



PUMP COURT CHAMBERS

Once a Thief”: Recordings and document downloads to support a grievance or claim – what is lawful, and what is wise?

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Covert Recordings in the Employment Tribunal

- *Chairman and Governors of Amwell View School v Dogherty* (2007):
 - recordings are not inadmissible merely because they are covert;
 - the EAT admitted a clandestine recording of the open part of a disciplinary hearing on basis that it was always going to be minuted.
- *Vaughan v London Borough of Lewisham*: EAT willing to admit covert material — c.39 hours of recordings initially refused, but a narrower application for c.5 hours was allowed.



Recordings of Private Deliberations

- Where a device is left to capture private conversations, the public interest in confidentiality weighs more heavily against admission.
- The decisive factor is expectation, whether the conversation was understood to be confidential.
- The balance may shift to admission, e.g. a discrimination claim where an inadvertent recording is the only evidence
- *Punjab National Bank v Gosain*: admission upheld where the recorded comments fell well outside legitimate consideration of the issues; the judge properly weighed relevance against confidentiality.
- *Fleming v East of England Ambulance Service NHS Trust*: panel members' break-time conversations admitted - relevant because the claimant had heard them and made his views known before dismissal.
- *Williamson v Chief Constable of Greater Manchester Police*: recording refused - privacy was expected, the evidence was insufficiently relevant, and there was no cogent reason (e.g. clear discrimination) to override exclusion.
- **In short:** where confidentiality was expected, the recording must be relevant and show impropriety on the part of the employer.



Human Rights: Article 6 v Article 8

- The question will require a balance to be struck between the two
- The Article 6 right to a fair trial can outweigh the Article 8 right to privacy where the evidence's importance to a fair hearing prevails.
- *XXX v YYY*: covert video relied upon by nanny taken in the employer's home and depicting child ruled inadmissible:
- ET at first instance held inadmissible
- EAT overturned, holding admission was necessary to protect claimant's Article 6 right to a fair trial; child's Article 8 right was infringed if viewed in public hearing, so appropriate course was to view the evidence in private
- CoA overturned, ET was the only court to view it, and found it did not assist the employee's case, so was not relevant and it did not affect the Article 6 / 8 balance
- *Avocet Hardware plc v Morrison*: an employer intercepted call made by employee, who was a telesales worker, to customer:
- ET ruled inadmissible as infringed employees Article 8 right
- EAT admitted on appeal - any Article 8 interference was justified under Article 8(2), and exclusion would breach the employer's Article 6 right.



Human Rights: Article 6 v Article 8

- The balance is fact-sensitive

Vukota-Bojic [2017] I.R.L.R. 94 factors apply:

- All the circumstances of the case
- Opportunity to challenge authenticity
- The quality and reliability of the evidence
- How it was obtained
- Whether it was decisive
- Admissibility does not cure an Article 8 breach — per *Jones v University of Warwick* [2003] EWCA Civ 151 courts may also order costs or reduce compensation (as in *Phoenix House Ltd v Stockman* (No.2)) [2019] I.R.L.R. 960.



Conclusion

- Admissibility turns on relevance and the quality / status of the discussion - chiefly whether there was an expectation of confidentiality.

Further considerations:

- Covert recording can undermine a party's credibility, especially where they had confirmed they were not recording.
- As Teams meetings and recorded hearings become routine, some tribunals question employers' resistance to recording
- Issue may have less significance in the future (at least as far as internal hearings are concerned)



Is It Lawful for an Employee to Download an Employer's Documents to Support a Grievance, Misconduct Investigation or ET Claim?



Implied Duty of Confidentiality During Employment

- Employees owe an implied duty of fidelity and good faith throughout the employment relationship.
- This duty includes an obligation to respect the confidentiality of the employer's commercial and business information - established in *Robb v Green* [1895] 2 QB 1.
- Implied duty applies even without express contractual confidentiality provisions, though most contracts reinforce it explicitly.
- Unauthorised disclosure that is sufficiently fundamental may constitute a repudiatory breach, entitling the employer to dismiss summarily.



The Courts' Position on Retaining Documents for Litigation

- **No recognised right:** courts have not accepted that anticipated litigation entitles an employee to retain confidential employer documents.

Brandeaux Advisers (UK) Ltd v Chadwick [2010] EWHC 3241 (QB) - employee emailed confidential files to her private address to 'arm herself'. High Court doubted litigation risk could ever justify this and ordered delivery up.

Nissan Motor (GB) Ltd v Passi [2021] EWHC 3642 (Ch) - employee retained documents for legal advice on ET/whistleblowing claim. High Court granted interim order for return; employee had no arguable right to retain them.

Amazon UK Services v Tejan-Kella [2020] EWHC 761 (QB) - confidential toxicology report retained post-termination in breach of contract; injunction granted; correct course was to seek specific ET disclosure.



The Employment Tribunal Disclosure Process

- Standard ET directions require each party to disclose all documents in their possession, custody or control relevant to the issues, mirroring CPR 31.6.
- Disclosure obligation rests on the party in possession of the documents, ordinarily the employer.
- In *Nissan Motor (GB) Ltd v Passi*, the court confirmed it is not for an employee who gains unauthorised access to determine unilaterally the scope of disclosure or to pre-empt the tribunal's power.
- Where an employee fears non-compliance by the employer, the correct remedy is to apply to the tribunal for an order not to retain documents unilaterally.



The Whistleblowing Exception and Its Limits

- Section 43J ERA 1996 renders void any agreement purporting to prevent a worker from making a protected disclosure.
- A properly protected disclosure under ss. 43A - 43H ERA 1996 shields the worker from breach of contract claims in respect of that disclosure.
- Claiming whistleblower status does not justify misappropriating, retaining or misusing confidential information:

Payone GmbH v Logo [2024] EWHC 981 (KB) - permanent injunction granted against further disclosure despite whistleblowing claims and prior use of material in tribunal bundles.

Zoll Medical UK Limited v Trebilcock [2020] EWHC 3798 (QB) - whistleblowing proceedings could not justify transfer of confidential documents for personal retention.



Limited Circumstances Permitting Document Use

- *UK Direct Business Solutions Ltd v Dodd* [2021] 6 WLUK 75 - narrow discretionary exception:
 - Ex-employee retained documents to assist as a witness in tribunal proceedings involving a colleague (not her own claim).
 - Court permitted retention for those specific proceedings only; further distribution required a separate court order.
- *Sinclair Pharmaceuticals Ltd v Burrell* [2025] EWHC 1602 (KB) - High Court overturned a without-notice injunction where privileged documents had been received by an employee; held the ET was the proper forum to determine whether the iniquity exception to legal professional privilege applied.



Disciplinary Risk to the Employee

- *Portsmouth Hospitals NHS Trust v Corbin* [2017] EAT - senior radiographer summarily dismissed for using confidential patient information when preparing a defence to disciplinary proceedings.
- ET found the dismissal unfair given the employer's closed-minded approach and lack of relevant training.
- EAT dismissed the appeal on liability for unfair dismissal as, among other things, employer had ignored mitigation and lesser sanction
- EAT remitted question of contributory fault as ET had not considered and employee had already conceded her actions were a breach of the Trust's confidentiality and gross misconduct policies

Key risk: even where the employee believes the retention is justified, courts and tribunals may uphold dismissal or reduce damages as a consequence.



Summary

- **General position:** employees have no lawful right to download or retain an employer's confidential documents to support a grievance, misconduct investigation or Employment Tribunal (ET) claim.
- Courts have consistently refused to recognise any such entitlement, however framed.
- This applies even where the employee claims whistleblower status, though valid protected disclosure may give employee some protection against breach of contract claim / injunction.
- Narrow exceptions to this rule e.g. where the documents were taken by a witness rather than a litigant
- Injunctions routinely granted: courts have ordered delivery up and destruction of copies without detailed inquiry into the employee's underlying merits.
- The proper route for obtaining documents is the ET's own disclosure process - not self-help retention.



Contact details



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Daniella Gilbert is an experienced practitioner specialising in employment law, commercial litigation and related commercial chancery disputes.

She has been recognised as a leading junior in employment law in the Legal 500. She acts for both claimants and defendants / respondents and has a diverse client base ranging from individuals, employees, sole traders and small businesses to large employers and Fortune 500 companies.

Daniella's precision and attention to detail has garnered her a reputation as an advocate well able to undertake particularly complex and high value cases. She appears in courts at many levels including the Court of Appeal, High Court, Employment Appeal Tribunal, Employment Tribunal and County Courts.

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