PUMP COURT

CHAMBERS

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Internal Disciplinary Procedures, WhatsApp Messages & Covert Recordings

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The Change in Forms of Evidence

Increasingly, transcripts of recordings (covert or otherwise) and WhatsApp and other messages are likely to be the most important evidence in a case – and of far more interest to the ET than witness statements, which are:

- produced many months later
- merely 'true to the best of your knowledge and belief'
- usually drafted by another, and
- written with litigation in view

The Tribunal's Approach to Evidence

Rule 41: "*The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts*"

In practice the only criterion is **relevance**

– if evidence is relevant to something the Claimant or Respondent **said** or **did** at the time, it is very hard to argue that it's prejudicial

Tribunals are **always** more interested in contemporaneous evidence

– cf. *Gestmin v Credit Suisse* [2013] EWHC 3560 (Comm)

There is much more of this evidence than there used to be – and it is highly likely to be admitted, irrespective of how it was obtained

Covert Recordings

The leading case is still *Phoenix House Ltd v Stockman*, UKEAT/0284/17/00

Issues which arise include:

- entrapment
- potential breach of contract/misconduct
  – but the EAT in *Phoenix House* said it was not automatically a breach of the implied term of trust and confidence [**78**]
- *Polkey*/contributory conduct/costs

But what **doesn't** arise is admissibility, and while covert recordings may impact on remedy, **the damage may already be done** at the liability stage

The EAT in *Phoenix House* expressed the view that:

> *It is not always desirable to record a meeting: sometimes it will inhibit a frank exchange of views between experienced representatives and members of management. It may be better to agree the outcome at the end. Sometimes if a meeting is long a summary or note will be of far more value than a recording which may have to be transcribed* [**79**]

In a disciplinary situation, I would respectfully disagree. Why?
Because of the risk it will be recorded anyway

My advice:

1. Assume **every** meeting is being recorded
2. Go one better – be the one making the recording, and openly
3. Get transcripts produced and agreed

Implications:

- cost – but likely to be saved in a single Tribunal avoided?
- the problem of 'Too Much Information'
  – unlike minutes, transcripts are unforgiving
  – make sure you can rely on those chairing meetings
  – get external support if need be

One final tip: **deliberate in another room**. Don't risk being recorded!

WhatsApp Messages

Very topical – COVID enquiry, Boris Johnson, Matt Hancock etc.

Government lawyers argued they are akin to '*conversations in corridors*' This is true in the workplace more generally, as increasingly verbatim messages from the time replace recollections in witness statements

Considerations:

- WhatsApps are encrypted, and tied to a phone number
- they can't be easily monitored by companies like email
- which phones are staff using for WhatsApp – work or personal?
- issues with accessing messages on 'old phones' (eh, Boris?)

Yet WhatsApps etc. are **as relevant as companies allow them to be**

Consider policies on how staff communicate for work purposes, which devices they can use, and what should be discussed by which medium

Disclosure and Relevance:

- WhatsApps are not threaded or organised by subject
- they will often contain a mixture of work/personal content
- informal/unguarded speech is much more likely

Twin dangers:

- cherry-picking/lack of context
- reams of irrelevant messages/inadvertent collateral disclosure

Example:

> The Claimant in a recent case disclosed personal WhatsApp messages with a former colleague discussing how difficult the Respondent's director was to work for. The intention was to show that there was no specific breakdown in relations with the Claimant as alleged, **but** the Claimant also mentioned in passing that she would not be working there in six months' time. She said in XX this was simply her venting at a friend and she did not intend to leave
>
> The result? The Tribunal made a *Polkey* reduction on that basis alone limiting losses to six months. Moral: consider disclosure carefully!

Internal Disciplinary Procedures

Where meetings are recorded and more evidence is in writing, it is all the more important to **get the procedure right and be seen to get it right**

Back to basics – the 4 key elements of a disciplinary process:

1. Investigation Report – often missed out
2. Disciplinary Invitation Letter
3. Disciplinary Outcome/Dismissal Letter
4. Appeal

1. Investigation Report

The purpose of an investigation is to decide **IF** there is a case to answer
If a case has proceeded to a disciplinary, the Tribunal wants to know:

- why?
- who took that decision?
  – and they need to be independent from the DM
- for what reason(s)?

Don't feed the narrative of a foregone conclusion

2. Disciplinary Invitation

The selection and framing of the disciplinary charges is central to fairness:
Strouthos v London Underground Ltd [2004] EWCA Civ 402

Considerations:

- the charge(s) must be precisely framed
- normally only matters charged can form the basis for dismissal

This ties in with the ACAS Code:

> *If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing.* ***This notification should contain sufficient information about the alleged misconduct*** *or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting.*

Don't open yourself up to an unfair dismissal **and** an uplift for want of being specific at the disciplinary invitation stage

3. Disciplinary Outcome/Dismissal Letter

This must link back to the findings at the disciplinary hearing which in turn must follow from the evidence at the investigation stage

Beware mission creep – an employee should only be found guilty of a charge which has been put to them (cf. *Strouthos*, involving a finding of dishonesty where that was never alleged in the disciplinary invitation)

Give the reasons for the dismissal **AND** the reasons for the sanction:

- link the findings to the evidence
- 'we find you guilty of gross misconduct' is not enough
  – does not address **why** dismissal is appropriate
  – the fact you can dismiss for GM doesn't mean you must
- pre-empt the challenge to the range of reasonable responses
- show that you have considered alternatives to dismissal
- give **meaningful** consideration to record and length of service
  – dismissing a decade in a sentence is not compelling

Again, do not feed the narrative of a foregone conclusion…

4. Appeal

A good appeal covers a multitude of sins – a bad one makes them worse

Make sure the Appeal Officer is independent, and not junior to the DM

- especially important in family/smaller businesses
- get external support if need be, impartiality is essential

Practical Considerations:

- If you say you're going to conduct a re-hearing, then do
- don't just say 'I find no reason to overturn the previous decision'
- address the actual grounds of appeal – and clarify them if need be
- adjourn for further investigation if necessary
- do not make findings that were not open to the original DM

All the same points apply to the Appeal Outcome as the Dismissal Letter

Time and money at this stage may save the time and money of a Tribunal