EMPLOYMENT TRIBUNALS (ENGLAND & WALES)
LONDON CENTRAL

BETWEEN

YVONNE ANDREWS

Claimant

-and-

(1) ARGENT (PROPERTY DEVELOPMENT) SERVICES LLP (2) MICHAEL LIGHTBOUND (3) ANITA SADLER

Respondents

Employment Judge:	Mr J S Burns
Representation	
Claimant:	Mr D Stephenson (Counsel)
Respondents	Mr T Cordery (Counsel)

JUDGMENT

1. The claims of sex discrimination are dismissed on withdrawal by the Claimant
2. The audio recording and transcript of the private conference of the First Respondent's managers and their discussions with their lawyers during that conference on 26/11/2019 (pages 17-28 of the numbered pages of the transcript and pages 344-355 inclusive of the hearing bundle for 11/8/2020) are inadmissible and must not be referred to or further adduced in evidence in this matter.
3. The claims of age discrimination are struck out.
4. The Respondents' application for an order striking out or depositing the race discrimination claims, is dismissed.

REASONS

1. The above judgment was given after a CVP open preliminary hearing during which I heard evidence on oath from the Claimant, was referred to a bundle of documents and received written and oral submissions from Counsel, and was referred to various authorities.

2. The tribunal considered it as just and equitable to conduct the hearing in this way. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties. No requests were made by any members of the public to inspect any witness statements or for any other written materials before the tribunal. The participants were told that is was an offence to record the proceedings. The tribunal ensured that the witness/es, who were all in different locations, had access to the relevant written materials. I was satisfied that the witness/es were not coached or assisted by any unseen third party while giving evidence.

For Order 2 above

Main facts

3. A covert recording was made by the Claimant of both the open sessions and of a private conference of the First Respondent's managers on 26/11/2019, which was the final redundancy consultation meeting, at the end of which the Claimant was dismissed.

4. During the private conference the managers made two telephone calls to their solicitors and also had discussions between themselves. It is agreed that the recording of the open sessions is admissible. It is agreed that the recording of the telephone calls to the solicitors are inadmissible because they are privileged. The Claimant however wished to adduce in evidence the discussions between the managers during their private conference when they were not speaking to their solicitor, (hereafter referred to as "the unprivileged discussions"). This was opposed by the Respondents.

5. The recording of the unprivileged discussions was made during an adjournment of the open sessions of a meeting with the Claimant, during which adjournment the Claimant and her TU rep had withdrawn so that the Respondents managers could confer in private. I find that the Claimant deliberately and with premeditation, made a covert recording, which she knew was a breach of privacy which would have been objected to had it been known about by the Respondents, and which she did not disclose when the open sessions of the meeting resumed. Thus, the Claimant was able to converse privately with her union representative but denied the same to the Respondents by covertly recording their discussions. The Claimant was dismissed from her employment at the end of the meeting, and subsequently appealed. Even then she did not reveal the recording, and the first the Respondents learned about it was when when they received the ET1 form.

6. The unprivileged discussions include some unprofessional comments, snide remarks about the Claimant, and inappropriate jocularity on the part of the First Respondent's managers. The main subject of discussion was how to dismiss the Claimant while at the same time minimising the risk of her bringing a subsequent successful tribunal claim. While the unprofessional comments, snide remarks and unwarranted jocularity does not reflect well on the managers, the record, even if it was adduced, would not provide incontrovertible or even strong evidence to support the Claimant's claims. There was no reference to sex or race, and during the unprivileged discussions there was some reference to the operational reasons why the Claimant's dismissal was thought to be appropriate by the managers, which reasons are consistent with the thrust of the First Respondent's defence to the unfair dismissal claim. In any event, the Claimant's case is not based on what took place during the unprivileged

discussions. Her case is that there was no real redundancy situation, and no meaningful consultation etc

7. The Claimant's main reason for wishing to adduce the unprivileged discussions was so that she could rely (in support of her claim for age discrimination) on a single reference made by one of the managers, (a Ms Sadler), to age.

8. However, in context even that may fall short for these purposes. As confirmed by Mr Stephenson, the Claimant (who was 49 years of age at the time) does not suggest she was dismissed because of her age. She wishes to claim that Ms Sadler's comment about age was an act of harassment or unfavourable treatment against the Claimant.

9. Context is all important in harassment claims. Ms Sadler's comment is not "incontrovertible evidence" of age discrimination. It was made solely in response to an hypothetical and irrelevant reference to age (of youngsters who might suffer in a redundancy selection because of perceived lack of experience) made by the Claimant's TU rep during the previous open session. Ms Sadler's subsequent private comment was a factual observation that the TU reps's opinion that young employees are often disadvantaged during redundancy processes was not relevant to the Claimant. Ms Sadler then added a comment about her own age. Even if the Claimant is genuinely offended by this, it is an unattractive submission that it should be regarded as actionable harassment when she heard it only as a result of a covert recording made by her in breach of privacy.

The law

10. Covertly recorded material is not automatically inadmissible just because the manner in which it was obtained was underhand and dishonest: Chairman and Governors of Amwell View School v Dogherty [2007] IRLR 198 at 68 and Vaughan v London Borough Of Lewisham (Unreported, UKEAT/0534/12/SM) at 12. In each case a balance must be struck between two competing public policy interests: A) the interest of the claimant in having all relevant evidence admitted; and B) the interest of the employer in preserving the integrity of their private deliberations when determining whether to terminate employment.

11. In turn, this requires an assessment 1) of the relevance of the evidence contained in the recording to the issues in the case (Dogherty at 27); and 2) the context of the deliberations and expectation of privacy. As to 1) this is a question of fact and degree: even if relevant, how relevant is the covertly recorded material (Vaughan at 22)?

12. As to 2), where the covert recordings are of a part of a meeting where it would be expected that there might be a written record, it is less likely that the recordings will be held inadmissible (Dogherty at §69). But where the recordings are of private deliberations, it is more likely they will be held inadmissible even if the material that is therefore excluded has been found to be relevant under 1). That is because there is a strong policy interest in panel members being able to deliberate freely in private (Dogherty at 72-73):

> *"Important as the public policy is that a party to proceedings should be able to avail themselves of any relevant evidence, it seems to us that there is in the instant case a contrary and superior public policy dimension that arises. Here, the panel members invited all parties and witnesses before them to withdraw, expressly so that they might deliberate*

privately. All parties – including Mrs Dogherty and her representative – accepted that invitation without demur on the premise that by doing so they would disable themselves from having any record of what might be said. That will have been underscored by the requested absence of the clerk at that point, making it clear that no note of the deliberations was being made. Likewise, those participating in the deliberations will have done so on the premise that no one of their number would then disclose or publish what had occurred during the private deliberations. Had one of the parties, or a witness, returned to the hearing-room whilst deliberations were underway, everyone involved would have understood that they would have been asked to leave and that discussion would have stopped whilst they were present. …In our judgment there is an important public interest in parties before disciplinary and appeal proceedings complying with the 'ground rules' upon which the proceedings in question are based. No ground rule could be more essential to ensuring a full and frank exchange of views between members of the adjudicating body (in their attempt to reach the 'right' decision) than the understanding that their deliberations would be conducted in private and remain private. How, otherwise, could a member of that body confidently expose for discussion a doubt concerning some evidence about which he or she was unsure? The failure to maintain respect for the privacy of 'private deliberations' in this context would have the important consequences of (1) inhibiting open discussion between those engaged in the task of adjudicating and (2) giving rise to a good deal of potential satellite litigation based on 'leaks' by particular members of the adjudicating body or from the clandestine or unauthorised recordings of such proceedings".

13. The balancing exercise referred to in Dogherty will not, however, always result in secret recordings of the private deliberations of a panel conducting grievance or disciplinary hearings being excluded. In Punjab National Bank (International) Ltd v Gosain UKEAT/0003/14 (7 January 2014, unreported), a case involving claims of sexual harassment, sex discrimination and constructive unfair dismissal, such evidence was admitted by an employment judge because of the nature of the comments allegedly made by members of the panels during the private sessions. These consisted of personal and offensive remarks made about the claimant, and other statements indicative of a wholly improper approach to the task which the panels were convened to perform. According to the employment judge, these comments, if said, fell 'well outside the area of legitimate consideration' of the matters to be considered by the grievance and disciplinary panels, and this distinguished the case from Dogherty. In any event, she held that, given the nature of the alleged comments, there were no public policy reasons for excluding them even though they were made in private. The EAT upheld the judge's decision. Judge Peter Clark held that the distinction with Dogherty was legitimate, and that the judge had properly performed the necessary balancing exercise between the competing public policy interests. He further upheld the employment judge's order admitting the entirety of the recordings of the private discussions, and not just those parts which were considered objectionable, leaving it to the full tribunal hearing the case to assess the cogency of the recordings and their impact on the issues to be determined.

Assessment

14. The material in the unprivileged discussions is not cogent or incontrovertible evidence in favour of the claims. It is ambiguous and double-edged at best.

15. I do not find that the facts in this case are similar to those in Punjab. In that case outrageous abusive comments made in private about sex were unsurprisingly admissible in a subsequent sex discrimination claim.

16. In the instant case some foolish unprofessional remarks were made but they fall short of the degree of offensiveness of the remarks made in Punjab, and they would be of little or no assistance to any proper determination of the claims.

17. I also do not accept Mr Stephenson's submission that, because the managers did not anxiously consider all the Claimant's arguments, and instead spent much of the time during the unprivileged discussions considering how best to protect the Respondent from an anticipated tribunal claim, that it follows that the said discussions fell 'well outside the area of legitimate consideration' of the matters to be considered by a dismissing panel.

18. Whether or not there was a genuine redundancy and, if so, whether proper consideration was given to the alternatives to redundancy, will be matters for the unfair dismissal claim. Most if not all dismissing panels will give consideration to self-preservation, and, more to the point, wish to do so in private, without being bugged by their own employee.

19. For these reasons I find that the forensic interest in the Claimant being able to adduce the unprivileged discussions is outweighed by the interest of the employer in preserving the integrity of their private deliberations.

For Order 3 above

20. The only "evidence" relied on by the Claimant in respect of her age discrimination claims is the single comment in the unprivileged discussions, which are inadmissible. Mr Stephenson sensibly accepted that if this material was inadmissible, the age discrimination claims would have to be struck out as having no reasonable prospect of success.

For Order 4 above

21. The Claimant has referred to a number of facts and matters in support of her race discrimination claims including a lack of training, claimed breaches of the EHRC Code of Practice, a claimed premature decision to make her role redundant on 02.08.19 prior to any consultation meetings or discussions with her, and "keeping her in the dark" unlike her white comparators Mark Young and David Scudder. She also points to statistical evidence about the racial profile of the work force and her team.
22. I am unable without hearing detailed evidence to properly assess the weight of these allegations and I am unable to safely conclude that the race claims have little or no reasonable prospect of success. Hence it is inappropriate to either strike out or deposit those claims.

J S Burns Employment Judge
London Central
11/8/2020
For Secretary of the Tribunals -

date sent to the Parties – 12th August 2020