

# What's the secret?

*Clandestine recordings of private discussions at workplace disciplinary and grievance hearings may be admissible in employment tribunal proceedings, report Sharon Tan and Paul McGrath*



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**'Technological advances have given rise to a spate of cases that have considered whether evidence obtained on a clandestine basis ought to be admissible in subsequent employment tribunal litigation.'**

In an era of increasingly sophisticated electronic devices and tech-savvy employees, employers are facing unprecedented challenges when conducting internal disciplinary and grievance hearings. It is now easy for employees to record proceedings covertly, should they wish to do so.

These technological advances have given rise to a spate of cases that have considered whether evidence obtained on a clandestine basis ought to be admissible in subsequent employment tribunal litigation.

The Employment Appeal Tribunal (EAT) recently held in *Punjab National Bank (International) v Gosain* [2014] that recordings were admissible as evidence in the employment tribunal even though the employee had obtained them covertly. The case is notable because the EAT decided to admit not only the open discussions held by the panel chairing the internal grievance and disciplinary hearings but those which the panel conducted in private.

## **Approach**

Employment tribunals have a broad range of case management powers. These include a wide discretion to rule on whether particular evidence is admissible in proceedings. Rule 41 of Schedule 1 to the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 makes clear that tribunals should seek to 'avoid undue formality' and are:

... not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts.

That said, when asked to deal with the admissibility of evidence that has been covertly obtained, employment tribunals often start by asking what Buxton LJ described, in *XXX v YYY* [2004] as the 'first and most important rule of the law of evidence'. This is whether the evidence is relevant to an issue between the parties – and if it is not, it will not be admissible, and the debate will be brought to a swift conclusion.

Once the evidence has been determined to be relevant, the generally accepted approach will be for the employment tribunal to balance the competing issues that are in play. There is, on the one hand, a public policy interest in claims being tried before a court or tribunal on the basis of all the available relevant evidence. That points in favour of admitting the evidence, regardless of the undesirable way in which it was obtained. But, in appropriate circumstances, this can be outweighed by more important considerations, such as:

- procedural unfairness to the employer;
- an unjustified interference with an individual's exercise of the right to private life, as conferred by Article 8 of the European Convention on Human Rights; and
- competing public policy interests.

The latter has proven to be the most successful for employers to date. Indeed, in *Chairman & Governors of*

*Amwell View School v Dogherty* [2006], the leading case on this subject, the EAT ruled that there was a contrary and superior public policy interest, namely protecting the private deliberations of a panel adjudicating on a matter of dispute. On that occasion, the EAT considered

proceedings complying with the 'ground rules' for those proceedings. It held that no ground rule could be more essential to ensuring a full and frank exchange of views between members of the panel than their ability to deliberate in private.

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that this trumped the public policy interest of trying cases on the basis of all available evidence.

In *Dogherty*, the claim was for unfair dismissal. The employee had obtained the evidence by leaving a recording device running in the meeting room, after she had been asked to leave to allow the panel to deliberate in private. The EAT found that there was an important public interest in parties to internal

**Where is the line drawn?**

The EAT in *Dogherty* stressed that the outcome of the balancing exercise between competing public policy interests might be different in a discrimination claim where the panel gives no reasons for its decision and the recording provides the only, or indeed incontrovertible, evidence of unlawful discrimination. This approach mirrors that taken in *BNP Paribas v Mezzotero* [2004],

which concerned discriminatory comments made during without prejudice discussions. In that case, the EAT stated, obiter, that the public policy interest in hearing allegations of unlawful workplace discrimination outweighed the public policy interest that gave rise to the without prejudice rule.

It was this public policy interest that appears to have led the EAT in *Gosain* to conclude that a covert recording of discussions between members of the panel was admissible in evidence despite the private nature of the conversations.

The claim in *Gosain* was for sexual harassment, sex discrimination and constructive unfair dismissal. The claimant alleged that the recording in question showed behaviour by the panel that proved procedural unfairness and confirmed that the managing director had made a crude sexual comment about her.

In admitting the evidence, the EAT reiterated that recordings will not be ruled inadmissible simply because they have been made covertly.

The EAT was of the view that the protection given to private deliberations in *Dogherty* did not apply in *Gosain* because the alleged comments:

... fell well outside the area of legitimate consideration of the matters which fell to be considered by the grievance and disciplinary panels respectively.

In other words, although made in private, the alleged comments did not form part of the panel's deliberations on the matters under consideration. Accordingly, they fell outside the 'ground rules' envisaged in *Dogherty*.

**No presumption in favour of admissibility**

It is worth noting that the inclusion of a claim of unlawful discrimination does not, in itself, give rise to a presumption in favour of admissibility.

The case of *Williamson v Chief Constable of Greater Manchester Police* [2010] involved a claim of disability discrimination. Here, the EAT

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*BNP Paribas v Mezzotero*  
[2004] IRLR 508  
*Chairman & Governors of  
Amwell View School v Dogherty*  
[2006] UKEAT/0243/06/DA  
*Punjab National Bank  
(International) & ors v Gosain*  
[2014] UKEAT/003/14/SM  
*Vaughan v London  
Borough of Lewisham & ors*  
[2013] UKEAT/0534/12/SM  
*Williamson v Chief Constable  
of Greater Manchester Police & anor*  
[2010] UKEAT/0346/09  
*XXX v YYY*  
[2004] EWCA Civ 213

confirmed that the balancing exercise outlined above does not need to favour disclosure of a covert recording if that recording is not the only evidence, or is not incontrovertible evidence, of discrimination.

**Procedural issues**

An employee seeking to persuade an employment tribunal that covert recordings should be admitted into evidence will not simply be able to allude to their existence and assert relevance.

In *Vaughan v London Borough of Lewisham* [2013], the claimant sought to admit covert recordings of 39 hours’ worth of conversations with colleagues and managers. She had, however, failed to provide sufficient information to enable the employment tribunal to determine whether the recordings were relevant. The EAT held that claimants who apply for the admission of evidence that has been covertly obtained ought to support any such application by producing the recordings in question, a transcript and a clear explanation of why the material is relevant. The EAT also indicated that a claimant’s prospects of success might be greater if the application were to be ‘focused and selective’ and restricted to a ‘limited quantity of material’.

**Comment**

Employers may instinctively find the *Gosain* decision troubling. The prospect that private conversations might end up in the public domain is certainly

unsettling. Employers need to be advised that there is a real risk of private conversations that stray from the issues under consideration being admitted into evidence. But the fact that the covert recording was admissible in this case does not necessarily mean that future

exclude a compromising conversation on the basis of a superior public policy argument is an uncertain and unattractive position in which to find oneself.

Legal advisers should therefore recommend that employers take practical steps to

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decisions will go the same way. The employment tribunal is likely to engage in a balancing exercise and each case will turn on the relative merits of the issues that are in play in that instance.

What is clear, however, is that prevention is better than cure.

Being obliged to argue that the employment tribunal ought to

minimise the risk of such issues arising in practice. Some suggestions are given in the box below. However, the safest course is, self-evidently, to ensure that the decision-making panel’s conduct is unimpeachable or at least that deliberations are undertaken in an area to which the employee and their representative have not had access. ■

**Practical tips for employers**

- Amend grievance and disciplinary policies to expressly ban the use of recording devices.
- Remind the employee of the policy at the start of a hearing and ask them to confirm that they are not using any recording equipment.
- Ask all those present to turn off phones or other electronic or portable devices.
- Ask employees to take all personal possessions with them, out of the room, during adjournments.
- Ensure that panel members retire during breaks or deliberations to a separate area to which the employee has not had access.
- Train managers in the importance of behaving appropriately not just during a hearing but also during any break or adjournment or when considering the process outcome. Limit deliberations strictly to the issues in question.
- Consider proactively recording the public parts of meetings (reserving the right to do so in the relevant policy) and providing the employee with transcripts.
- Ensure that the employee is allowed to exercise the right to be accompanied.
- Operate on the assumption that the employee may be recording the hearing and that it is more likely than not to be admissible before any employment tribunal proceedings.
- Give written reasons for any decisions taken.
- Keep a contemporaneous note of the rationale behind any decisions made.