EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2014/27 Covert recordings of the private deliberations of grievance and disciplinary panels are admissible as evidence (UK)

<p>The Employment Appeal Tribunal (“EAT”) has upheld a decision by the Employment Tribunal to the effect that covertly recorded private deliberations at disciplinary and grievance hearings should be admitted as evidence in a claim. The content of the private deliberations fell outside the panels’ area of “legitimate consideration”. For that reason the Tribunal had been right to distinguish the case from previous case law, which stated that covertly recorded private deliberations should be excluded as evidence on public policy grounds</p>

Summary

The Employment Appeal Tribunal ("EAT") has upheld a decision by the Employment Tribunal to the effect that covertly recorded private deliberations at disciplinary and grievance hearings should be admitted as evidence in a claim. The content of the private deliberations fell outside the panels' area of "legitimate consideration". For that reason the Tribunal had been right to distinguish the case from previous case law, which stated that covertly recorded private deliberations should be excluded as evidence on public policy grounds.

Background

There is no general rule preventing covertly recorded evidence from being admitted in the Employment Tribunal. The Tribunal has a wide discretion to admit evidence which is relevant, and the admissibility of covert recordings is normally a question for the Tribunal in each case.

Guidance on covert recordings was provided by the case of *Chairman and Governors of Amwell View School v Dogherty* [UKEAT/0243/06], which was decided in 2006. In that case, the EAT concluded that two questions needed to be asked when considering whether to admit evidence that had been covertly obtained. Firstly, is the evidence relevant? Secondly, if it is relevant, is there any good reason to exclude it?

In *Amwell*, the EAT found that public policy was a good enough reason to exclude certain recorded evidence. In that case, the EAT drew a distinction between the "public" or open part of a disciplinary or grievance hearing (which is attended by both the claimant and the decision-making panel) and the "private" or closed part of the hearing (which takes place when the claimant withdraws to allow the panel to deliberate).

It found that there was no public policy ground on which to exclude a recording of the public part of the hearing, and this should be admitted as evidence. However, it found that there was a public policy reason to exclude recordings of the private part of the hearing. The EAT concluded that it was in the public interest for the parties to a disciplinary or grievance hearing to obey the "ground rules" upon which proceedings are based. The EAT in *Amwell* said:

"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....The failure to maintain respect for the privacy of "private deliberations" in this context would have the important consequences of inhibiting open discussion between those engaged in the task of adjudicating..."

The EAT's view was that it is vital that decision-making panels could be confident that their private discussions would, in fact, remain private, so that they can confidently express their views. For that reason, it ordered covertly recorded private deliberations to be excluded from the Tribunal. This case has been followed since and covert recordings of private deliberations have historically been excluded from Tribunal proceedings.

The EAT in *Amwell* did, however, caveat their finding by saying that their conclusions might

have been different if that claim had been for unlawful discrimination and the recordings had shown evidence of that discrimination; or if no reasons for the decision in the grievance or disciplinary matter had been given to the claimant.

Facts

Ms Gosain worked for Punjab National Bank (International) Ltd for just over 18 months. Following her resignation, she brought claims of sexual harassment, sex discrimination and constructive unfair dismissal.[1]

During her time at the Bank, Ms Gosain had attended both a disciplinary hearing and a grievance hearing. She had secretly recorded all of both hearings, including the private deliberations that took place when she was not in the room. When she disclosed the recordings to the Bank, they applied for an order to exclude the private discussions of the panel members.

The Tribunal distinguished between this case and *Amwell*. This was because of the nature of the discussions which took place while Ms Gosain was out of the room. During the private deliberations:

i.one manager commented that he was deliberately skipping the key issues raised in Ms Gosain's grievance letter;

ii.the Managing Director of the Bank instructed the panel to dismiss Ms Gosain; and

iii.a third manager, who was hearing the disciplinary matter, made an extreme misogynistic, sexual comment about Ms Gosain.

The Tribunal found that the comments that were made during the private deliberations fell well outside "the area of legitimate consideration" of the matters which the panel should have been considering. The Tribunal also found that the comments were clearly relevant to Ms Gosain's claims of sexual harassment, sex discrimination and constructive unfair dismissal. On that basis, it found no reason to exclude the "private" part of the recorded evidence and refused to grant the order.

The Bank appealed the decision to the EAT. It said that the Tribunal judge had been wrong to distinguish this case from *Amwell*, and to find that the general rule that relevant evidence should be admitted to a hearing outweighed the public policy interest in preserving the privacy of internal deliberations.

Judgment

The EAT upheld the Tribunal's decision.

It supported the Tribunal's view that the circumstances in this case were materially different from those in *Amwell*. This was because the comments that the grievance and disciplinary panels were alleged to have made fell well outside the "ground rules" that had been discussed by the EAT in *Amwell*.

Essentially, the EAT held that employees withdraw from disciplinary and grievance hearings in good faith, on the understanding that the purpose and nature of the deliberations undertaken while they are absent will relate to the issues in hand. In this case, the Tribunal judge had found that the private discussions in this case "did not constitute the type of private deliberations which the parties would understand would take place in relation to the specific matters at issue." She also found that, given the nature of what had allegedly been said, there was no public policy reason why those comments should be protected. The EAT supported these views.

The EAT also commented that the EAT in *Amwell* had explicitly refrained from setting down a firm rule of practice that private deliberations would never be admissible, as shown by their comment that in discrimination cases or cases where no reason was given for a decision their finding might have been different. In this case – a discrimination case in which the private recordings were clearly relevant to the discrimination claim – the Tribunal judge had been right to balance the general admissibility of relevant evidence against the competing public policy interest in preserving the confidentiality of private deliberations.

Commentary

The presentation of covertly recorded evidence from grievance and disciplinary hearings is very common in English and Welsh Employment Tribunals. In practice, advisers should warn employers that there is a danger that disciplinary and grievance panels might be recorded.

However, provided the panel conducts itself properly, any covertly recorded private deliberations are still unlikely to be admitted as evidence. Employers should therefore feel free to discuss the matters at hand with relative freedom.

What was key in this case was that the panels in question had breached the employee's good faith by using their private deliberations to make extreme comments about her – comments that showed a discriminatory attitude and a complete disregard for due process. Because of the nature of those comments, and the fact that they had gone far beyond what the claimant would have expected to have been discussed, public policy protection no longer applied. Panels therefore need to bear in mind the fact that they must justify the claimant's good faith

by staying within the expected parameters of discussion when coming to their decision. Failure to do so is likely to waive their protection.

Comments from other jurisdictions

Austria (Martin Risak): Unlike in common law systems, Austrian law on civil procedure does not provide for any exclusion of evidence, even if it has been obtained unlawfully. It is up to the courts to consider freely all the evidence in front of them. Therefore, the evidence described in the case at hand might be submitted in a labour court and would have to be considered by the judges in their ruling.

Germany (Klaus Thönißen): It is very unlikely the case reported here would have been an issue under German labour law. First of all, there is no disciplinary or grievance panel in German labour law and so this particular issue could not have arisen. Secondly, German labour law does not have its own rules of procedure when it comes to the admission of evidence and so the matter is rather one of civil procedure.

However, it is very likely that a German court would not have admitted the evidence in the case at hand. The basic rule in German civil procedure is that covertly recorded conversations of any kind are inadmissible as evidence in a trial. The highest civil court in Germany, the Federal Court of Justice (*Bundesgerichtshof*), allows covertly recorded discussions only, when their admission is considered as self-defence – for example, in order to show there was a criminal act or to identify criminals. Therefore, Ms. Gosain could not have submitted her covertly recorded deliberations in a German court.

Luxembourg (Michel Molitor): The solution discussed by the Employment Appeal Tribunal is quite interesting to look at from a Luxembourg legal practitioner's point of view, since a judge in Luxembourg would surely not have ruled the same way.

The general principle in relation to evidence is indeed that it must be obtained in a fair manner in all circumstances. This has been reaffirmed many times in Luxembourg's case law, including a case decided on 4 October 2002, in which the Court of Appeal determined that a recording on a magnetic tape was inadmissible, stating that evidence obtained without the knowledge of the parties cannot be a valid proof, as it was obtained unfairly and is therefore irregular.

In a case such as the one presented here, the Luxembourg judges would not have taken into account the reason the evidence was presented - they would simply have rejected it.

Subject: disciplinary and grievance hearings; covert recordings

Parties: Punjab National Bank (International) Ltd & Others – v – Gosain

Court: Employment Appeal Tribunal

Date: 7 January 2014

Case Number: UKEAT/0003/14/SM

Internet publication: www.bailii.org>United Kingdom>UK Employment Appeal Tribunal>year>January>Punjab

---

Creator: Employment Appeal Tribunal
Verdict at: 2014-01-07
Case number: UKEAT/0003/14/SM