



EMPLOYMENT TRIBUNALS

Claimant: Mr L Boyes

Respondent: Northern Trains Limited

Heard at: Manchester (in public, by video)

On: 8 March 2022

Before: Employment Judge C H O'Rourke

Appearances

For the Claimant: Mr R Driver – former colleague

For the Respondent: Mr N Singer - counsel

OPEN PRELIMINARY HEARING JUDGMENT

The Claimant's application for leave to admit evidence of private discussions, obtained by covert recording, is refused.

REASONS

Background and Issues

1. Following the Respondent's decision to dismiss the Claimant, a train conductor, for allegedly failing to carry out 'revenue duties' (i.e. collect a ticket machine at the start of his shift and make ticket sales to passengers, travelling without pre-purchased tickets), he appealed that decision.
2. He attended an appeal hearing on 25 November 2020. He covertly recorded that hearing, to include leaving the recording device running when the 'public' element of the hearing was finished, thus also recording the appeal panel in 'private' deliberation.
3. On proposing to the Respondent that the full transcript of this recording be included in the hearing bundle, the Respondent objected, obliging the Claimant to apply to the Tribunal for leave to do so.
4. For the avoidance of doubt, the following is not in dispute between the parties:

- a. That the transcript is an accurate account of the recording.
 - b. That the 'public' parts of the recording/transcript can be included in the bundle.
5. The only issue, therefore, is whether or not the 'private' deliberations of the appeal are admissible.

The Law

6. Both parties referred me to the following authorities:
- a. **Amwell View School Governors v Dogherty [2007] ICR 135** **UKEAT**, which is authority for the proposition that such recordings are not, simply because of their covert origins, inadmissible in the employment tribunal. There, the EAT allowed the unfair dismissal claimant to adduce clandestine recordings of the open part of the disciplinary hearing before the school governors that led to her dismissal. The EAT saw no reason, based on either public policy or the right to privacy, why evidence of a hearing of which it was always intended that there would be a written record should not be admitted. However, it went on to hold that the claimant could not adduce secretly obtained recordings of the governors' private deliberations. It stated that there is an important public interest in parties before disciplinary and appeal proceedings complying with the 'ground rules' — in this case, the understanding that the panel's deliberations would be conducted in private and remain private.
 - b. In **Punjab National Bank (International) Ltd v Gosain [2014] WL 1097018** **UKEAT** the EAT held that an employment judge had been entitled to distinguish **Dogherty**, when ordering that a covert tape-recording made during an employer's private deliberations concerning a grievance and disciplinary hearing should be admitted into evidence. The judge had found that the comments which were alleged to have been recorded, if said, fell well outside the area of legitimate consideration of the matters before the disciplinary and grievance panels. In reaching her decision, the judge had properly balanced the competing interests between the relevance of the evidence on the one hand and the public interest in preserving confidentiality of private deliberations on the other when making her order.

Submissions

7. Both parties made oral submissions and the Claimant, additionally, had provided written submissions.
8. **Claimant**. In summary, the Claimant said the following:

- a. He pointed to four extracts from the transcript [189, 191, 192 and 196] which he said should be admitted, as they were '*significantly relevant evidence relating to his dismissal*'.
- b. The Respondent cannot rely on the 'ground rules' principle in **Dogherty**, to render the extracts inadmissible and he asserted that there are no public policy reasons to consider otherwise.
- c. The extracts relied upon go to the fairness of the dismissal, the fairness of the disciplinary process and the reason for dismissal. Those referred to in this Hearing were as follows (with the Claimant's comments, as to their relevance, below):

[189] *'Gary (the appeal manager): -all that type of stuff. Where we going with this then now what er, what do we reckon?*

Vicky (HR advisor): Yeah

Gary: Have you got, uh, so.

*Vicky: I just—I feel I like--and I said this to Paul with the first one *sighs* We're trying to make a point--*

Gary: Oh I know, Well he said that yesterday.'

The Claimant interprets this exchange as the appeal manager stating that he had been directly told by another manager involved in the dismissal decision that the Claimant was dismissed 'to prove a point'.

[191] *Vicky: Yeah. I'm gonna ask the solicitor for some advice because all of that. 'Cause what isn't fair is, to him as an individual and for this case. We can't do something on this case because we're bothered about another one-- what's done is done with that, if it's wrong, you know, we probably gonna have to deal with that when we can. We can't let him pay for that, if you know what I mean?*

The Claimant interprets this comment as suggesting that there was an underlying agenda for the appeal hearing, to support and uphold the dismissal decision, rather than reach a balanced and fair outcome, having heard all the evidence presented.

[192] *Okay. Um, now, another point-- They're saying-- So, it's-- Uh, all these instances of him not taking machines. I-It, you know, They're saying it's because of revenue availability, and, you know, it's poor, you know, the machine availability there-there's issues and the OTAP- uh, with staff saying, uh, you know, you don't need to take one and all of this, which is, you know, we know it's, uh, we know it-we-we know it's a problem. There was a problem, isn't there? But then, they're saying that the reason why he didn't report that to control is because-- Well, everybody knows because there's a-a revenue sho, uh, revenue machine shortages, um, at Victoria, uh-uh, and all the right people know about it. So, you won't need to report it, you know.*

[196] Gary: *And to be honest I do know, there has been issues at Victoria with machine availability, there has.*

The Claimant considers that this exchange is evidence that the Respondent knew that there was a problem with availability of revenue/ticket machines at Victoria Station, but contradicted this conclusion by stating in the appeal outcome letter of 4 December 2020 [not in the bundle] that:

'Nothing has been raised locally in relation to any shortages at Manchester Victoria, if shortages do occur it is usually due to equipment failure and is very short term. I do not believe you raised any concerns to your line manager about general machine availability.'

- d. The balance between the public interest in the panel's deliberations being conducted in private and remaining private and his right to access and provide evidence to support his case falls in his favour.

9. Respondent.

- a. A more general reading of the transcript [e.g. 103, 187 and 194] shows that the Respondent's managers had no 'hidden' agenda as described, but were holding a genuine conversation as to the merits of the Claimant's appeal. It was clear, for example at [197] that the panel was thinking deeply about the matter.
- b. The extract that the Claimant refers to at [189] is entirely within the 'ground rules'. The panel are raising relevant considerations and considering the options open to them.
- c. The extract at [197] is simply the panel considering the consistency of their decisions, with previous similar decisions, which is entirely proper.
- d. As to the availability, or otherwise, of the ticket machines, there is no real conflict between what is recorded in the transcript [192] and in the appeal outcome letter. It is certainly not blatant enough to evade the general rule in **Dogherty**.

Conclusions

10. I find that the covert recording of the private deliberations of the panel is inadmissible, for the following reasons:
 - a. In respect of the extracts at [189 and 191], I don't consider those comments to fall in any way close to the border of the 'ground rules'. These are entirely routine comments and considerations by an appeal panel, as to, firstly, the reason for choosing to dismiss the Claimant, which it appears, in this case, was because the

Respondent considered that a ticket inspector failing to maximise revenue for his employer was a particularly egregious act, necessitating an example being set, potentially an entirely proper conclusion. Secondly, considering whether such disciplinary decisions are consistent with other such decisions, is again an entirely proper field of enquiry for such a panel. Indeed, as was pointed out to Claimant, had the decision in his case been inconsistent with those in relation to other employees and such inconsistency was dismissed by the panel, then he would have had a valid complaint in that respect.

- b. In respect of the availability, or otherwise, of ticket machines, the conflict between what is said in the recorded discussion and in the outcome letter is closer to the 'boundary line'. The matter is potentially relevant to the issues in the claim, but, nonetheless, I don't consider that this extract is admissible, for the following reasons:
- i. Based on the authority of **Gosain**, the threshold necessary to outweigh the public interest in the privacy of disciplinary and appeal panel discussions is a relatively high one. In that case, the female claimant had brought sex discrimination and harassment claims. In private discussions, in a related grievance hearing, which was covertly recorded, a manager made a gross sexual reference to the claimant and which was found not to be *'part of the deliberations in relation to the matters under consideration'* and therefore fell outside the 'ground rules'. In this claim, however, the discussion as to ticket machine availability was a matter under consideration.
 - ii. The allegation that there was a shortage of ticket machines is just one part of the overall factual matrix in the claim. The Claimant was dismissed for allegedly failing, on many occasions, to carry out revenue duties [33], for example on 37 of 78 shifts, in a six-month period and having revenue collection figures significantly below the average. In his appeal against that dismissal he raised nine 'core' grounds of appeal, but significantly expanded on those in the appeal hearing, of which only a part relates to machine availability. Therefore, I don't consider that not admitting the related extract will exclude from consideration *'the only – and incontrovertible – evidence of such ...'* alleged unavailability (**Dogherty** para.74). There will be nothing to prevent the Claimant raising this matter as an issue in the final hearing, or adducing such other evidence as may be available to support that contention.

11. For these reasons, therefore, the Claimant's application is refused.

Employment Judge O'Rourke

8 March 2022

Judgment and Reasons sent to
the parties on:

31 March 2022

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For the Tribunal Office:

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