

Appeal No. UKEAT/0054/17/BA

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

At the Tribunal
On 6 November 2017
Judgment handed down on 28 November 2017

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

MR G FLEMING

APPELLANT

EAST OF ENGLAND AMBULANCE SERVICE NHS TRUST

RESPONDENT

Transcript of Proceedings

JUDGMENT

Revised

APPEARANCES

For the Appellant

MS JANE McCAFFERTY
(of Counsel)
and
MR ZAC SAMMOUR
(of Counsel)
Instructed by:
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For the Respondent

MR STUART BRITTENDEN
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Instructed by:
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SUMMARY

PRACTICE AND PROCEDURE - Admissibility of evidence

The Claimant claimed disability discrimination and that he had been unfairly dismissed by the Respondent on 23/11/15. He wished to rely on his recording of conversations involving internal panel members during the breaks in a disciplinary hearing which took place on 13/8/15. The Employment Judge ordered that he could not rely on the recording for any purpose at the Full Hearing on the basis that its contents were “private/legally privileged”.

The Claimant appealed on the basis that LPP was not established and that the Employment Judge ought to have considered the contents of the recording before deciding on its admissibility. The Respondent agreed (in effect) that the appeal should be allowed and that the EAT should itself decide the extent to which the contents of the recording could be relied on.

The EAT decided:

- (1) LPP was established in relation to (a) references to the Respondent’s solicitor’s advice in the course of conversation between panel members and (b) the entire contents of the conversation between the Respondent’s solicitor and members; and those matters could not be referred to or relied on for any purpose by the Claimant at the final hearing;
- (2) As to the balance of the recording, in this case the public interest in the ET hearing any relevant evidence outweighed the public interest in preserving the privacy of private deliberations of an internal disciplinary panel, but only because the Claimant had listened to the tape soon after 13/8/15, been extremely upset by it, made known his views and thereafter refused to engage in the procedure before his dismissal on 23/11/15 and the EAT considered that the ET could not properly assess

the decision to dismiss without reference to the full contents of the recording
(except, necessarily, those parts subject to LPP).

A **HIS HONOUR JUDGE SHANKS**

B **Introduction**

C 1. Mr Fleming, the Appellant, was employed by the Respondent NHS Trust as a vehicle technician from 2009 until he was dismissed on 23 November 2015. He has brought proceedings against the Trust in the Employment Tribunal claiming that he was discriminated against on grounds of disability and that he was unfairly dismissed. In support of his claim he wishes to rely on a recording of conversations which took place between panel members in his absence during the breaks in a disciplinary hearing held on 13 August 2015.

D 2. Following a case management hearing on 27 July 2016 Employment Judge Postle ordered that he could not rely on the contents of the recording in any way at the final hearing on the basis that its contents were “private/legally privileged”. He has appealed against that Order on the grounds that legal professional privilege was not established and that the Employment Judge should have considered the contents of the recording when making the Order. The Trust opposed the appeal but at my suggestion they agreed at the hearing to the pragmatic course of (in effect) conceding the appeal and letting me decide the question of what use can be made of the recording rather than remitting that issue to the ET.

E **Factual Background**

F 3. For obvious reasons there has been no investigation of the facts or formal evidence given at this stage, so this account is based on the claim and response forms in the ET, the brief account in the Employment Judge’s case management summary, a transcript of the recording which was provided to me, and matters put forward by counsel on instructions.

A 4. Mr Fleming started work for the Trust in 2009 but he was absent from work most of the
time from Spring 2012 until his dismissal as a result of stress and depression which he says
were aggravated by the response of the Trust. It is accepted by the Trust that from April 2015
B he had a disability for the purposes of the **Equality Act 2010** arising from “mixed anxiety
depression disorder”.

C 5. As part of the Trust’s sickness absence policy Mr Fleming was required by the Trust to
attend an Occupational Health appointment on 12 June 2015 and a meeting with a manager,
Paul Henry, on 6 July 2015 but he failed to attend either of them for what he considered to be
good reasons. As a consequence the Trust called him to a disciplinary meeting at Beccles
D Ambulance Station on 13 August 2015 to consider whether his failure to attend the appointment
and the meeting amounted to gross misconduct.

E 6. The disciplinary meeting was conducted by Rob Ashford, the Essex Locality Director,
supported by Helen Adams, an HR Manager. Mr Fleming attended with his wife and the
management side was represented by Mr Henry and Karen Berry, an HR Advisor. There was
also a note taker in attendance. It is common ground that the meeting was difficult and that Mr
F Fleming was distressed and kept interrupting while the management side was putting its case
and the meeting never got as far as considering his case. It is also common ground that he
recorded the meeting on his phone without informing anyone. During two short breaks when
G the parties left the meeting room leaving Mr Ashford, Ms Adams and the note taker there alone
it appears that Mr Fleming left his phone in the room recording; he says that was inadvertent
but the Trust are understandably rather sceptical about that.

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A 7. During the first break there was a conversation between Mr Ashford and Ms Adams in
which they referred to the way Mr Fleming was conducting himself at the hearing, views were
B expressed about the suitability of the disciplinary procedure (as opposed to sickness procedure),
and there was some discussion about the best way to proceed with the hearing. There were also
various references to advice given by the Trust's solicitors.

C 8. In the second break there was further reference to that advice and the need to phone Mrs
Shah, the Trust's solicitor. Mr Ashford then left the room (it seems to broker a deal between
the two sides) and Ms Adams and the note taker were left together discussing Mr Fleming and
D his case in general. On his return Mr Ashford said that Mr Fleming had agreed to a meeting
with Mr Henry that day and that he therefore proposed that the process should be paused and he
and Ms Adams made a number of other comments about the Mr Fleming's behaviour at the
E meeting. They then phoned Mrs Shah and received advice from her. After the call, Mr Ashford
and Ms Adams agreed on what he was going to say (i.e. that the hearing was to be adjourned on
condition that Mr Fleming attend a meeting that day with Mr Henry and later an appropriate
Occupational Health referral). There were further references to their views on the
F appropriateness of the disciplinary procedure and the behaviour of Mr Fleming; in a number of
places these were expressed in robust and sometimes inappropriate terms, particularly by Mr
Ashford.

G 9. The meeting was adjourned on the basis that Mr Fleming agreed to meet Mr Henry the
same day and that he would attend a re-scheduled appointment with Occupational Health to see
an appropriate mental health clinician. The meeting with Mr Henry that day went ahead and
H was productive and good-humoured.

A 10. Shortly afterwards Mr Fleming listened to the tape of the meeting and what was said
during the breaks and was extremely upset. At least in part because of what he heard he did not
attend the Occupational Health appointment or a further meeting with Mr Henry or the
B reconvened disciplinary meeting with Mr Ashford. He made it known to Mr Ashford and Ruth
McCall, the Trust's Director of HR, that he had learnt what had been said and, according to the
Trust's ET3, he sent "a stream of lengthy and accusatory emails ... alleging that he had been
C subjected to bullying, harassment and corruption ... and seeking a stay of the disciplinary
proceedings".

D 11. The reconvened disciplinary meeting took place on 16 November 2015 in Mr Fleming's
absence and on 23 November 2015 the Trust wrote to him dismissing him for gross misconduct
in failing to attend the June Occupational Health appointment and the July meeting.

E 12. The Trust say that Mr Fleming should not be able to rely at all on the tape of what was
said in the breaks on the basis of legal professional privilege and/or because they comprise the
private deliberations of a disciplinary panel. Since legal professional privilege if established
provides an absolute bar it is logical to deal with this first.

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Legal Professional Privilege

G 13. I was referred to a number of authorities and can summarise the position thus:
(1) Legal professional privilege covers confidential communications between a
lawyer and client for the purpose of giving or obtaining legal advice.
(2) "Legal advice" covers all advice given by a lawyer in her capacity as such
H (**Three Rivers District Council v Bank of England (No 6)** [2005] 1 AC 610).

A (3) The privilege is absolute; it belongs to the client and can only be waived by the client.

B (4) The privilege does not apply where the purpose of seeking or giving the advice is to effect “iniquity” (**Barclays Bank plc v Eustice** [1995] 1 WLR 1238).

C (5) “Iniquity” involves conduct which goes beyond a mere civil wrong: there must be something akin to sharp practice or fraud or something which the law treats as entirely contrary to public policy (**BBGP v Babcock** [2011] Ch 296).

D 14. I have considered the references to the advice given by the Trust’s solicitors and the contents of the conversation between Mrs Shah and Mr Ashford (and Ms Adams) during the second break and am satisfied that they are, on the face of it, privileged, but I can see no basis for saying any other parts of the recording are privileged.

E 15. Ms McCafferty suggested that this was a case where the purpose of seeking or giving the advice was to effect iniquity but the evidence does not, in my view, come close to showing that the purpose was to effect “iniquity” as that term is used in the authorities. Further, it is clear that, at least on 13 August 2015, if there was an iniquitous scheme, Mr Ashford and Ms **F** Adams were not part of it and did not seek or refer to any advice from the solicitor with a view to carrying it out.

G 16. In my view therefore the claim to legal professional privilege advanced by the Trust is valid. Unless privilege is waived, Mr Fleming may not at the Full Hearing before the ET make any use of (a) references to the solicitor’s advice in the course of conversation between Mr **H** Ashford and Ms Adams or (b) any part of the telephone conversation between Mrs Shah and Mr Ashford (and Ms Adams).

A **The Public Policy in Relation to Private Deliberations of an Internal Grievance/**
Disciplinary/Appeal Panel

B 17. I was referred to three EAT authorities on this topic: **Chairman and Governors of**
Amwell View School v Dogherty [2007] ICR 135, **Williamson v Chief Constable of Greater**
Manchester Police (unreported, UKEAT/0346/09/DM, 9 March 2010), and **Punjab National**
Bank v Gosain (unreported, UKEAT/0003/14/SM, 7 January 2014). It seems to me the legal
C position is as follows in relation to evidence of the private deliberations of an internal panel:

C (1) The fact that such evidence is the product of a covert recording is not in itself
a ground for not admitting it.

D (2) There is however an important public interest in preserving the privacy of
such deliberations; otherwise, full and open discussion may be inhibited and the
integrity of the outcome may be undermined.

E (3) When a party seeks to rely on such evidence a balance must be struck
between that public interest and the public interest in litigants being able to avail
themselves of any relevant evidence.

F (4) The balance must be struck having regard to the particular circumstances of
the case; that may involve a consideration of the nature and quality of the
deliberations on the one hand and the value and weight of the evidence on the other.

G (5) In a discrimination case where a panel gives no reasons and the only (and
incontrovertible) evidence of discrimination comes from a recording (or evidence
from one of the panel members) of the panel's private deliberations, or where such
deliberations show that the panel are simply acting under instructions from
management, it is likely that the evidence will be admitted but there are no hard and
H fast rules and a balance must be struck in each case.

A 18. Turning to this case, and leaving out any consideration of the parts of the conversation
subject to legal professional privilege, it is right to say that the discussions recorded were not
expressly stated in advance to be “private deliberations” (as in Amwell) and that they were not
B *final* deliberations. However, they were all (including the discussion between Ms Adams and
the note taker) directly related to the hearing the panel was carrying out and the decision it had
to make about how to proceed and it must have been in everyone’s contemplation that such
C matters would be discussed by the panel members during any breaks while the parties were
absent and that such discussions would be private. In my view there is therefore a strong public
interest in preserving their privacy.

D 19. Ms McCafferty maintained that some of the statements made in the course of the
conversation, in particular by Mr Ashford, were “uniquely probative” of the issues in the claim
because they contained “direct evidence of discriminatory and offensive attitudes to Mr
E Fleming’s disability”. Although they may have some probative value in relation to the
complaint of discrimination, I am afraid I cannot accept that they provide “uniquely probative”
or incontrovertible evidence of discrimination. The comments relied on clearly arose from Mr
F Fleming’s behaviour and state on the day, not from the mere fact of his disability; it is fair to
say they express some exasperation (both with his behaviour and the difficult situation the panel
found themselves in) and that some of them are not expressed in an ideal way, but the panel
were deliberating as they thought in private and it is noticeable that they also express some
G sympathy for Mr Fleming’s position and that the course taken by Mr Ashford does not indicate
any kind of animus against him.

H 20. In the circumstances, if the events of 13 August 2015 had been “the end of the story” I
would have had no hesitation in deciding that the public interest in preserving the privacy of

A private deliberations prevailed in this case. However, the fact is that Mr Fleming listened to
what had been said in the breaks and let Mr Ashford (and indeed Ms McCall) know his views
B about what he had heard before the decision was taken to dismiss him. It does not seem to me
that that decision can be properly assessed by the ET without reference to what happened after
the meeting and to the actual content of the discussions which led Mr Fleming to adopt the
position he did (save, necessarily, in so far as they are privileged). In those unusual
C circumstances it seems to me that the balance is tipped in favour of the admission of the
evidence of what was said in the breaks.

D 21. For clarity I should say that the effect of this decision must be, I think, that Mr Fleming
is able to rely on this evidence for any purpose, including to support his case that the
disciplinary procedure was inappropriate and that Mr Ashford was motivated by a
discriminatory attitude towards him.

E **Conclusion**

F 22. I therefore rule that Mr Fleming should be allowed to present evidence to the ET about
what happened during the breaks and his reaction to it, except in so far as it is covered by legal
professional privilege as set out above. Any transcript produced or recording played at the
hearing will need to be carefully checked to see that it does not disclose privileged material and
there may need to be careful editing of the documents in the case and Mr Fleming's witness
G statement. I would recommend in this connection that there is a further case management
hearing before a different Judge to the one who is to deal with the final hearing to make sure
there are no "crossed lines".

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A 23. This is an edited version of the Judgment provided to the parties which has been prepared with a view to publication by excluding any reference to the content of the advice which is subject to LPP.

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