Appeal No. UKEAT/0107/16/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 21 June 2016
Judgment handed down on 25 October 2016

Before

THE HONOURABLE LADY WISE

(SITTING ALONE)

BIRMINGHAM CITY COUNCIL — APPELLANT

(1) MS D BAGSHAW AND OTHERS
(2) THE ARTHUR TERRY LEARNING PARTNERSHIP — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR PAUL EPSTEIN (One of Her Majesty's Counsel) and MS LOUISE CHUDLEIGH (of Counsel) Instructed by: Birmingham City Council Legal & Democratic Services PO Box 15992 Birmingham B2 2UQ
For the First Respondents	MS RACHEL CRASNOW (One of Her Majesty's Counsel) Instructed by: Equal Pay Legal Ltd Trigen House Central Boulevard Blythe Valley Park Solihull B90 8AB
For the Second Respondent	No appearance or representation by or on behalf of the Second Respondent

SUMMARY

PRACTICE AND PROCEDURE - Disclosure

An experienced Employment Judge ordered disclosure by a third party of Judgments and interlocutory Orders relating to cases of a similar type to those being litigated by the Claimants. It was argued that he had failed to apply the test of relevance and necessity before making the Order and that he had focused only on a concern about the inequality of arms between the parties to the litigation. It was also contended that he should have first examined the documents and ought to have understood that only Judgments, not interlocutory Orders were in the public domain.

The Judge had been addressed on the test and it could easily be inferred from his Reasons, taken as a whole, that he had applied it. The circumstances, unusually, justified the Order for disclosure at an early stage in the proceedings, the Claimants having been unable to comply fully with an Order for particularisation without it. In the absence of confidentiality objections, it had been competent and appropriate for the Judge to order disclosure without first examining the documents for reasons adequately explained by him. Any distinction between Judgments and interlocutory Orders, only the former being strictly in the public domain, had been dealt with by redaction and limitation of the type of Judgments covered by the Order. The Judge's focus on the overriding objective in exercising his power to order disclosure of documents was in the circumstances entirely appropriate and the outcome a fair one. The appeal was dismissed.

THE HONOURABLE LADY WISE

Introduction and Background

1. This appeal relates to an Order made by Employment Judge Goodier dated 10 March 2016 ordering a third party, Birmingham City Council ("BCC"), to disclose all interlocutory Orders and Judgments of the Employment Tribunal in the possession of the Council's Legal and Democratic Services Directorate ("the BCC Legal Department") in six named equal pay multiple cases taken against BCC. The background to this Order for a third party disclosure being made is set out in the first chapter of the Employment Judge's Reasons. In essence, there are eight Claimants in this multiple case, all represented by Equal Pay Legal Ltd. All of the Claimants had been employed by BCC until on 1 September 2012 there was a transfer under the **Transfer of Undertakings (Protection of Employment) Regulations** ("TUPE") of their employment to the Respondent, the Arthur Terry Learning Partnership ("Terry"). All eight Claimants brought equal pay claims against BCC, but on 21 May 2015 they withdrew those claims, and Judge Goodier dismissed the claims insofar as directed against BCC. Accordingly, BCC is a third party in the ongoing proceedings, but the BCC Legal Department has represented both BCC and Terry throughout.

2. The claims were all raised in February 2013 in order to avoid any time bar argument by Terry that, as transferees under **TUPE**, claims against them would have to be brought within six months of the transfer before claims relating to the pre-transfer employment could be taken against them. Accordingly, the claims made were all *pro forma* and not properly specified or particularised. Judge Goodier had responsibility for case managing the claims from the outset. The claims had been stayed, but, at a closed Preliminary Hearing ("CPH") on 24 July 2015 it was agreed that the stay should be lifted, that Judge Goodier should give directions for the

claims to be clarified and that thereafter the case should proceed to an open Preliminary Hearing ("OPH") on 4 May 2016. One of the directions in the Order of July 2015 was that the Claimants should, by 25 September 2015, serve a Schedule containing information in respect of each Claimant. The Judge specified ten matters to be so specified.

3. Between September 2015 and January 2016 the Claimants' solicitors reported various difficulties that they said they had encountered in collating some of the information required to complete the necessary Schedules for each Claimant. The Respondent, Terry, suggested that the Claimants make applications to BCC under its subject access request protocol. That was done, and some material was provided by BCC as a result. In January 2016 the Claimants served a Schedule that did not contain all of the information required under the Order of July 2015 but with an explanation and a detailed explanatory note to accompany the Schedule setting out why they contended further information was required before they could do so. Shortly thereafter the Claimants served Particulars of an application for specific disclosure by BCC and subsequently served draft directions for disclosure.

4. The application for disclosure was heard on 24 February 2016. Three classes of documents were covered by the application. The first class related to job evaluation score and assessments that led to the implementation of single status backdated to 2008 by BCC for certain classes of employee. For the reasons set out by the Employment Judge, that part of the application was refused, and neither side takes issue with that decision. So far as the second class of document is concerned, this requests the specifics of the grade the proposed comparators were given at the time of single status. That request was not for disclosure of documents but for information easily available to BCC, and Judge Goodier ordered that such information be provided. Again, no issue is taken at appeal in relation to that decision. The

appeal concerns the third class of documents, namely Judgments and Orders in certain first instance equal pay multiple cases against BCC. Paragraph 5 of the Employment Judge's Reasons sets out the arguments and basis for the decision to grant the application relating to these documents and that reasoning was the focus of the appeal before me. The central issue is whether the Judge applied the law correctly in relation to this class of document.

The Applicable Law

5. There was broad agreement about all of the applicable law and Rules relevant to the Employment Judge's decision, and I summarise that below. At the outset, however, I acknowledge the clear statement by the Court of Appeal in **O'Cathail v Transport for London** [2013] ICR 614 that in relation to case management the Employment Tribunal has exceptionally wide powers of managing cases and that its decisions in this respect can only be questioned for error of law. Absent an error of legal principle in the approach or perversity in the outcome, the Employment Appeal Tribunal will not intervene with the decision of an experienced Employment Judge such as Judge Goodier.

6. The law applicable to specific disclosure is set out in section 2 of Judge Goodier's Reasons. BCC accepts that the Judge correctly directed himself in relation to the law, the issue being whether he then applied it properly. In summary, the two relevant Rules of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** are Rule 2, which includes in the overriding objective to deal with cases fairly and justly, a requirement, so far as practicable, to ensure that the parties are on an equal footing (a Tribunal shall of course seek to give effect to the overriding objective in interpreting or exercising any power given to it by the Rules), and Rule 31, which empowers the Tribunal to order any person to disclose documents or information to a party as might be ordered by a County Court. Reading

across to the **Civil Procedure Rules** ("CPR") these provide at paragraph 31.17 that a Court (including the County Court) may make an Order for disclosure by a third party, provided that the documents are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings and disclosure is necessary in order to dispose fairly of the claim or to save costs. This is the test of relevance and necessity.

7. The proper approach to the application of the two stage test was articulated by Eady J in **Flood v Times Newspapers Ltd** [2009] EWHC 411 under reference to the various relevant authorities. One such authority is the House of Lords decision in **Science Research Council v Nassé** [1980] AC 1028, which is authority for the proposition that if disclosure is necessary for the fair disposal of the proceedings it must be ordered despite any confidentiality attaching to the documents. Where confidentiality is an issue, the Court or Tribunal concerned should first inspect the documents to consider whether justice could be done by adopting special measures. A more recent exposition of the proper sequence in considering an application for disclosure in the Employment Tribunal context can be found in **Plymouth City Council v White** UKEAT/ 0333/13.

8. Finally, it is important to note that the expression "likely to support the case" in **CPR** Rule 31.17(3) has been interpreted by the Court of Appeal as meaning that the document or documents in question "may well assist": **Three Rivers District Council v Bank of England (Disclosure) (No. 4)** [2003] 1 WLR 210 CA.

The Judge's Reasons for Granting the Application

9. Insofar as material to the issues in this appeal, Judge Goodier's summary of the argument before him and his reasons for making the Order in relation to the third class of documents is in the following terms:

> **"5.2. At the July 2015 preliminary hearing I had … gone on to comment on the lack at that time of evidence as to the efforts that the claimants' solicitors had made to obtain information from the claimants themselves and from other sources, including "… tribunal judgments in equal pay multiple cases against [BCC]. The judgments in those cases have made many detailed findings of fact which would be highly material in particular to Rated as Equivalent claims."**
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> **5.3. Employment Tribunal Regions such as the Midlands West (formerly Birmingham) Region keep judgments or orders only so long as individual case files are retained, and therefore they are generally destroyed after about 12 months. The Regions have no archive of old decisions open to the public. Judgments and orders are held on a Register at Bury St Edmunds, and the Register can in theory be searched by the public. The witness statement of the solicitor Mr Smith (C 501) and an exhibit to it (C 517) explained what the claimants' solicitors had done to seek information as to the first-instance decisions from the Register. They were not successful. I was satisfied that they had done all that was reasonably practicable to extract the information from that source. Ms Crasnow submitted that it was right that the tribunal should order disclosure of the judgments by BCC.**
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> **5.4. Miss Chudleigh characterised this part of the application as "an extreme example of a fishing expedition". … the claimants do not know what the first instance decisions are about … the highest the claimants' case could possibly be put at was that some of the first-instance decisions might be relevant: this does not approach the standard required in the test of (a) relevance and (b) necessity. …**
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> **5.5. Of course, if a first instance judgment in a claim against BCC contains a finding of fact, that finding would not be res judicata even against BCC in proceedings by other claimants. It would not be res judicata in proceedings against the respondent in the present multiple case. It could, however, be of at least some value for a hearing in this case: it might, for example, give rise to an evidential burden on the respondent if it wished to argue that a different finding should be made. In addition … it is possible that significant concessions as to fact or law might have been made by BCC in the lengthy and painstaking pre-trial process and recorded in case management orders, and I considered that these might have a similar value.**
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> **5.6. BCC is of course a very large organisation. … No doubt copies of judgments and orders relating to various cases, and classes of employees, are to be found in filing cabinets in many of its various Directorates. It would be a huge and quite disproportionate task to trawl through all of them. However, I was for a number of years the Employment Judge in this region with sole responsibility for the case-management of the equal pay multiple claims against BCC … I … have observed that the BCC Legal Department invariably produces (as indeed it had done for this CPH) a helpful bundle containing all relevant earlier orders and judgments. … from my experience I inferred that the BCC Legal Department possesses an archive of judgments etc, and that it is efficiently run so that material can readily be located in it. I asked Miss Chudleigh whether she wished me to adjourn the CPH so that she could take instructions on this topic, but she did not ask me to do so.**
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> **5.7. There is a particular feature of this litigation which causes me concern, and it is the inequality between the information bases of the two sides. Judgments of the Employment Tribunal are public documents, are in the public domain, and are in theory, but not, it appears, in practice, capable of being located and copied from a public source. The respondent is represented by the BCC Legal Department and therefore has access to the archive … The claimants have access to no such archive. … the overriding objective includes, so far as practicable, ensuring that the parties are on an equal footing. If I am right, and the first instance decisions contain material that is relevant for these cases, then the disclosure of the judgments is likely to be conducive to more focused and effective case-management and trial, and may avoid the re-litigation of points already decided or conceded elsewhere. This will be an advantage not only to the parties to this litigation, but generally in the efficient use of the resources of the tribunal … If I am wrong, then the parties will have been put to some**

inconvenience and cost, though not, I think, very much, and nothing will have been gained other than that the tribunal will have attempted to address the inequality to which I refer above.

…

5.9. I had observed during submissions that usually when an application for specific disclosure is considered the documents the subject of it have been identified and located, and it was possible for them to be shown to the Judge so that the questions of relevance and necessity can properly be assessed. In this case the documents have not been located. Although I could have ordered that this be done, and the application then considered in the light of them, I concluded that it would be wasteful and disproportionate to require BCC to locate and produce them for this purpose: if the documents are located and produced and prove to be irrelevant to the [claimants'] cases, no doubt the parties will agree that they should be omitted from any trial bundle.

5.10. I gave careful thought to the authorities mentioned at paragraph 2 above, and of the importance of preventing the claimants from conducting a fishing expedition. I considered that the circumstances of this case were highly unusual: (a) the judgments etc have the potential to achieve a saving of time and cost for the parties, and more efficient use of the resources of the tribunal; (b) the judgments etc are in theory, but not in any real sense in practice, in the public domain; (c) one party has ready and convenient access to the judgments etc and the other has not; and (d) this situation creates an inequality between the positions of the parties which might result in inconsistency between findings of fact in previous cases and in this case which would be contrary to the interests of justice. …"

The Issues: the Arguments on Appeal

10. In presenting the appeal, Mr Epstein QC made a number of preliminary observations. First, he pointed out that the Order for further particularisation made by the Judge following the disclosure Order was not onerous on the Claimants. The stage at which the proceedings had reached was that the claims were not yet coherently specified, and of course no defence to them has yet been stated. Further, the Claimants by the time of the hearing in February 2016 had received a lot of material from information already disclosed by BCC. In particular, as recorded at paragraph 3.6 of the Reasons, all of the material necessary to specify Ms Bagshaw's claim had already been disclosed. Junior counsel for BCC had submitted to Judge Goodier that it was obvious that Ms Bagshaw's potential claims were: EV against her chosen comparators for the period to June 2010, RAE against her chosen comparators of the same or lower grades for the period of June 2010 to 31 August 2012, and finally a contractual claim from 1 September 2012 to 27 February 2013. The Employment Judge records at paragraph 3.8 that he was struck particularly by the considerable amount of information that counsel for BCC had extracted from the information now in the hands of the Claimants about the way in which it is

open to, for example, Ms Bagshaw to plead and advance her case. That revelation lay behind the Judge's decision to refuse the application so far as it related to the first class of documents.

11. The argument for BCC was condensed into two main grounds. These could be encapsulated in the following questions: (1) did Judge Goodier apply the wrong test; and (2) even if he applied the correct test, did he then fail by not examining the documents in question before reaching a decision? So far as the first ground was concerned, this was divided into two issues: that of particularisation and that of future conduct of the case. It was submitted that nowhere in paragraph 5 of the Reasons does the Employment Judge conclude that the documents in question are relevant or necessary for particularisation. The obvious inference is that he did not consider that disclosure was relevant or necessary for that purpose. When he did apply the test correctly to the first class of documents, he refused disclosure. It was self evident that if the Judge had considered that the test was satisfied in relation to the third class of documents, he would have said so. While it is accepted that the Order and Reasons have to be read as a whole, Mr Epstein reiterated that nowhere in paragraph 5 of the Reasons does the Judge explain why disclosure is relevant or necessary to allow particularisation by the Claimants. It was clear from the Reasons that the overriding concern of the Employment Judge was that of equality of arms. He allowed his view of fairness to come between him and the correct legal test. The correct approach would have been to consider whether the information was relevant and necessary for the Claimants to particularise their claims. The reasoning focuses only on conduct of the litigation generally not on this first stage. As a fallback position, Mr Epstein argued that even if the Employment Judge could be seen as having concluded that the test was satisfied he must have then applied a test lower than that required by **Flood** because he had already acknowledged that the Claimants had sufficient information to allow them to plead their claims. The details they were ordered to provide are fairly basic.

12. Turning to the substantial issue of future conduct in the application of the test, the important point was that the issues are not yet identified. When the Order was made, the Claimants had not provided proper particulars, and there are no defences in. Against that background it was simply wrong to conclude that the material sought to be disclosed is relevant and necessary. Reference was made to **Harrods Ltd v Times Newspaper Ltd** [2006] EWCA Civ 294 at paragraph 12, where the Court of Appeal emphasised that it was essential first to identify the factual issues that would arise for decision in a case before making any Order for disclosure as disclosure had to be limited to documents relevant to those issues. Judge Goodier erred in failing to identify the issues to which disclosure of the documents sought would be said to be necessary or relevant. In any event, the issues could not be identified at such an early stage. It was premature for the Judge to state that the Judgments and Orders in question were relevant and necessary without knowing what the issues were in these cases. Accordingly, the wrong test was applied. There was no analysis of the issues, and the decision was expressed in tentative terms, such as "*could … be of at least some value*" (paragraph 5.5) and, "*it is possible that significant concessions as to fact or law might have been made*".

13. The second ground of appeal, the alleged failure to examine the documents before making a decision, could, it was submitted, be taken to be part of ground 1 or a standalone argument. Mr Epstein accepted that it was not essential in every case to examine the documents first and also that the authorities suggested that examination would usually relate to confidentiality issues. However, both sides accepted that the starting point was that examination of the documents before reaching a decision was the usual course to be adopted. The Employment Judge in this case, having gone straight to an equality of arms argument without applying the test of relevance and necessity properly, failed to then acknowledge that he was not the presiding Judge in all of the decisions he was ordering disclosure of. He failed

to refresh his memory on those that he had been involved in, and he ignored the distinction between Judgments that might be said to be in the public domain and interlocutory Orders, which were not. On the last point, BCC lodged a short note on the distinction between Judgments and interlocutory Orders. It was not in dispute at the hearing before me that only the former could properly be said to be in the public domain. It was argued to be a further error on the part of the Employment Judge that he failed to make such a distinction, although it was accepted that this was not a point raised at the hearing before him.

14. Mr Epstein also referred to the witness statement of a Field Services Officer employed by Equal Pay Legal Ltd, who represents the Claimants, to visit the Register of Judgments Office at Bury St Edmunds, Ipswich, to search for all equal pay tribunal cases relating to, amongst others, BCC. He argued that it was clear from that statement that it would have been possible for the employee to carry out the task, albeit that it might have taken some time to find and photocopy all of them.

15. For the Claimants and Respondent in the appeal Ms Crasnow QC dealt with the examination of documents point first. She highlighted that at paragraph 5.9 of his Reasons Judge Goodier records that he raised during submissions at the hearing that the usual course was for the Judge to examine the documents before exercising a discretion. He then explains why he decided not to do that in this particular case, concluding that it would be wasteful and disproportionate to require BCC to locate and produce them for the purpose of examination only. It was noted also that BCC did not ask Judge Goodier to adjourn the hearing so that the documents could be examined. An opportunity had been given by the Judge to allow BCC to check whether the archive of Judgments existed in the form he thought it did. No such adjournment was sought. In the circumstances, it was inappropriate for BCC now to argue that

the Employment Judge erred in not calling for the documents and examining them before he took his decision. In any event, he took into account the issues normally addressed by examination. He ordered redaction and excluded any Judgments relating to claims withdrawn after settlement, and for that reason any concern about the interlocutory Orders not being strictly in the public domain was dealt with. These Orders could be distinguished from those relating to the type of documents usually considered confidential, such as documents about a grievance process concerning an employee not engaged in the proceedings. While it might be said that another Judge would have taken a different course on examination of the documents before a decision, that was not enough to conclude that Judge Goodier erred. His decision not to examine the documents was not so disproportionate that it could be challenged.

16. Turning to the substantive issue in the appeal, posing the first question of whether the Tribunal applied the correct test, it was submitted that the issues of relevance and necessity are adequately covered in the Reasons in paragraph 5. There was sufficient to illustrate that the Judge considered the question of whether the documents "may well assist" the Claimants. It was a relatively low threshold, because disclosure is an interim Order. So far as what was said to be the tentative nature of his language is concerned, it was perfectly appropriate, in concluding that something was likely to be relevant, to allow for an outcome contrary to that. In paragraph 5.2 of the Reasons the Employment Judge records the view that he had stated at an earlier stage that these first instance cases contained many detailed findings of fact "*which would be highly material in particular to Rated as Equivalent claims*". That was sufficient to illustrate that the Judge knew exactly what the purpose of the disclosure was. The expression "highly material" was obviously linked to the relevance test. Paragraph 5.5 assists in understanding why the Employment Judge regarded Judgments as relevant. They will assist the Claimants in relation to findings made in relation to comparators; in other words, they will

know whether those comparators were successful. The expression "*If I am right, and the first instance decisions contain material that is relevant for these cases …*" at paragraph 5.7 is a clear reference to the test of relevance, particularly when read together with what was said at paragraphs 5.2 and 5.5. There was no inconsistency between the reasons given for granting the Order in relation to the third class of document with refusal of the first class of documents. The test was not met in relation to the first class of documents, but it was in relation to the third class. There is a proper analysis of how the Judgments have the potential to assist the Claimants. The use of the conditional tense provided further confirmation that the Judge had understood the test.

17. In relation to the suggestion that the Claimants could have completed the Schedules without the Judgments on the basis of the material already disclosed to them, it was submitted that the Claimants were anxious to avoid broad pleadings with many comparators, it being preferable for them to be able to name specific comparators about which BCC have the details. It was appropriate to do that and also to avoid repetition with any earlier claims. The clear context for disclosure was particularisation of the claims, and the Employment Judge had listed the factors that satisfy the relevance point.

18. So far as the necessity limb of the test is concerned, Judge Goodier was well aware that his decision was made under reference to that test. He records the submissions made by counsel for the Respondent that the two stage test had not been met. The two issues arising under the test of necessity are saving of costs and fair disposal of the case. It was clear that if a Claimant can get particularisation right at an early stage it will save costs. It avoids any need for future amendment or any strike-out arguments. This is noted by the Employment Judge, where he records that it would assist in avoiding the re-litigation of points already decided or

conceded elsewhere. So far as fair disposal of the case was concerned, there was reference to more focused and effective case management at paragraph 5.7. These factors and that of avoiding re-litigation of issues already determined satisfied both of the elements of fair disposal and saving costs.

19. The other factors relied on in paragraph 5.10 focus solely on fair disposal, including the inequality of arms point. Accordingly, properly understood, it could be seen that the Employment Judge satisfied himself in relation to the two elements of the test and then at paragraph 5.10 records that the circumstances of this particular case are unusual. Judge Goodier had longstanding knowledge of the BCC employment pay litigation. He very much had in mind the stage at which the claims were, because the Claimants had explained repeatedly that they were unable to complete their particularisation without the documents sought to be disclosed. In relation to the suggestion that the employee of the Claimants' representative could have done more and secured copies of the relevant Judgments, it could easily be inferred by the acceptance of the costs Order against the Claimants in relation to disclosure that this was something that they would have avoided if they could. It was difficult to see what more the employee who attended at Bury St Edmunds could have done. Some of the decisions requested were more than six years old.

20. For the Respondent to be correct in this case in relation to a failure to consider what the issues between the parties were, it would be impossible for any Claimant to ask for disclosure before particularisation, and it was conceded that it was competent to do so. It was clear that the comparators to be relied on by the Claimants would be manual workers still employed by BCC. The refusal by Judge Goodier of disclosure of the class 1 documents illustrates that he had a very good idea of what the issues in the case were. The **Harrods** case was very different

and involved detailed pleadings at a later stage. Here, the question of relevance was being considered at the stage of particularisation, something that Judge Goodier himself had ordered. He had an explanatory note accompanying the partly completed Schedule of January 2016, and to that extent he knew what the issues were going to be. The alternative to disclosure would have been to expect the Field Officer to copy thousands of pages in an attempt to try to secure the information sought. That would be disproportionate. In any event, such an argument was not made to the Employment Tribunal.

21. Finally, in relation to the argument about confidential Orders as opposed to those in the public domain, it was clear from the reasons given that the Judge had in mind that some of the documents were Judgments and some were Orders. No suggestion had been made to him that there should be a separation of the documents into those in the public domain and those not strictly in the public domain. In essence, no confidentiality argument at all was made to the Employment Judge. The matter was focused as one of a fishing exercise.

22. In a brief reply Mr Epstein drew attention to the list of Particulars to be specified: at pages 2 and 3 of the Judge's Order it was pointed out that only the name, job title or grade of any comparators had to be specified. Accordingly, the documents with findings of fact in relation to certain named comparators were not needed for particularisation. The job titles of the various comparators were already available and could have been used to complete the Schedule.

Discussion

23. Both sides to this dispute acknowledge that the Employment Judge, whose decision is appealed against, has particular experience in the area of equal pay claims. It is accepted also

that he set out the correct test to be applied in dealing with an application for specific disclosure.

24. The first and most substantive issue for determination is whether the Employment Judge failed to apply properly the test of relevance and necessity. In effect the Judge's overall task has three aspects to it. As Eady J put it in **Flood v Times Newspapers Ltd** [2009] EWHC 411 (QB):

> **"23. The first requirement is that any documents sought must be shown to be likely to support or adversely affect the case of one or other party. Thus, the question to be asked in each case is whether they are likely to help one side or the other. The word "likely" in this context has been considered in the Court of Appeal and is taken to mean that the document or documents "may well" assist: see e.g. *Three Rivers District Council v Governor and Company of the Bank of England (No 4)* [2003] 1 WLR 210.**
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> **24. Secondly, the hurdle must be overcome of demonstrating that disclosure of the documents sought is "necessary" in order to dispose fairly of the claim or to save costs. This only arises for consideration if the first hurdle has been surmounted. Unless the documents are relevant in that sense, it is not necessary to address the test of necessity.**
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> **25. Thirdly, there is a residual discretion on the part of the court whether or not to make such an order - even if the first two hurdles have been overcome … It is at this third stage that broader considerations come into play, such as where the public interest lies and whether or not disclosure would infringe third party rights in relation, for example, to privacy or confidentiality. If so, the court must conduct a careful balancing exercise …"**

25. In effect, what the Appellant contends is that Judge Goodier approached matters as if this balancing exercise was all that mattered, without first scrutinising the text of relevance and necessity. It is said that he moved straight to his central concern of inequality of arms rather than going through the logical sequence required. I have reached the view that the Appellant's argument fails to acknowledge the background to the Order being sought and the whole reasoning of the Employment Judge. First, in giving his reasons for the Order made, Judge Goodier explains that it was he who had expressed the view at the Preliminary Hearing in July 2015 that the Judgments in question "… *have made many detailed findings of fact which would be highly material in particular to Rated as Equivalent claims*" (Reasons, paragraph 5.2). So the issue of the relevance of such Judgments had been raised prior the consideration of the disclosure application. More importantly, the opposition to disclosure on behalf of BCC at the

hearing was, in terms, that the application did not meet the requirements of (a) relevance and (b) necessity (Reasons, paragraph 5.4). The Reasons that follow, properly understood, address that challenge. The Judge explains that while the findings from previous cases would not be *res judicata*, they could be of some value for the present proceedings and that it was possible that significant concessions as to fact or law in the previous cases might have similar value. I do not consider that such a view can fairly be characterised as overly tentative against the background of the firm position expressed at the earlier hearing. It seems to me that the Judge was simply being careful not to rely too much on his memory of the cases when ordering disclosure. In any event, as Ms Crasnow pointed out, the passage in paragraph 5.7 that begins "*If I am right, and the first instance decisions contain material that is relevant for these cases …*" addresses the test of necessity very directly. It is articulated with the conditional "*if*" simply because, absent the material being produced, it was proper to allow for an outcome contrary to the view expressed. On the issue of the reference to it being "*possible*" that the Judgments would help, as already indicated, the test is no higher than that the documents "may well assist" the party seeking disclosure. While the distinction between probability and a possibility can be determinative at the final stages of proof of a civil case, it is clear that the Judge was not here using the word "possible" in the context of a standard of proof. It was simply recognition that he should not set out exactly what he understood the Judgments to contain when they had not yet been disclosed. In the particular circumstances of the Judge in question having prior knowledge of the litigation that was the subject matter of the documents sought, I consider that his Reasons address adequately the issue of relevance. Having enunciated the test, it is not incumbent on a Judge to conclude his Reasons with a statement that he considers that the test is met. It can easily be inferred from the Reasons given for granting the Order.

26. So far as necessity is concerned, it was contended that the Claimants already had sufficient information to allow them to plead their claims and so the test of necessity had either not been applied at all or some lower standard had been applied. At paragraph 5.7 the Judge concludes that the disclosure sought would be likely to be conducive of more focused and effective case management and trial, also avoiding the risk that points already litigated or conceded in earlier cases might be re-litigated. It cannot be said that the Judge was unaware that all of the issues in the case were not yet focused - the application for disclosure was specifically made on the basis that the claims could not be fully particularised without it. While normally an application at this early stage would be rejected as premature, in this particular case there were good reasons to make an exception. It was competent to do so. The circumstances in **Harrods Ltd v Times Newspaper Ltd** [2006] EWCA Civ 294 were rather different in that there the Order for disclosure was sought when the litigation was at an advanced stage on its way to trial and an analysis of the pleadings was clearly the correct way to determine what issues would arise for decision at trial. In the present case, the issue of disclosure was inextricably linked with the need to identify the issues and the difficulties facing the Claimants in that regard. The advantages of certain limited disclosure being ordered in terms of cost and efficiency were recognised by the Judge. The focus on the inequality of arms is explicable by the Judge's particular experience of the subject matter. In relation to whether the Claimants' representative could have done more to find and copy the Judgments, the Judge accepted that this would not have been reasonably practicable. That is a conclusion that he was entitled to reach on the material before him. Again there is sufficient in the Reasons to conclude that the Judge also applied the necessity limb of the test.

27. In relation to the alleged failure to examine the documents before reaching a decision on disclosure, the Appellant concedes, correctly, that it is not essential in every case to examine the

documents first. Examination of the documents is necessary where there is a contention that they are confidential, although confidential documents may still be disclosed - **Science Research Council v Nassé** [1980] AC 1028. In **Plymouth City Council v White** UKEAT/ 0333/13, HHJ McMullen clarified the procedure to be followed for examination of documents by the Judge where there is a confidentiality objection. In the present case, confidentiality was not argued as an issue at the hearing before Judge Goodier. A distinction between Judgments and interlocutory Orders, the latter not being in the public domain, was raised only on appeal and I deal with that below. That apart, as is clear from paragraph 5.9 of the Reasons, it was the Judge himself who raised with counsel that the usual course was to examine the documents before determining questions of relevance and necessity. No adjournment was sought by counsel appearing for BCC at that time and the Judge gives good reasons why it would be wasteful and disproportionate to order the documents to be located and produced prior to a decision being made. It is in those circumstances somewhat unsatisfactory for the Appellant now to argue that it was an error on the part of the Judge not to examine the documents before reaching a decision. He adopted a pragmatic and cost efficient course in the absence of any argument that due to their confidentiality it was essential for him to examine the documents before making an Order.

28. Finally, there is the new matter raised on appeal about the distinction between Judgments and interlocutory Orders. Ms Crasnow accepted that only the former could be said to be in the public domain. However, as the Judge had ordered redaction to preserve the anonymity of the litigants and had excluded any Judgments relating to claims withdrawn after settlement, she argued that any concern about any apparent failure to draw a distinction between them had been dealt with. I agree with that submission. While Judge Goodier does not draw any distinction between Judgments and Orders, there are no adverse consequences of

his failure to do so and so any error in that regard is not sufficiently material to justify interference with his decision. He appears to have taken considerable care to limit the material ordered to be disclosed to the Claimants.

29. In conclusion I consider that there are no errors in the decision of Judge Goodier such as to justify allowing this appeal. His approach takes sufficient account of the test for and restrictions on disclosure. Paragraph 5.10 of his Reasons represents a summary of the particular circumstances of the case that led to a decision on early disclosure that, as an experienced Judge, he was well aware was a departure from the usual course. His focus on the overriding objective in exercising his power to order disclosure of documents was in the circumstances entirely appropriate and the outcome a fair one. The appeal is dismissed.