Appeal No. UKEAT/0003/14/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 January 2014

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

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(1) PUNJAB NATIONAL BANK (INTERNATIONAL) LTD
(2) MR O SINGH
(3) MR P SINGH APPELLANTS

MS S GOSAIN RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR RICHARD O'DAIR (of Counsel) Instructed by: Cubism Law 116-118 Chancery Lane London WC2A 1PP
For the Respondent	MR I P SINGH (Representative)

SUMMARY

PRACTICE AND PROCEDURE – Preliminary issues

Whether court recordings of relevant meetings prior to Claimant's alleged dismissal were to be admissible in evidence at trial insofar as they involved private discussions in the absence of the Claimant. An Employment Judge held that they were, having considered the relevant EAT cases. Employer's appeal dismissed.

HIS HONOUR JUDGE PETER CLARK

1. This case is proceeding in the Watford Employment Tribunal. The parties are Ms Gosain (Claimant) and Punjab National Bank (International) Ltd and Others (Respondents).

2. Originally the case was listed here for an appeal by the Respondent against an order made by Employment Judge Smail dated 23 December 2013, refusing a postponement of an eight-day substantive hearing listed to commence at Watford on 6 July 2014 pending determination of the Respondents' appeal against a ruling made by Employment Judge McNeill QC and dated 16 December 2013 that certain covert recordings made by the Claimant be admitted in evidence at the full hearing (the McNeill ruling). That appeal had been delayed pending production of Judge McNeill's written reasons for her ruling.

3. In the event those reasons were provided to the parties yesterday on the first day of the substantive hearing before a Tribunal chaired by Employment Judge Southam. That Tribunal adjourned the hearing until Wednesday 8 January so that the appeal proceedings could be dealt with here today.

4. In these circumstances it is common ground that I should hear the Respondents' substantive appeal against the McNeill ruling. The appeal against Employment Judge Smail's order is consequently rendered moot.

5. The Claimant was employed by the Bank as a CSA from 3 May 2011 until her resignation on either 29 or 30 January 2013. In April 2013 she lodged a form ET1 at the ET alleging sexual harassment, sex discrimination and constructive unfair dismissal. The issues in

those claims, which are resisted, are set out in the case management orders of Employment Judge Heal dated 8 July 2013.

6. Prior to her resignation the Claimant attended a grievance hearing on 7 November 2012 and a disciplinary hearing on 15-16 January 2013. She recorded both "public" and "private" conversations connected with those hearings. The recordings were disclosed to the Respondents in July 2013. They objected to the admissibility of the private contents of those recordings, said by Mr Singh to run for approximately 15 minutes at the grievance stage and some 30 seconds at the disciplinary stage.

7. At a preliminary hearing held on 16 December 2013 Judge McNeill ruled that the recordings were admissible at trial, having been referred to the relevant EAT learning to be found in **Amwell View School Governors v Dogherty** [2007] ICR 125 (Mr Recorder Luba QC and members), **Vaughan v London Borough of Lewisham & Ors** [2013] UKEAT/0534/12 (Underhill J, as he then was, and members) and **Williamson v Chief Constable of Greater Manchester Police** UKEAT/0346/09, 9 March 2010 (HHJ Birtles sitting alone). She concluded that the circumstances of this case could be distinguished from those in **Dogherty**, in which the EAT overturned an ET decision to admit covert recordings of private deliberations of a panel conducting a disciplinary hearing. Her reasoning is set out at paragraphs 20-21 thus:

> **"20. The real difference between the current case and the *Dogherty* case is that the comments which are alleged to have been recorded, if said, fall well outside the area of legitimate consideration of the matters which fell to be considered by the grievance and disciplinary panels respectively. For example, it is alleged to have been said during a break in the grievance hearing that the first respondent's Managing Director had given an instruction to dismiss the Claimant; also that the manager hearing the grievance said that he was deliberately skipping the key issues raised in the Claimant's grievance letter, namely that she was not being allowed a proper lunch break and issues around her pregnancy. It is further alleged that Mr Luhana, the manager hearing the disciplinary matter, is recorded during the break making a comment in Punjabi which, when translated, was that another employee of the first respondent 'ripped apart the Claimant's vagina'.**
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> **21. In short, comments which the Claimant alleged were made during the private part of the hearings were not part of the deliberations in relation to the matters under consideration. The circumstances in that respect were materially different from the circumstances in *Dogherty*. If the comments alleged were made, and I make no finding on that matter, they are not the sort**

of comments which fall within the 'ground rules' principle set out in Dogherty because they did not constitute the type of private deliberations which the parties would understand would take place in relation to the specific matters at issue at the grievance and disciplinary hearings. If I were wrong about that, given the nature of what is alleged to have been said, I can see no public policy reasons why these particular comments, even though made in private, should be protected and should provide an exception to the general rule that relevant evidence is admissible."

8. In challenging that ruling Mr O'Dair acknowledges that the recordings are potentially relevant and probative of the Claimant's case and therefore prima facie admissible. However, he submits that the Judge was wrong to distinguish **Amwell**; reached a perverse conclusion in finding that the public policy interest in preserving the privacy of internal deliberations was outweighed by the general rule that relevant evidence should be admitted at trial. Thirdly, it is contended that her order, extending to the whole of the private discussions on 7 November 2012 and 15 January 2013, is too wide.

9. I remind myself of the wide discretion granted to Employment Tribunals to make case management orders. See, by way of example, **Noorani v Merseyside TEC Ltd** [1999] IRLR 184 (CA). I can only interfere where an error of law is shown

10. Dealing with Mr O'Dair's grounds of appeal, first, I do not accept that the Judge was in error in the distinction which she drew with the circumstances of the **Amwell** case. Further, the EAT were not laying down any firm rule of practice, as is plain from paragraph 74 of Mr Recorder Luba's Judgment. The fact that the recordings were made covertly is not, of itself, a ground for ruling them inadmissible. Where the Tribunal fell into error in **Amwell** was in failing to carry out the balancing exercise, setting the general rule of admissibility of relevant evidence against the public policy interest in preserving the confidentiality of private deliberations in the internal grievance/disciplinary context. Here, Judge McNeill was actuely aware of the need to strike the balance, and in my judgment she did so permissibly. That is the

effect of her alternative finding at paragraph 21. In my judgment her conclusion cannot be characterised as perverse in the true legal sense. See **Yeboah v Crofton** [2002] IRLR 634.

11. As to the width of the order, ultimately I am not persuaded that the order is excessive. It will be for the full Tribunal to assess the cogency of the recordings and their impact on the issues which it must determine.

12. In these circumstances, no error of law having been made out, the McNeill ruling appeal fails and is dismissed. For completeness, I shall also dismiss the Smail appeal and direct that the hearing at Watford proceeds tomorrow.