Appeal No. UKEAT/0333/13/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 23 August 2013

Before

HIS HONOUR JUDGE McMULLEN QC

(SITTING ALONE)

PLYMOUTH CITY COUNCIL — APPELLANT

MR C WHITE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS DEBBIE GRENNAN (of Counsel) Instructed by: Plymouth City Council Legal Services Department Floor 3, Civic Centre Armada Way Plymouth PL1 2AA
For the Respondent	MS ELAINE BANTON (of Counsel) Bar Pro Bono Unit

SUMMARY

PRACTICE AND PROCEDURE – Disclosure

The Employment Judge erred in conducting a five hour telephone CMD in ordering disclosure of documents he had not read and in applying the test of *relevance* rather than *necessary for a fair trial*. The sequence in a disclosure application is:

(1) The Judge must first consider if the document sought is relevant (if it is not, then it will not be ordered to be disclosed).

(2) If it is relevant, the next question is whether it is necessary for the fair trial of the case for it to be ordered to be disclosed. Where there is objection, the Judge should examine the document itself so as to consider whether or not in a contention that it is confidential it should still be disclosed (see **Nassé**).

(3) If the document is relevant and necessary and is to be disclosed, the Judge should consider whether there is a more nuanced way of disclosing the material so as to respect confidentiality and the Judge may then decide to order the document to be disclosed wholly or partially, usually by the system now known as redaction.

(4) The disclosure Judge having read the disputed documents should not conduct the full hearing unless the parties agree.

The order was set aside and the issue remitted to a different Employment Judge.

HIS HONOUR JUDGE McMULLEN QC

Introduction

1. This case is about disclosure of information prior to a hearing of an unfair dismissal claim on 28 October 2013 for five days. I shall refer to the parties as the Claimant and the Respondent. The vehicle for the present appeals is a decision by Employment Judge Carstairs at a case management discussion relating to, among other things, disclosure. The Judge has recorded his reasons at the request of HHJ Peter Clark, which are divided into two. That is because the first set of reasons relates to the appeal by the Respondent and the second to a cross-appeal by the Claimant. They are dated, respectively, 15 July and 7 August 2013. The hearing was listed for one hour. It took place on the telephone on 2 May 2013 at 2.15pm and lasted until 18.55, 4 hours and 40 minutes. The Claimant represented himself; the Respondent was represented by Ms Alison Frazer of counsel. Today the Claimant has the advantage to be represented by Ms Elaine Banton and the Respondent by Ms Debbie Grennan, both of counsel. The essential issue is whether the Judge was right to order such disclosure as he did. The direction of HHJ Peter Clark was based upon the forthcoming hearing and in order to preserve the date.

The legislation

2. The legislation is not in dispute. It was not cited by Judge Carstairs. The relevant rule is rule 10(2)(d) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004**, which gives the power to a Judge to require any person to disclose documents or information to a party or to allow a party to inspect such material as might be ordered by a County Court.

The facts

3. This case has taken up a good deal of Employment Tribunal and EAT time. There are three or four CMDs, one PHR and an appeal to the EAT presided over by Langstaff P with members. The outcome of all of that is that the Claimant now is running an unfair dismissal claim, his other claims for discrimination having been struck out without successful appeal. As to the unfair dismissal claim there is an unappealed order for a deposit made by Employment Judge Roper, he considering that the case as it now stands has little reasonable prospect of success. Undaunted, the Claimant of course presses on and seeks to advance his case of unfair dismissal by reference to a very substantial number of documents. I shall not spend time detailing the facts in this case, because I respectfully adopt the account given by the President in his Judgment (see UKEAT/0174/12).

The issues and discussion

4. When I read the papers in this case, it struck me immediately that there was agreement between counsel that the Judge had applied to the order for disclosure the test of what was *relevant* to the proceedings and not what was *necessary*. I was seduced by paragraph 1 of Ms Banton's skeleton argument, where she says the Judge ordered what he considered was relevant to the Claimant's case. That of course is a concession, because Ms Grennan's ground 1 is that that is the wrong test. However, recovering from that position, Ms Banton invites me to say by looking more carefully at her argument that she is indeed disputing that the Judge applied the correct test.

5. Further in my case management of this case in preparation for today I directed counsel to consider making a Scott schedule showing what it was was in dispute. I am most grateful to them both for scrambling to put together an estimable nine-page schedule.

6. The Judge decided by reference to what was relevant to order the disclosure of documents. That approach is found in paragraph 6 of his order dated 3 May 2013, paragraph 7 of his reasons for that and the wider approach ordering disclosure in order to assist the Claimant (see paragraph 8 in his second set of reasons). Making the typographical correction agreed by counsel, it is accepted that the Judge was approaching the matter of disclosure on the basis of what was *relevant*.

7. In my judgment, that is the wrong test. The primary test is laid down in the Rule itself, which requires a crossover to the rules for disclosure in the CPR. So far as they have been discussed in the employment context as long ago as **Science Research Council v Nassé** [1980] AC 1028, the House of Lords set out the principles, and they are as follow:

> **"1. There is no principle of public interest immunity, as that expression was developed from *Conway v Rimmer* [1968] AC 910, protecting such confidential documents as those with which these appeals are concerned. That such an immunity exists, or ought to be declared by this House to exist, was the main contention of Leyland. It was not argued for by the SRC; indeed that body argued against it.**
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> **2. There is no principle in English law by which documents are protected from discovery by reason of confidentiality alone. But there is no reason why, in the exercise of its discretion to order discovery, the tribunal should not have regard to the fact that documents are confidential, and that to order disclosure would involve a breach of confidence. In the employment field, the tribunal may have regard to the sensitivity of particular types of confidential information, to the extent to which the interests of third parties (including their employees on whom confidential reports have been made, as well as persons reporting) may be affected by disclosure, to the extent which both employees and employers may have in preserving the confidentiality of personal reports, and to any wider interest which may be seen to exist in preserving the confidentiality of systems of personal assessments.**
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> **3. As a corollary to the above, it should be added that relevance alone, though a necessary ingredient, does not provide an automatic sufficient test for ordering discovery. This tribunal always has a discretion. That relevance alone is enough was, in my belief, the position ultimately taken by counsel for Mrs Nassé thus entitling the complainant to discovery subject only to protective measures (sealing up, etc). This I am unable to accept.**
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> **4. The ultimate test in discrimination (as in other) proceedings is whether discovery is necessary for disposing fairly of the proceedings. If it is, then discovery must be ordered notwithstanding confidentiality. But where the court is impressed with the need to preserve confidentiality in a particular case, it will consider carefully whether the necessary information has been or can be obtained by other means, not involving a breach of confidence.**
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> **5. In order to reach a conclusion whether discovery is necessary notwithstanding confidentiality the tribunal should inspect the documents. It will naturally consider whether justice can be done by special measures such as 'covering up' substituting anonymous references for specific names, or, in rare cases, hearing in camera.**

6. The procedure by which this process is to be carried out is one for tribunals to work out in a manner which will avoid delay and unnecessary applications. I shall not say more on this aspect of the matter than that the decisions of the Employment Appeal Tribunal in *Stone v Charrington & Co Ltd* (unreported), February 15, 1977, per Phillips J, *Oxford v Department of Health and Social Security* [1977] ICR 884, 887, per Phillips J and *British Railways Board v Natarajan* [1979] ICR 326 per Arnold J well indicate the lines of a satisfactory procedure, which must of course be flexible."

8. The matter is taken further in the speech of Lord Wilberforce:

"Since confidential documents are not privileged from inspection and public interest immunity fails, the tribunal which for this purpose is in the same position as the High Court and the county court, may order discovery (which includes inspection) of any such documents as it thinks fit – with this proviso 'Discovery shall not be ordered if an so far as the court [tribunal] is of the opinion that it is not necessary either for disposing fairly of the proceedings or for saving costs.'

If the tribunal is satisfied that it is necessary to order certain documents to be disclosed and inspected in order fairly to dispose of the proceedings, then, in my opinion, the law requires that such an order should be made; and the fact that the documents are confidential is irrelevant. […]

My Lords, I cannot agree that industrial tribunals should approach cases such as these relating to confidential documents with any preconceived notion that discovery should not be ordered 'except in very rare cases' and only in the last resort. I think that these cases should be approached with a completely open mind. The question being 'is discovery necessary for fairly disposing of these proceedings?' if the answer to that question is in the affirmative, as I ventured to think it often may be, then discovery should be ordered notwithstanding the documents' confidentiality. The irrelevant parts of the documents should, of course, be effectively covered up.

In my view, it would be impossible for a tribunal to decide whether the disclosure of confidential documents was necessary for fairly disposing of the proceedings, without examining the documents. […]

While the reluctance of Phillips J is understandable, the outcome in both cases was, in my judgment, unacceptable. For neither tribunals nor the Employment Appeal Tribunal were possessed of sufficient knowledge to entitle them to decide as they did, and whether any of the documents sought were 'necessary for disposing fairly of the proceedings or for saving costs' must for them have been still a matter of mere guesswork. That being the position, the proper course was that described by Arnold J in [*Natarajan*]:

> **'We think that before deciding whether an examination is necessary, the judge or chairman of the tribunal … or the appellate court … must decide whether there is any prima facie prospect of relevance of the confidential material to an issue which arises in the litigation; put another way, whether it is reasonable to expect that there is any real likelihood of such relevance emerging from the examination. If there is not, we do not think that the exercise of examination is necessary or should take place.'"**

9. Since then, the Court of Appeal has returned to the matter in **Canadian Imperial Bank of Commerce v Beck** in a Judgment upholding mine here in the EAT overturning a Judge by reference to the correct test, for there Wall LJ said the following:

> **"22. In our judgment, the law on disclosure of documents is very clear, and of universal application. The test is whether or not an order for discovery is 'necessary for fairly disposing of the proceedings'. Relevance is a factor, but is not, of itself, sufficient to warrant the making of an order. The document must be of such relevance that disclosure is necessary for the fair disposal of the proceedings. Equally, confidentiality is not, of itself, sufficient to warrant the refusal of an order and does not render documents immune from disclosure. 'Fishing expeditions' are impermissible.**
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> **23. As to the correction of an error of law committed by a judge who is exercising a judicial discretion, the law is equally clear. The leading case is *G v G* [1985] 1 WLR 647, which contains references to the well-known judgment of Asquith LJ in *Bellenden (formerly Satterthwaite) v Satterthwaite* [1948] 1 All ER 343 at 345. For an appeal to succeed, the exercise of discretion which is challenged must, in Asquith LJ's words: 'exceed the generous ambit within which reasonable disagreement is possible'."**

10. Thus I hold that the failure by the Judge to direct himself in accordance with the Rule, and the extension of the Rule to the Civil Procedure Rules on disclosure, and to the clear statement of the law in **Nassé** is an error.

11. The question then is: should the matter be dealt with by the EAT or referred to the Judge? I suppose prior to that the question is whether or not the Judge, having made that error, was unarguably right. I am not in a position to make that decision, because I do not have the materials upon which the Judge could make a decision as to what was necessary and what was confidential; nor, it seems, did the Judge. Critical documents that are the subject of this appeal were not shown to the Judge so that he could examine them. I accept Ms Grennan's astringent analysis of the authorities. The sequence in a disclosure application is:

(1) The Judge must first consider if the document sought is relevant (if it is not, then it will not be ordered to be disclosed).

(2) If it is relevant, the next question is whether it is necessary for the fair trial of the case for it to be ordered to be disclosed. Where there is objection, the Judge should examine the document itself so as to consider whether or not in a contention that it is confidential it should still be disclosed (see, again, **Nassé**).

(3) If the document is relevant and necessary and is to be disclosed, the Judge should consider whether there is a more nuanced way of disclosing the material so as to respect confidentiality – in this case, for example, there is an issue of child protection – and the Judge may then decide to order the document to be disclosed wholly or partially, usually by the system now known as redaction.

(4) The disclosure Judge having read the disputed documents should not conduct the full hearing unless the parties agree.

12. It follows that the Judge in this extraordinary – indeed, in the experience of counsel before me, unique – circumstance of a 5 hour telephone hearing did not give himself the opportunity to examine as he should have the documents over which a dispute arose. I am not in that position. I cannot say from any documents shown to me that the Judge was unarguably right to do that, and so the order must be set aside.

13. I bear in mind the very unusual circumstance of setting aside a Judge's exercise of discretion (see the cases cited in **Beck**), but the power does exist, and, given that I have decided that it followed a failure of the Judge to direct himself correctly, it is open to me to say that this decision is flawed and it should go back. Ms Grennan contends it should not go back to Judge Carstairs; Ms Banton does not resist it. Ms Grennan points out that Judge Roper has made a decision on the deposit order and it is understandable that the Claimant would not feel it right to have the case put before him. Three other Judges in the region have looked at this matter, one of whom has retired. So, the conclusion that I reach, which is the consensual position of counsel before me, is that this case should be remitted to a Judge who is not Judge Carstairs nor

Judge Roper, according to the decision of the Regional Employment Judge. The questions will be asked that I have set out above. But at all times the list of issues that Judge Carstairs crafted in paragraph 1 of his reasons on the second order will be in the forefront of the Judge's mind.

14. In order to illustrate how important that is, I accept the three examples given by Ms Grennan whilst of course accepting, as I have, that the Judge did not use the correct test and did not adopt the right process. The first is as to the strategy meeting. This is a document that must be considered by the Judge in its unredacted form. It is an important event, but whether the minute itself is of such importance, given the Harris report, will be an issue for the Employment Tribunal, and I note that the redacted form has been given already to the Claimant.

15. The second is a comparison with two other employees. On its face, the list of issues does not include a contention that the Respondent was unfair by reason of its differential treatment of employees in similar circumstances. These are matters that must be considered by a Judge before the wrongful activity, as it is said, of two other named employees is put into the public arena. On the information that Ms Grennan has been able to give me, at least one contention by the Claimant appears to be wholly unfounded. This, again, is a reason why the process of examination by a Judge is important before it is allowed to be exposed.

16. Thirdly is her example of the clients whom the Claimant was responsible for: before they are all disclosed, a view needs to be taken as to what the files contain. Given the Respondent does not contend that the Claimant's relations with his clients created a problem and that many of the clients anyway were difficult, the use of this material cannot, it seems to me, be proportionate, but again that is a matter that I must leave to the Judge.

17. I then turn to the cross-appeal, which relates to what is said to be the grievance. On this, Judge Carstairs did give very full reasons, and, in my judgment, the reasons that he gave are perfectly sustainable. As I pointed out in my pre-hearing note to counsel, the Judge here has directed himself on relevance and held that the material relating to the grievance was not relevant. It therefore cannot logically have been essential. The reasons given by the Judge for failing to order this material seem to me to be cogent, and I will dismiss the cross-appeal.

18. A view has to be taken of this case. It is an old case, it has spawned a vast amount of procedural intervention, and it is important now that this case proceed to a trial. The parties have their eyes wide open. The Respondent has challenged the Claimant by way of its application for a deposit order, and it has succeeded. It failed on the strike-out, but nevertheless the Claimant must be alert to the threat hanging over his head as a result of the Judge's deposit order. The parties must also bear in mind a proportionate approach to the issues to be tried here and must at all times have in the forefront of their approach the words of Lewison LJ in **Davies** at paragraph 33 so that the issues are kept within narrow bands.

Conclusion

19. I would like to thank both counsel for their help today. The appeal is allowed. This will be remitted to a Judge. The Scott schedule will be before the Judge so that it can be seen what issues are still in play. The cross-appeal dismissed