Covert recording in a PI claim: ramifications for Employment Tribunals?

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***Mustard v Flowers & Ors* [2019] EWHC 2623 (QB)**
Master Davison, High Court, QBD Division
(Judgment handed down on 11 October 2019)

The Facts

Background

On 21 January 2014, a road traffic accident took place in Milton Keynes (liability having been conceded). The Claimant's (hereinafter referred to as "**C**") Honda Jazz was struck from behind by a Fiat Punto; there are 3 defendants (referred to collectively as "**D**").

C claims that the accident resulted in her sustaining a *"sub-arachnoid brain haemorrhage and a diffuse axonal brain injury such as to have left her with cognitive and other deficit"*[1]. D's witnesses say that C suffered no, or only a minor, brain injury whereas C's experts say C suffered a serious brain injury but that the manifestations of that injury are subtle. The minutiae of the conflicting medical evidence is irrelevant for the purposes of this article but reference is included for context.

Towards the end of 2017 into early 2018, C was examined by D's experts. C was advised by her solicitor to record the examinations on a digital device. She was examined by 3 of D's experts: Mr M (D's orthopaedic surgeon), Mr K (D's neurosurgeon) and Dr T (D's neuropsychologist). C recorded consultations with Mr M and Mr K covertly.

In respect of the consultation with Dr T, C asked if she could make a recording. Dr T agreed that C could record the clinical examination but not the neuropsychological testing. C

[1] Para 2 Judgment

accepted this and tried to switch off the device, however failed to do so and therefore inadvertently recorded the whole consultation with Dr T.

Recordings appear also to have been made by D's expert witnesses, specifically Dr G (D's neuropsychiatrist), Dr S (D's audio-vestibular physician) and the aforementioned Dr T.

C announced her intention to record to Dr C, Dr G and Dr S (although Dr S apparently took no issue at the time but nevertheless also complained that the recording was covert) and they all agreed. In relation to Mr M and Mr K, they were covertly recorded and in respect of Dr T, her permission to record was sought but only granted for the clinical interview and not the neuropsychological assessment.

C's solicitor, in his evidence in opposition of D's application to exclude the evidence, confirmed that all D's experts had been forewarned by their own Instructing Solicitors that C was likely to record the consultations and C had assumed that they knew. C's solicitor reiterated the issue that C had elected to record the appointments to provide an aide memoire due to issues with memory and fatigue.

D's objections

In particular, during the course of the litigation, Mr M and Dr T have complained in very strong terms about the covert recordings. Dr T's objection to the recording of the neuropsychological testing were as set out at paragraph 11 of the Judgment, namely that:

> (a) it raised issues regarding the proprietary rights in the tests, which were not for release into the public domain;
> (b) it rendered the claimant herself essentially "un-assessable" on any future occasion;
> (c) it undesirably conferred on the claimant's solicitors "insider knowledge" of the content and methodology of the tests;
> (d) by reason of the foregoing, raised professional conduct issues; and
> (e) that because her consultation with C had been recorded but C's consultation with her counterpart, Professor M, hadn't been, she was unable to scrutinise any shortcomings in his approach and operating methods in the same way

Application before QBD

Cross applications were made to the High Court. D invited the Court to exclude the evidence obtained by way of the covert recordings pursuant to Civil Procedure Rules 32.1(2). C resisted that application and instead alleged that the recording of the Dr T consultation revealed serious errors in her administration of the neuropsychological testing such as to render it of "*doubtful value*"[2], based on a witness statement provided by Professor M. The issue for the Court to determine therefore was what to do with evidence which "*may have been obtained improperly or unfairly but which is nevertheless relevant and probative*"[3]

Counsel for D did not dispute that the evidence from Professor M was relevant and probative because it was capable of defeating or qualifying the adverse conclusions that might otherwise have been drawn against C based on the test scores with Dr T.

It was argued on behalf of D that (1) the recordings were unlawful because they breached the Data Protection Act 2018 and GDPR rules and (2) that they should be excluded because they were (a) unlawful or had been obtained in an improper manner (b) because they impaired or undermined the validity of Dr T's testing; and (c) gave rise to an uneven playing field or inequality of arms as only D's experts had been recorded in such a way.

Both parties accepted the proposition that evidence that had been unlawfully or improperly obtained might still be admissible.

Decision

The Judge allowed the evidence to be admitted. In determining the correct test to be applied, the Court considered that:

> "*What was required was that the court should consider the means employed to obtain the evidence together with its relevance and probative value and the effect that admitting or not admitting it would have on the fairness of the litigation process and the trial. The task of the court was to balance these factors together and, having regard to the Overriding Objective, arrive at a judgment whether to admit or exclude. To put it slightly differently, the issue was whether the public policy interest in*

[2] Para 6 Judgment
[3] Para 6 Judgment

excluding evidence improperly obtained was trumped by the important (but narrower) objective of achieving justice in the particular case."[4]

Whilst noting that the covert recordings of Mr M and Mr K were "reprehensible", the Judge observed that the evidence obtained through the recording of Dr T's examination was highly relevant and probative, indeed as were the recordings of Mr M and Mr K. The issue of a "level playing field" was discounted as theoretical. As a postscript, it is of note that the issue of covert recordings was described as a "*thorny topic, [which] falls to be decided on a case by case basis*"[5].

Comment

Covert recordings are rife in Employment Tribunal litigation. Tribunals determine the admissibility based on two guiding principles: relevance and probative value. Motivation and timing may be topics that a C is pressed on in cross examination. Agreed transcripts of any such recordings are essential for a smooth running final hearing.

In an era where any employee can make their own recordings easily on a digital device, and where verbatim handwritten or typed meeting minutes are unlikely to be practically possible for employers, a clear yet comprehensive policy on the recording of meetings (and the consequences of covert recordings) is a must for employers.

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[4] Para 19 Judgment
[5] Para 41 Judgment