IN THE LONDON SOUTH EMPLOYMENT TRIBUNAL

CASE NUMBERS: 2375023/2011
2390531/2011
2302643/2012
2302645/2012
2313031/2012

BETWEEN:

MS A. VAUGHAN

Claimant

and

LONDON BOROUGH OF LEWISHAM

Respondent

RESPONDENT'S SUBMISSIONS PHR: 2ND & 3RD AUGUST 2012

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1. These submissions are provided by LBL in respect of Claims 4 - 8. As should be evident from the tribunal file, this case has generated voluminous correspondence, documentation, response and counter-responses. For this PHR C has produced a 65 page skeleton argument, containing excessive citation of authority. In an attempt to keep LBL's costs to a manageable level, and with a fixed gaze on the issue of proportionality, these submissions will not engage with each and every point raised by C.

2. Since receiving C's 65 page skeleton argument, LBL has received further correspondence from her raising various complaints, objections etc... For the avoidance of doubt LBL will not provide acknowledgment of receipt or respond to the same unless required to do so at the PHR (again, in an attempt to keep costs to a minimum). The same applies in respect of any response that C provides to these submissions.

3. References to C's bundle are [C###] and R's bundle [R###]. R's 'menu' of items it seeks to be addressed at the PHR are set out in a letter dated 19.6.12 [R67].

4. These submissions will address the issues in the same order as they appear in C's skeleton argument.

Submission of Covert Recordings

5. This is dealt with at p8 of C's submissions. C's revelation on 23.7.12 that:

> "I have dozens of recordings estimated to last around 39 hours in total" @ para 27
>
> is simply astonishing.

6. She has confirmed that the recordings date from 26.4.11 to 6.3.12 (a period nearly spanning a year).

7. It is not accepted that simply because the recordings *might* be relevant to any matter contained in one of the many Claim Forms, that they are automatically admissible.

   (1) The 2004 Rules of Procedure confer extensive powers to tribunals in respect of case management.

   (2) It is trite that tribunals are given extensive latitude in respect of how this discretion is exercised at an interlocutory case management stage. Recognising that discretion can be exercised in a variety of ways by different tribunals, as a general proposition, the appellate courts are slow to interfere with interlocutory matters.

   (3) Key to the exercise of discretion is the issue of the overriding objective. It is not accidental that the overriding objective features in Reg 3 – the first substantive provision in the Regulations.

   (4) The tribunal will be very familiar with the overriding objective, but Reg 3(2) makes reference to a duty imposed upon the tribunal 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'.

   (5) The reference to 'saving expense' is not further defined, this however includes saving the parties' costs (to prevent these from spiralling out of control), as well as expeditious use of tribunal resources – to allow other cases to be heard given the competing burdens placed upon the Tribunal system.

<u>Response to C's Application</u>

8. LBL avers that C's application to adduce the recordings amounts to plainly unreasonable conduct of the proceedings and should be refused. In summary:

   (1) The existence of these recordings had hitherto been unknown to R.

(2) C never told anyone that she was recording them. C never sought their permission to do so.

(3) Conversely, C dishonestly confirmed that she had never recorded any meetings during the investigation interviews. Her response was "No. You keep asking me this constantly" [R29].

(4) As LBL does not know what exactly is included within the transcripts, it is unclear whether or not the covert recording of employees by C – which LBL would be vicariously liable for in any event – constitutes an infringement of the Data Protection Act 1998 (or associated guidance issued by the ICO).

(5) Notwithstanding uncertainty as to (4), it is clear that C acted in breach of her contractual obligations to LBL in covertly recording colleagues (and/or falsely denying that she had made any recordings). At the very least it is self-evident that the procuring of such recordings constitutes an obvious breach of the implied term of mutual trust and confidence. In the premises, when exercising discretion, the tribunal is invited to bear in mind that the recordings were obtained in breach of contract – their genesis is therefore tainted.

(6) As is mentioned in the pleadings, C submitted extensive grievances to LBL, these were investigated and decisions promulgated on the material that she chose to provide in support of the same.

(7) At no stage did C reveal the existence of recordings in her possession – or rely upon these in support of her grievances.

(8) On that basis, the relevant people investigating and deciding upon her grievances could not possibly have taken this hitherto undisclosed material into account.

(9) C boldly asserts that:

> 'The covert recordings conclusively prove my allegations against Lewisham Council and prove that I was discriminated against and unlawfully dismissed' (@ para 27)

(10) Two points arise from this: (1) if they were not disclosed, this evidence could not possibly feature in the mind of the dismissing officer; (2) if the recordings 'conclusively prove' her grievances/complaints, then why weren't they referred to in the grievance/disciplinary process?

(11) Absent any explanation for this, the *only* sensible conclusion is that C deliberately withheld the existence of this evidence in the hope

that she could gain some (perceived) unfair advantage in using it in tribunal proceedings. No other explanation is viable. 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.

(12) Finally, C's following justification is misconceived:

> '... if an investigation was carried out by virtue of ***Burchell*** the recordings conclusively prove that LBL could not have held a genuine belief that I was guilty of the allegations/alleged conduct that I had been accused of. That belief could not have been reasonably held by reason of the content of the covert recordings. The recordings will support my contention that my dismissal lays outside the band of reasonable responses...' (@ para 34).

it is trite that the fairness of a dismissal cannot be judged by reference to evidence that was not disclosed or the hearing officer was not made aware of at the time. Again, another powerful factor against allowing this material to be admitted is that the justification is misconceived.

9. The paradox of C's application is this: she was dismissed for SOSR arising from a breakdown in working relationships with colleagues – had LBL known at the time that she was covertly recording colleagues to such an extent, then this would have provided conclusive evidence that there was such a breakdown such as to warrant termination.

Proportionality/Overriding Objective

10. The issue of proportionality is very much the key consideration:

(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 C to simply 'submit the iPOD (and transcripts as evidence)' as she suggests at para 27.

(4) LBL would need to be furnished with the iPOD and the transcripts in order 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 transcripts if they are produced (such material must be voluminous) this task will have to be undertaken or shared by more than 1 solicitor at LBL, and also Counsel.

(6) Leaving aside the costs which will be borne by LBL with its limited resources in times where austerity measures are in place, at Counsel's hourly rate, it would cost more than **£10,000** (incl VAT) to simply read the documents in 39 hours. In addition to that, the material will need to be assimilated, cross-referenced, and incorporated into case preparation (at significant additional cost). This would ordinarily be reflected in the brief fee (which will be higher if such material is admitted).

(7) The documents will need to be photocopied. It is unclear how many bundles will be occupied by the transcripts, but photocopying costs will be astronomical.

(8) On any view, to allow the material will not achieve the objective of 'saving expense' – the converse will be the case.

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

(10) C is not deprived of advancing her case. She can rely upon the matters set out in the grievance process – she made a decision at the time to limit the material relied upon for the internal grievance process. There is little prejudice to her now for having made that choice, to be bound by it now.

11. Finally, whatever proposition C cites in support of her application, this is not a case where C is precluded from advancing her case if the material is not admitted. The lengthy grievances and Claim Forms are testament to this.

Alternative Case

12. If the tribunal is minded to accede to C's application to adduce the evidence, LBL invites the tribunal to impose the following conditions which are consistent with the overriding objective. It should be noted that Rule 10(1) confers the power on the tribunal 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 tribunal can make 'such other orders as he thinks fit'. The above factors are not repeated here, but are relied upon in support of the conditions:

(1) C is to provide the iPOD to an independent transcription provider (subject to LBL's agreement as to the identity of the same).

(2) C is to solely bear the costs of (1).

(3) C is to solely bear the photocopying costs in respect of 4 copies for use at the tribunal hearing and 2 copies for use by LBL in preparation for the hearing.

(4) Additionally, C is to agree to pay a contribution towards LBL's legal costs in preparation of the same.

(5) Alternatively, any combination of (1) – (4) as the tribunal deems appropriate.

13. The above conditions are justified: C has unlawfully obtained this evidence in breach of contract; she has not adduced this material previously; she insists that it be admitted – therefore should be prepared to bear the costs of this. Any conclusion to the contrary would be in discord with Reg 3.

Whether the ET believes that C's claims have no reasonable prospect of success?

14. C deals with this at pp16 – 22. LBL has made it unequivocally clear that it does not seek this issue to be addressed at this PHR for the reasons already fully set out in the letter of 19.6.12 [R67].

15. At para 45 C confirms that '... I am not making an application for a deposit order against myself'. On that basis, the ET does not need to deal with this issue at all (noting that the test of 'no reasonable prospect of success' is confined to strike outs (Rule 18(7)(b)), whereas 'little reasonable prospect' is the applicable test for deposit orders (Rule 20(1)).

16. C's submissions on this point are therefore otiose.

Whether to permit C's application to amend dated 28.5.12

17. The amendment letter is at [R38]. C addresses this at p22. She confirms that the amendment application 'does not constitute the making of entirely new factual allegations which change the basis of my existing claim'.

18. C has brought 8 detailed claims. If she is not making 'new factual allegations' then there is no point in the amendment. It is disproportionate, and excessive in the circumstances. C has not explained why it was not appropriate to have included these matters in the first instance.

19. Further, an amendment should not be allowed in circumstances where the substantive allegation is unclear or not capable of being understood: cf [R38].

Without Prejudice References: Strike Out

20. This is dealt with at p23 of C's submissions. This issue concerns paragraphs 10 – 12 and 88a of Claim 7. This involves correspondence arising between C and Paris Smith Solicitors in the context of without prejudice discussions and the provision in a settlement agreement about safeguarding referrals. By way of background, it is unsurprising that - as is the case with other employers falling under the auspices of GMC, NMC, Health Professions Council and the like - LBL is under a statutory duty (both retrospectively or prospectively) to make referrals to appropriate safeguarding agencies in respect of employees who worked with relevant groups, such as young people (should the need arise or information relevant ever come to light in the future).

21. C complains that she was told that LBL:

Para 10: 'wishes to reserve its right to make a 'safeguarding referral' and that I viewed this as a threat and a detriment...

Para 11: '**The issue that arose from the without prejudice discussions because it 'took matters far beyond' what had taken place in the settlement discussions. ...** The conduct of the Respondents was totally inconsistent with the maintenance of without prejudice privilege. Those discussions had not been conducted in good faith by the Respondent. **The 'without prejudice' correspondence was used by my employer** as a tool to intimidate and discriminate against me and put pressure on me to leave my job, rather than about resolving a dispute. **It would not be just and equitable to exclude evidence of the 'without prejudice' correspondence** from the proceedings because the correspondence is a blatant example of discrimination, harassment and victimisation'

Para 12: '... The next day I received a response from LBL's legal department, it stated that the Council **does not waive privilege** and as a result the Council is unable to make any comment in open correspondence, other than to deny the allegations of discrimination. It did however confirm that the Council does not intend to make a referral to ISA and is unaware of any circumstances which would give rise to such a referral.'

22. At paragraph 66 of C's submissions she confirms that the safeguarding referral matter was included in a settlement offer.

23. LBL's objection to the inclusion of this evidence is summarised at paragraph 21(a)(ii) of Response 7. The following matters are beyond contention:

(1) Even on C's pleaded case, the issue of LBL reserving its position as to making a safeguarding referral – should the need ever arise or information come to light – arose squarely within the context of an extant dispute between the parties. She refers to these conversations being without prejudice.

(2) Such dispute had already manifested in legal proceedings being presented against LBL.

(3) Negotiations had taken to resolve the dispute under the auspices of ACAS.

(4) The safeguarding issue was directly concerned with the wording to be included in any potential compromise agreement. A point which C has admitted @ para 66.

24. The most recent authority on the matter is ***Woodward v Santander UK Plc [2010] IRLR 834 EAT***. That case concerned the inclusion of without prejudice evidence in W's witness statement and an application by the Respondent for it to be excluded (which was upheld by the ET). The facts are summarised @ para 27. Namely, W asserted that during previous settlement negotiations she pressed for the settlement terms to include provision for giving a reference. Her legal representative advised her that this had been "flatly refused" by the employer.

25. In that case, W sought to refer to this evidence in a number of passages in her statement and sought to 'draw from the alleged refusal the conclusion that the respondents had 'reprisal in mind' from the time of the negotiations; and she invited the tribunal to view subsequent events through the lens of that refusal...' @ para 28.

26. In parenthesis, the situation is entirely analogous to C's allegations in Claim 7: she alleges that LBL victimised her or had reprisal in mind in respect of the safeguarding issue.

27. After considering the authorities at paras 47-55, HHJ Richardson provided the following guidance to tribunals:

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We would observe that the policy underlying the 'without prejudice' rule applies with as much force to cases where discrimination has been alleged as it applies to any other form of dispute. Indeed the policy may be said to apply with particular force in those cases where the parties are seeking to settle a discrimination claim.

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Discrimination claims often place heavy emotional and financial burdens on claimants and respondents alike. It is important that parties should be able to settle their differences (whether by negotiation or mediation) in conditions where they can speak freely. A claimant must be free to concede a point for the purposes of settlement without the fear that if negotiations are unsuccessful he or she will be accused for that reason of pursuing the point dishonestly. A respondent must be free to adhere to and explain a position, or to refuse a particular settlement proposal, without the fear that in subsequent litigation this will be taken as evidence of committing or repeating an act of discrimination or victimisation. And it is idle to suppose that parties, when they participate in negotiation or mediation, will always be calm and dispassionate. They should be able, within limits, to argue their case and speak their mind.

62

What are the limits? To our mind they are best stated in terms of the existing exception for impropriety. **This exception, as we have seen, applies only to a case where the tribunal is satisfied that the impropriety alleged is unambiguous. It applies only in the very clearest of cases.** A court or tribunal is therefore required to make a judgment as to whether the evidence which it is sought to adduce meets this test. Words which are unambiguously discriminatory will of course fall within the exception: see the example given by Cox J at paragraph 37 of *Mezzotero*.

28. The case of ***BNP Paribas v Mezzotero*** can be dealt with shortly:

(1) That case did not involve an extant dispute between the parties – therefore the without prejudice rule was not engaged at all: see ***Woodward*** @ para 34.

(2) It was sufficient to dispose of the appeal on the basis of (1). The consideration of the unambiguous impropriety point was brief.

(3) To the extent that there is any conflict between ***Mezzotero*** and ***Woodward*** the convention is that the more recent EAT authority should be preferred.

(4) The Court of Appeal refused permission to appeal against the EAT judgment in ***Woodward*** with Pill LJ commenting that he found the reasoning of the EAT "entirely convincing": @ para 13; Case No A2/2010/1456.

(5) On any sensible view this is not one of those "very clearest" of cases.

Waiver

29. As to any suggestion that LBL has waived its right to privilege, this is unfounded. The mere repetition or proclamation by one party of without prejudice matters is not sufficient for waiver. The EAT in ***Woodward*** expressly recorded its acceptance of the concession that:

"... it must be possible to point to some unequivocal act on the part of the respondents expressly or impliedly waiving privilege. We can see no evidence of any such act..." @ para 68.

30. C's own pleading expressly mentions that LBL was not waiving privilege @ para 12. This position is maintained in Response 7. Nowhere is there clear and unambiguous evidence of waiver.

31. It cannot be right that any reference by C to this issue in a PHR (if this is in fact established by C) erodes privilege (particularly given the complexities raised by this litigation). The PHR was listed to consider other matters, principally an outstanding costs application rather than ancillary matters. In any event, it cannot be right that reference to w/p matters at a PHR constitutes bilateral waiver, that is an untenable proposition. By way of illustration, it is perverse to say that references to w/p matters in the bundles and submissions for the purposes of this PHR constitutes waiver in circumstances where admissibility of this material is an item of the agenda for this hearing.

32. It is not accepted that LBL waived privilege in the SOSR dismissal hearing. C is put to strict proof in respect of this assertion.

33. Reliance by C on ***Brunel University and Anor v Vaseghi and Anor [2007] IRLR 592 CA*** is misguided. That case was wholly distinguishable on the facts. V brought ET proceedings, BU published an article making reference to unreasonable demands for money in the context of without prejudice discussions in that case. V submitted a grievance complaining of victimisation. BU set up an independent hearing to consider the grievance, parties gave evidence about w/p matters. V instituted proceedings containing extensive references to w/p points. BU's Response incorporated the grievance decision (which also included w/p points). BU did not reserve its position in respect of waiver.

34. Smith LJ commented @ para 25:

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The facts of this case are most unusual. In our judgment, on the particular facts of this case, the EAT's observations and its conclusion were justified. **In most cases, where a grievance meeting takes place in the usual way, internally, there will be no question of waiver if the parties mention matters covered by 'without prejudice' privilege.** But in the particular and unusual circumstances of this case, where the proceedings were in effect a trial of the victimisation issues by an independent panel and where both parties gave or called evidence of the previous negotiations, the EAT was entitled to conclude that privilege had been bilaterally waived.

35. There has been no 'trial' in respect of the w/p correspondence. LBL has not called evidence in respect of the same. It has always repeated that it

does not waive privilege and will not engage with any complaint in respect of the same.

36. Even if the tribunal is prepared to countenance the point that there may have been waiver at some prior point in time (of which there is no cogent evidence), this is not dispositive of the matter. At para 40 Smith LJ said this:

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In our view, it is clear that, by referring to the 'without prejudice' discussions in their ET1s and witness statements, the employees made it plain that they intended, unless prevented, to waive their privilege. **By pleading their responses as they did and by attaching the grievance panel's reports to the ET3s, the university made it plain that it too intended to waive privilege. In our view, bilateral waiver had taken place at the time the ET3s were lodged with the tribunal office.** Considering the nature of the issues, this was an entirely sensible and understandable position for both sides to take. **However, we would accept that the die was not yet irrevocably cast in that either side could have applied to amend its pleading so as to remove all reference to the 'without prejudice' material. If the university had sought that permission and if permission had been granted, it would have been possible for the waiver to be withdrawn. Of course, the grant of such an amendment would be discretionary. The time at which the application was made would be highly relevant. If made shortly after the ET3 had been filed, it might have had a good chance of success.** So also would the extent of the consequential amendment of the case be significant. **If the 'without prejudice' material were peripheral to the case, the amendment might be allowed more readily than where the effects of amendment were to be radical.** But where as here, an application to amend has not even yet been made and where the application to withdraw reference to the 'without prejudice' discussions would have a radical effect on the proceedings, we have no hesitation in saying that it is now far too late for the university to retrieve the position. The waiver, clearly communicated by its ET3 response, must now stand.

37. The short point is that once waiver has been established, the 'die was not yet irrevocably cast'. Here, LBL has made a timely objection – in the Response to Claim 7, and a timely application for the material to be withdrawn at this PHR.

38. C is obviously familiar with the facts and case law, for the above reasons, it is clear beyond any sensible doubt that the material is inadmissible.

Should the ET hold a separate hearing for the balance of Claim 3 and consider Claims 4-8 immediately afterwards?

39. C submissions p30. This issue has already been addressed by the ET on a preliminary basis at the CMD on 24.4.12. The reasons set out at

paragraphs 4-6 in the CMO cogently explain why the previously suggested course should be adopted [R21].

Human Rights/Fair Trial/Recusal

40. This is dealt with at pp31 – 38. There is no basis or procedure for this issue to be resurrected again. On 22.6.12 Employment Judge Hildebrand wrote to C advising her that:

> 'The application by the Claimant for Employment Judge Balogun to recuse herself is refused. This is an order not a judgment and the review procedure is inapplicable' [R86].

41. This is not the first time that C's point has been addressed and rejected by the tribunal. In the premises, it is not necessary for LBL (or the tribunal at this PHR) to engage further in respect of this issue.

Whether C was disabled?

42. This is addressed at p48 – 57. LBL has previously accepted that C is a disabled person for the purposes of EqA 2010. The burden however remains with C to satisfy the limbs set out in ***Environment Agency v Rowan [2008] IRLR 20 EAT***. This is a matter for the full hearing not the PHR.

Number of individual named respondents

43. In its letter of 19.6.12 LBL raised the issue of whether C was still pursuing claims against individual named respondents in circumstances where no statutory defence was being raised [R68].

44. C's response to this on 19.6.12 was to suggest 'I do not believe it necessary to justify my reasons for continuing proceedings against the individual named respondents as there has been no application by the respondents to strike them out and my reasons are already clearly set out in my pleadings' [R71].

45. It is noted that C wishes to continue her claims against all named individuals – submissions pp 57-58, notwithstanding that this is disproportionate.

Proportionality Direction

46. LBL's letter of 19.6.12 invited the ET to give a proportionality direction in a similar vein to that given in ***Gayle v Sandwell & West Birmingham Hospitals NHS Trust [2011] IRLR 810 CA*** [R68]. In fact, the direction is quoted in full in that letter.

47. It may well be unnecessary for the tribunal to now expressly issue such a direction because C has been made alive to the point, and quotes the direction in full at p58 of her submissions. She has argued against proportionality at p59-62, and has argued against the ***Gayle*** direction specifically at paragraph 147 (p62).

48. Absent a change of stance by C, it is improbable that this issue could be further addressed in any meaningful way at this PHR.

Schedule of Claims

49. At p46 para 108 C seeks 49 days to produce a schedule of claims. In fact, the 84 allegations at pp39-46 appear to be already a summary of the detriments that C seeks to pursue. It is unclear what is omitted.

50. LBL does not accept C's suggestion of sequential disclosure. Given that C has already the SOSR bundle and other documents, disclosure can be by list with copies requested subsequently if considered appropriate.

Further directions

51. LBL does not accept the suggested timetable for preparation of witness evidence (nearly 1/3 of a calendar year). C knows what her case is, has submitted comprehensive Claim Forms and grievances, and does not need to wait until a bundle is finished or 112 days to complete her statement.

52. LBL will address the ET as to the timetable/listing at the PHR.

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