 2012 [RSB p16(last para)]. On more than one occasion A pointedly refused to provide sufficient illumination prior to the PHR: [RSB @ p6]. See also RSB p20 (para 7). A adopted the same position in her PHR submissions: RSB p29 @ para 26.

13. The ET correctly records (at para 7) that A did not explain with any degree of particularity *how* the recordings were relevant. Mindful that the recordings *might* shed light on a particular issue, as the Judgment records, A was asked to be more specific as to how the recordings were relevant or would assist ET. A simply did not elaborate further or provide any examples. A was therefore unable to demonstrate that the recordings were of sufficient probative value. The ET was fully entitled to attach significance to this in the exercise of its judicial discretion[6].

14. OVERRIDING OBJECTIVE/PROPORTIONALITY: (Judgment para 8) Key to the exercise of discretion in this case is the issue of the overriding objective. Regulation 3(2) imposes a duty on ET's to deal with cases 'in ways which are proportionate to the complexity or importance of the issues'; ensuring that the case is 'dealt with expeditiously'; and 'saving expense'.

15. The reference to 'saving expense' is not further defined. This includes saving the parties' costs, as well as efficient use of ET resources – to allow other cases to be heard given the competing burdens placed upon the ET system[7].

[6] A's Notice of Appeal suffers from precisely the same defect – she does not provide specific reasons as to why the recordings possess probative value. The Notice of Appeal does not engage with para 7 of the Judgment. In summary, the repetitive incantation that the recordings 'conclusively prove' (eg paras 92, 95, 109) [CB 37-38, 42] provide no assistance.

[7] Note that for Claims 1 -3 which have been hearing, the ET had to grapple with 2,600 pages of documents, 3 questionnaires and responses, 300 pages of witness evidence, and 400 pages of written submissions – Notice of Appeal @ para 9 [CB 15].

16. As regards the issue of proportionality:

(1) The recordings are said to last around 39 hours in total.

(2) If they are admitted, they will have to be transcribed in full.

(3) It is not sufficient for A to simply 'submit the iPOD (and transcripts as evidence)' as she initially suggested in her application to the ET. It is noted that in this appeal A seeks an order that she be permitted to transcribe the material herself: [CB 69] @ para 186 (a).

(4) LBL would need to verify the accuracy of any transcript. This would take an inordinate amount of time to do.

(5) Assuming that it will take 39 hours to simply read the (voluminous) transcripts if they are produced this task will have to be undertaken or shared by more than one solicitor at LBL, and also Counsel. Extra time would be needed to assimilate, cross-reference, and incorporate the material into case preparation.

(7) The cost of copying the documents will be astronomical.

(8) Allowing the material would never achieve the aim of 'saving expense'

(9) The length of the hearing will be extended if the material is allowed – this is not dealing with cases 'expeditiously'.

17. Crucially, at no stage has A ever provided *any* explanation (let alone a satisfactory one) as to why she went to the effort of making the recordings, but yet never disclosed them to LBL during the lengthy grievance and dismissal process. If, as she now asserts, they are vital to proving her complaints or otherwise unequivocally demonstrate that LBL's officers have been dishonest, then surely the time to have relied upon them was during the internal process (or an appeal against dismissal)? The fact is that A made a conscious decision not to rely upon the clandestine recordings. Why did she record the events? She must have intended to use them at some stage? She had ample opportunity to raise this evidence before. It accords entirely with justice that she should be bound by her election not to rely upon them during the grievance process. The reasonable inference to be drawn is that she withheld them in pursuit of some perceived tactical advantage in the ET proceedings OR the recordings are not of sufficient probative value as she maintains – otherwise she would have relied upon them earlier.

18. TRANSCRIPTION: (Judgment para 6): Rule 10(1) confers the power on ETs to 'make an order in relation to any matter which appears to him to be appropriate'. Illustrative examples are listed at Rule 10(2), but the type of order which can be granted is not limited – the ET is empowered to make 'such other orders as he thinks fit'.

19. It is self-evident that, if admitted, the recordings would need to be transcribed. If A was left to transcribe them, then LBL would need to be afforded the opportunity to review the recordings and the transcripts for their accuracy. During the hearing, A confirmed that she was not willing or able to agree to this condition *if* the recordings were to be admitted (see paragraph 7).

20. On the basis that A wanted to rely upon *all of the material*, it follows that she should bear the consequences of this. In this instance, the ET's inquiry as to transcribing the recordings was a proper one (and a consideration which plainly fell within Rule 10(2))[8].

21. OTHER FACTORS IN ADDITION TO JUDGMENT: LBL relies upon and repeats the matters listed at para 39 of the Answer [CB 81-82]. A dishonestly confirmed to LBL that she had never recorded any meetings. Her response was clear and unequivocal "No. You keep asking me this constantly": see letter 26 April 2012 RSB 4]. She therefore lied. The recordings are tainted: A's actions in covertly recording colleagues (and/or falsely denying that she had made any recordings) give rise to a breach of the implied term of trust and confidence.

STUART BRITTENDEN

17 January 2013

OLD SQUARE CHAMBERS

[8] A confirms in her Notice of Appeal that she did not advance any substantive reason as to why she would not/could not arrange for the transcription to be done – [CB 28] @ para (h) last two lines.