



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

and

Respondents

Ms AA Vaughan

London Borough of Lewisham & Ors

PRE HEARING REVIEW AND CASE MANAGEMENT DISCUSSION

HELD AT London South

ON 2 August 2012

EMPLOYMENT JUDGE BALOGUN (Sitting alone)

Appearances

For Claimant: In person

**For Respondents: Mr M Palmer, Counsel, for CEL and Babcock
Mr S Brittenden, Solicitor, for LBL and others**

JUDGMENT ON PRE HEARING REVIEW

1. The Claimant's application to admit into evidence covert recordings is refused.
2. Evidence relating to without prejudice communications between the Claimant and the Respondent is inadmissible. All references to without prejudice communications are to be struck from the pleadings.
3. The Claimant's application, in relation to claim 2300254/2011 (stayed part of claim 3) to admit into evidence material post dating February 2011 is refused.
4. The Claimant is granted leave to amend her claim: 2313031/2012 (claim 8)
5. The Respondents' amended response to claim: 2390531/11 (claim 5) dated 28 July 2012 is accepted in substitution of its original response.

ORDERS AND DIRECTIONS

Further Particulars

1. By **23 August 2012**, the Claimant shall provide the Respondents with further particulars of her proposed amendments to claim: 2313031/12, set out in her letter of 28 May 2012. Such particulars shall include:
 - i. The date and place of the acts complained of
 - ii. What was said, done or written
 - iii. Who was involved
 - iv. The type of discrimination complained of (e.g. direct, harassment, victimisation etc)
 - v. Details of any comparators, if appropriate

Leave to amend Response

2. The Respondents to claim 2313031/12 are granted leave to file an amended Response, if necessary, by **13 September 2012**.

Schedule of Allegations

3. On or before **19 October 2012**, the Claimant shall provide the Respondents with a schedule setting out in tabular form details of each and every allegation. The Schedule should set out:
 - a. The allegation and the date on which the incident occurred
 - b. Who was involved
 - c. The type of discrimination/detriment complained of and the relevant statutory provision
 - d. The date/description of any document relied upon

Consolidation

4. Claim 231303/12 shall be heard together with claims 4-7.

Schedule of Loss

5. The Claimants will provide the Respondents with a schedule of financial loss claimed and the basis for the calculations on or before **31 August 2012**.

Hearing

6. The matter will be listed for a **28 day** hearing to consider liability only, on a date to be advised.
7. Days **1 to 3** of the Hearing will be dedicated to hearing the stayed part of case no: 2300254/2011 (claim 3) and the parties to the remaining claims need not attend.

8. Days **4 to 8** shall be **Reading Days** for the Tribunal and the parties to the remaining claims are not required to attend until Day 9.
9. The parties are required to prepare and present their cases so as to complete all evidence and submissions within the allotted time and must be prepared to work to an appropriate timetable.
10. Once the hearing date has been listed, no postponement will be granted unless there are exceptional circumstances.

Documents

11. On or before **31 October 2012**, the parties shall disclose to each other a list of all documents in their control, custody or possession relevant to the issues in this case.
12. On or before **14 November 2012**, the parties shall provide to each other copies of the documents on their lists.

Bundle

13. The Respondents will be responsible for preparing the Tribunal bundle.
14. The Respondents will provide the Claimant with a clear paginated copy of the bundle **18 weeks** before the hearing and shall bring four copies of the bundle to the Tribunal on the first day of the Hearing.

Witness Statements

15. It is ordered that evidence in chief in this case will be given by reference to typed witness statements. The statements will contain all the facts which the party or witness called on behalf of a party can properly tell the Tribunal, relevant to the issues in this case.
16. The facts should be set out in chronological order and in numbered paragraphs. If a party or witness intends to refer to a document, the reference in the statement must be cross referenced to the page number in the bundle.
17. It is ordered that statements be exchanged no later than **4 weeks** before the Hearing.

Written Chronology

18. The parties are to exchange written chronologies of key events no later than **1 week** before the Hearing and should bring 3 copies to the Tribunal.

REASONS

1. This Hearing follows on from one held on 19 and 20 April 2012. Since then, a further claim, no: 2313031/12, has been presented alleging disability discrimination, public interest disclosure detriment and unlawful deduction of wages. For reasons of expediency, proportionality and in line with the overriding objective, the new claim has been consolidated with the others.
2. The purpose of this hearing was to consider a number of case management issues identified by the parties in advance and to discuss the management of the case generally. The parties provided written submissions on the identified issues.

Covert Recordings

3. The Claimant applied to have admitted into evidence various covert recordings, made on her ipod, of her interactions with individuals named in her complaints, between 26 April 2011 and 6 March 2012. The recordings were said to last around 39 hours in total. The Respondents objected to the application.
4. The starting point on issues of admissibility is rule 14(2) of the Tribunal Rules 2004, which allow the Tribunal to determine whether any particular item of evidence should be admitted and the weight to be attached to it, even if such evidence would not be admissible in other courts.
5. I have also reminded myself that in discrimination cases, which by their very nature are fact sensitive, a Claimant should be permitted to adduce all relevant evidence to support his or her claim so that the Tribunal has all the facts before it to enable it to make findings and, if appropriate, draw inferences from those findings. This must of course be balanced by the need to deal with the case in a way that is proportionate to the complexity or importance of the issues, in line with the overriding objective to deal with cases justly.
6. 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 conditions. Those conditions, set out in her email of 3 August 2012, are unacceptable.
7. Aside from the issue of transcription, there is also the question of relevance. In her submissions, the Claimant describes the relevance of the recordings by reference to general assertions she makes about the Respondents' case. For example, she says that 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 findings/dismissal letter*".

When asked by 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.

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.
9. For the above reasons, the application is denied.

Admission of evidence relating to without prejudice communications

10. In paragraphs 10-12 and 88 of claim no: 2302645/12, (claim 7) the Claimant refers to matters which, she accepts, arose during without prejudice discussions with the Respondents. The Respondents contend that they have not waived privilege and are therefore seeking for these references to be struck out.
11. It is a general principle of law that correspondence or statements made between parties for the purposes of negotiating a settlement to their dispute is classified as "without prejudice" and is inadmissible in litigation proceedings unless privilege is waived by all parties. That principle has recently been affirmed in: Woodward v Santander UK plc [2010] IRLR 834
12. An exception to the rule applies where exclusion of the without prejudice communications would act as a cloak for perjury, blackmail or other unambiguous impropriety. The requirement for any impropriety to be unambiguous must be strictly applied lest the exception overtake the rule and render it of no value. Unilever plc v Proctor & Gamble Company [2000] 1 WLR 2436
13. The Claimant contends in her submissions that the Respondent has waived privilege and that privileged communications had already been referred to in open correspondence between her and the Respondent. I have looked at the said correspondence [pages 11-13 of the Claimant's bundle] and it makes no reference at all to privileged communications even though it deals with an issue that arose during the course of those discussions.
14. Also, it is clear from the Response to claim 7 that the Respondent had not waived privilege and there is no evidence before me to suggest that it has changed its position.
15. The Claimant's contention that the Respondents' conduct falls within the "unambiguous impropriety" exception in the context of "*a genuine and legitimate complaint of disability discrimination and PIDA detriment*" demonstrates a misunderstanding of the limitations of the exception.

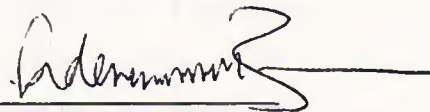
16. In my view, there are no reasons to depart from the general rule and I find that any evidence relating to the without prejudice communications between the Respondent and the Claimant are inadmissible.

Admissibility of evidence relating to matters post February 2011 in relation to claim 3

17. Claim 3 relates to alleged discriminatory acts by CEL and Babcock relating to events occurring after 31 December 2010 up until the Claimant's return to work on 7 February 2011. The Claimant is seeking to introduce various documents post February 2011 and has provided a list of the said documents under cover of her email to the Tribunal dated 1 August 2012. The Claimant submits that these documents shed light on the Respondent's motivation and prove there is a culture of discrimination. The Claimant also contends that the documents support her contention that the witnesses perjured themselves in the concluded proceedings and are also evidence of the Respondent's unreasonable and vexatious conduct in relation to those proceedings.
18. Dealing first of all with documents 59 onwards, these comprise inter-party correspondence and correspondence between the parties and the Tribunal relating to the earlier proceedings. It seems to me that the Claimant is, by their introduction, seeking to re-litigate a case which has been concluded and, so far, upheld on appeal. I fail to see the relevance of these documents to the outstanding issues in claim 3 and the application to introduce them into evidence is refused.
19. Documents 29 to 58 all post-date 7 February 2011. When invited by me to explain the relevance of the documents to the issues the Claimant simply referred me to her written submissions. Having read those submissions, which comprise of general assertions, I am not satisfied that the documents are probative of whether the Claimant suffered discriminatory treatment at the hands of the Respondent between 1 January and 7 February 2011. I am therefore refusing to allow these additional documents to be admitted as part of claim 3.

Claimant's request for an order for further and better particulars of the response to claims 2302645/2012 & 2302643/12

20. The Claimant's above request dated 1 June 2012 was refused as I was satisfied that the responses to the above claims, which are comprehensive, make clear that the Respondents resist the claims and the basis upon which they do so.



Employment Judge Balogun

Date and place of Judgment and Order
London South
7 August 2012

Date sent to the parties

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7/8/2012
G. Cotgreaves