EAT: Covert Recordings and impact on Remedy

By Grace Nicholls
3PB Barristers

Phoenix Housing Limited v Tatiana Stockman
HHJ Richardson, Mr Smith and Dr Smith (EAT)
(Judgment handed down on 5 July 2019)

The Facts

The Claimant (hereinafter referred to as "**C**") worked for the Respondent (hereinafter referred to as "**R**") between March 2010 and November 2013 as a payroll officer and then as a financial accountant. Her line manager was the Head of the Finance Department (Andre Betha (hereinafter referred to as "**AB**")) and his line manager was the Director of Finance (George Lambis (hereinafter referred to as "**GL**")). A restructuring took place in 2013 and she obtained the role of payroll officer.

Events on 23 May 2013 were the catalyst for proceedings; C complained to AB that GL was treating her differently and the restructuring was biased against her. She said another employee agreed with her (Mr Mistry). This employee was spoken to and said sometimes GL didn't speak to her. AB said he would raise the concern with GL later that day. AB and GL met, and GL said he wanted to speak to Mr Mistry himself. The discussion which took place was good natured and Mr Mistry was not being reprimanded. C walked in and demanded GL tell her what the conversation was about. GL told her the meeting was private and that she should leave the office. She refused to leave and was asked at least twice more to leave before doing so.

Paula Logan (hereinafter referred to as "**PL**") from HR spoke with C, confirmed she would investigate matters and would speak with C again at 3:30pm that day. At that meeting, C was told that interrupting and failing to leave the meeting would trigger disciplinary action. C said she would raise a grievance. It is this meeting on 23 May that C covertly recorded.

On 30 May, C raised a grievance including raising health and safety issues and unlawful harassment by GL. Disciplinary matters in respect of 23 May were arranged to be heard along with C's grievance. C was at this stage off work and would not consent to information about her current state of health being divulged. The disciplinary matters were heard in her absence on 16 August 2013 and a 12-month formal warning was issued. Following further investigation, the grievance was rejected by letter on 28 August 2013. Both decisions were appealed. C confirmed in early September 2013 that she intended to return to work but was instead put on authorized absence by R until her grievance appeal had concluded.

Both appeals were heard on 16 September 2013. C's allegations against GL were repeated but ultimately both appeals were rejected. Following an unsuccessful mediation meeting in November 2013, C was written to by Jayn Bond (hereinafter referred to as "**JB**") on 25 November 2013 inviting her to a meeting 3 days later to discuss if the working relationship between C and R had irretrievably broken down. The meeting was chaired by Ms Zacharias (a manager from another department).

C's position at the meeting was that she could put the grievance behind her and wanted to return to work. She said the new role would be less stressful and that she and GL could work together professionally. This was not accepted by Ms Zacharias and she concluded the relationship had irretrievably broken down. C was dismissed with immediate effect. C's appeal against dismissal was rejected on 10 January 2014.

The Law

Employment Rights Act 1996 ("ERA 1996")

s122(2): Basic award: reductions

Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

s123(1) Compensatory award

Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and

equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

The ET Decision

C brought the following claims against her former employers:

a. "Ordinary" unfair dismissal
b. Unfair dismissal and detriment for making public interest disclosures (whistleblowing)
c. Race discrimination and victimization
d. Breach of contract

Her ordinary unfair dismissal claim was successful (not the subject of any further challenge), together with "whistleblowing" detriments and victimization in respect of two specific allegations of detriment. The ET did not find that the dismissal was an act of victimization or automatically unfair on the basis of the principal reason of the making of protected disclosures. A reserved judgment was handed down in April 2015. The EAT's summary of the reasons for the success of the unfair dismissal claim are set out at para 20 of the EAT judgment as follows:

> *"(1) The process was not fair: C was given only 3 days' notice of the hearing and did not have any real indication of the basis of the case against her, whereas Ms Zacharias had a detailed file of relevant documents. (2) The hearing was not even-handed: Ms Zacharias was both prosecutor and judge. (3) Ms Zacharias took into account matters which C had no opportunity to consider, including observations of GL about the mediation meeting. (4) Most fundamentally of all, the conclusion that there had been an irretrievable breakdown was unreasonable, given that the Claimant had only pursued a single grievance and had said that she was prepared to put the matter behind her*."[1]

The ET entirely rejected the complaints of racial harassment against GL. Following a trip to the EAT in May 2016 the matter was remitted back to the ET in respect of the two allegations of detriment.

[1] Para 20 EAT Judgment

The second substantive ET hearing was held in April 2017 and by way of judgment in May 2017, the ET upheld its previous decision in part, namely concluding that a letter dated 25 November 2013 amounted to the detriment for "whistleblowing" and victimization. That conclusion is now appealed by R.

A remedy hearing took place in June 2017 and by a reserved judgment in September 2017, the ET declined to order re-instatement or re-engagement. That decision was the subject of a cross appeal by C.

C was awarded £947 (basic award), £9,709 (compensatory award) and £5,110 (injury to feelings). In reaching those figures, a reduction of 30% was applied. During the ET hearing, it emerged that C had made a covert, digital recording of a meeting that took place on 23 May 2013. R also appealed to the EAT about how the ET had dealt with that issue (namely reducing the award by 10% plus 20% for reasons not subject to appeal).

Therefore, three matters fell to be determined by the EAT in January 2019:

1. Had the ET erred in concluding in respect of one allegation that R had committed an act of victimization and public interest detriment?
2. Had the ET erred in declining to order re-instatement or re-engagement?
3. Had the ET erred in its approach to the question of whether and to what extent a reduction should be made under s122(2) or s123(1) Employment Rights Act 1996 where C had, without the knowledge of R recorded a meeting.

This article will only deal with the third point on the covert recording but, for ease, the EAT rejected suggestions that the ET had erred in respect of questions 1 and 2 above and dismissed the appeal and cross appeal.

Before the ET, at the remedy hearing it was argued that had it known about the recording of 23 May at the time of dismissal, it would have dismissed for gross misconduct and therefore it was not just and equitable to make any award. It was further argued on behalf of R that the basic award should be reduced to nil under s122(2) ERA 1996. The ET made the following findings on this issue, as summarised in the EAT at paragraph 55:

> "*C did not make the recording for the purpose of entrapment or attempted entrapment…C asked no questions which gave the impression of being made in order to obtain a favourable answer…C was [in fact] flustered at the time and uncertain even if the device would record. She did not make any use of the*

recordings as part of the internal proceedings…she created a transcript because of her legal obligations under the ET's disclosure process. In one respect the transcript was detrimental to her argument…the making of a covert recording was not set out specifically in the Respondent's disciplinary policy as amounting to gross misconduct; and the Respondent had not, even at the date of the remedy hearing, amended its policy in light of the ET proceedings. The Respondent's witnesses at the ET hearing would not have been those who dealt with any gross misconduct disciplinary proceedings if they had been brought"[2]

The ET acknowledged that it was entitled under s122(2) to reduce the basic award where C's conduct pre-dismissal was such that it would be just and equitable to do so. Paragraph 43 of the ET decision sets out the rationale for reducing the award by a further 10% in respect of the covert recording (the basic and compensatory awards having already been reduced by 20% for other reasons):

"43. The Tribunal concludes that this matter, whether more properly addressed under Devis, Polkey, or pure statutory 'just and equitable' principles, is one of assessing the chance of the Claimant being dismissed fairly had the Respondent known about the Claimant's conduct at any time before her actual dismissal and then adjusting any amount of the Compensatory Award in line with that conclusion as is just and equitable.

45. The Tribunal concludes that when weighing all the circumstances and assessing whether or not the Respondent would have fairly dismissed the Claimant had it known of the recordings, it is just and equitable to reduce the Compensatory award by 10% to fully reflect the circumstances relating to the covert recordings. It is possible that once the reasonably available facts were known, the Respondent may objectively and reasonably have considered this to be a misconduct matter which then fairly led to dismissal. The Tribunal considers in the circumstances that this is a low percentage chance.

46. The Tribunal further concludes that given the terms of the statutory Basic Award contribution provisions it is just and equitable to further increase the Basic Award reduction by the same amount to a total of 30%."[3]

[2] Para 55 EAT Judgment
[3] Para 43,45 and 46 ET Remedy Judgment

The EAT Decision

Before the EAT, Counsel for R made three key submissions:

(1) That the ET had erred in law in regarding the exercise which it had to undertake as being in any way akin to a Polkey exercise
(2) That the ET was bound to hold any covert recording of a confidential conversation in the absence of pressing justification was a breach of the implied term of mutual trust and confidence and that the ET had been wrong to place reliance on the absence of covert recording in the disciplinary policy
(3) That the ET had reached a perverse and inadequately reasoned decision namely that it had been impossible to reach any conclusion other than one of entrapment

The EAT's considered that:

> "*just as there is a subjective and objective element to a Polkey assessment, so there must be a subjective and an objective element to the ET's approach to section 122(2) and section 123(1) where the issue is whether and to what extent it is just and equitable to make an award in the light of conduct which the employer subsequently learns about. The question is whether and to what extent it is just and equitable to reduce an award given the actual employer and employee, not a hypothetical employee*"[4]

The EAT's view was that the ET had not lost sight of the objective element (as well as having considered the subjective element) and did ask itself what the chance was of C being dismissed fairly. It held that the ET had applied the just and equitable test to both s122(2) and s123(1).

In terms of the second submission on a breach of the implied term of mutual trust and confidence, the EAT held that it did not consider that the ET were bound to conclude that the covert recording of a meeting necessarily undermined the trust and confidence of the employment relationship to the extent that there was an irretrievable breakdown, thus entitling the employer to dismiss the employee.

[4] Para 71 EAT Judgment

The EAT's analysis focused on the ease of modern technology and the ability to record (and its possible use for obtaining advice from a Union, to keep a record or to protect against misrepresentation). It further considered that context was important; that the purpose was relevant as it could be done by "*a highly manipulative employee seeking to entrap the employer to the confused and vulnerable employee seeking to record or guard against misrepresentation*"[5] .

The Judgment goes on to consider the extent of the employee's blameworthiness, what has been recorded (i.e. highly confidential business information, personal information relating to another employee etc), whether the employee has lied about making a recording, whether the employee has been told not to make recordings and has done so in defiance of this and finally any evidence of the employer's attitude towards such conduct historically. It was reiterated however that it was good employment practice to say if there was any intention to record a meeting, save in the most pressing circumstances.

The EAT concluded that the ET had not therefore fallen into error and had not been bound to find the actions of C justified a conclusion of a breach of the aforementioned implied term and was entitled to make an assessment of the circumstances. In terms of the entrapment argument, the EAT held that:

"*There was a time when an employee – or for that matter an employer – had to go to a great deal of trouble to record a meeting covertly. At that time, it would be straightforward to draw the conclusion that the recording had been undertaken to entrap or otherwise gain an unfair advantage. But in our judgment times have changed*."[6]

All appeals and cross appeals were therefore dismissed.

[5] Para 78 EAT Judgment
[6] Para 77 EAT Judgment

Comment

This case provides a helpful restatement of the factors which an Employment Tribunal is likely to take into account, in particular on the issue of remedy. With the ever increasing incidents of covert recordings taking place, and with Claimant's seeking to rely on them at hearings, and Respondent's seeking to argue the points raised by the Respondent in this case in terms of remedy, is it time for a wholesale review of the way that grievance, disciplinary and appeal meetings are captured/recorded?

Grace Nicholls
Pupil
3PB Barrister
020 7583 8055
grace.nicholls@3pb.co.uk