Appeal No. UKEAT/0294/17/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 13 December 2017

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

MRS R DHANDA APPELLANT

TSB BANK PLC RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DANIEL BARNETT (of Counsel) Instructed by: TSBU St John's Terrace 3-7 Ampthill Street Bedford MK42 9EY
For the Respondent	MISS JUDE SHEPHERD (of Counsel) Instructed by: Bond Dickinson LLP Ballard House West Hoe Road Plymouth PL1 3AW

SUMMARY

PRACTICE AND PROCEDURE - Disclosure

An Employment Judge erred in law in ordering general disclosure of all documentation which passed between a Union and its member (the Claimant) in connection with disciplinary issues giving rise to Employment Tribunal proceedings.

Given the confidential nature of such correspondence, albeit not privileged, a Tribunal ought ordinarily to carry out an inspection of the documents said potentially to be disclosable and should test each against the principles set out in **Canadian Imperial Bank of Commerce v Beck** [2009] IRLR 740, itself derived from **Nassé v Science Research Council** [1979] IRLR 465, namely whether a document is not only relevant but also necessary for fairly disposing of the proceedings.

No such inspection should be carried out until a list of issues said to be in dispute in the proceedings is put before the Judge.

HIS HONOUR JUDGE MARTYN BARKLEM

1. This is the Full Hearing of an expedited appeal, permission for such having been granted by Her Honour Judge Eady QC on 29 November 2017. Expedition was granted in order to preserve the hearing of a claim in the Employment Tribunal at Huntingdon on 15 January 2018.

2. The appeal is brought by the Claimant below and I will use the terms by which the parties were known below in this Judgment.

3. The appeal concerns an Order made by Employment Judge Bloom for disclosure by the Claimant of documentation shared between her and her Union, in the course of its dealings with her up to the time of instructions being sent to counsel for the drafting of a formal ET1. It is common ground that legal professional privilege does not apply to dealings between the Union and its members prior to that date.

4. It is neither useful nor possible, given the shortness of time since I received the papers in this case, to set out the underlying facts in great detail. In the interests of enabling this Judgment to be delivered extempore and thus fulfilling the purpose of expedition, I will not attempt to respond to every issue arising from the very helpful skeleton arguments prepared by Mr Daniel Barnett of counsel for the Claimant and Miss Jude Shepherd of counsel for the Respondent; each of whom appeared below. I am grateful for their skilled and economical submissions this morning.

5. The Claimant was a Branch Manager working for the Respondent. She left a note in a communications book for a maintenance contractor's employee to dispose of two old televisions and some rubbish. For reasons which have not been explained, and possibly never will be, the contractor's employee, a Mr Turner, took this as an instruction to sever the wires leading to the branch computer server and to dispose of it in a nearby skip. In fact, the Respondent has certain policies in relation to the disposal of waste and, the Respondent says, had the policy been followed the contractor would not have been asked to dispose of the televisions and thus he would not have disposed of the server with the serious consequences for security and operational issues which flowed from that.

6. The Claimant was interviewed and was instructed not to contact Mr Turner as the Respondent wished to ensure that the matter remained confidential. In fact, the Claimant did contact Mr Turner by way of text message or messages, the contents of which were subsequently made known to the Respondent by Mr Turner and which appeared, to the Respondent, to be telling Mr Turner what to say and/or putting him under pressure.

7. In the amended grounds of resistance at paragraph 3, it is also asserted by amendment that the Claimant altered the note in the communications book after the server had been disposed of. That does not seem to have been an allegation which she faced in the disciplinary process and no further reference to the consequences of this appears in the amended grounds of resistance. I am told today that the issue may be relevant to the question of remedy, something which Mr Barnett accepts.

8. The Respondent accepts in paragraphs 13 and 16 of the amended grounds of resistance that the Claimant's note to Mr Turner asked him to remove televisions, not the server, and that she had no intention to cause the significant consequences of her actions.

9. The issues for the Tribunal, so far as liability is concerned, are relatively narrow. Stripping them down to the bare bones, it is alleged in the particulars of claim that there was a flawed investigation, that the Claimant ought not to have been forbidden from speaking to Mr Turner, that the text message which she sent to him could not have been a breach of confidentiality, and that no reasonable employer could have made the findings that it did from a fair investigation. Finally that the sanction, demotion and a move to another branch, was disproportionately severe.

10. I stress that the hearing of the claim is yet to take place. Nothing which I have said, or will say, in this short Judgment should be taken as predetermining any issue which remains live before the Employment Tribunal.

11. The Claimant was and remains a member of the TSBU, a certified Trade Union, and took advice from officers of the Union. She was represented by Union representatives who attended hearings and made notes.

12. On 30 August 2017, a solicitor in the firm of Bond Dickinson, acting for the Respondent, wrote to the Employment Tribunal, copied to Emma Stopford who is a Director of the Union. The letter reads as follows:

> **"Dear Sirs**
>
> **Mrs R Dhanda V TSB Bank Plc - Case 3400025\2017**
>
> **We act for the Respondent in the above proceedings and write to request an order for specific disclosure of relevant documents within the Claimant's control, specifically any and all**

correspondence (including emails), memos, meeting/interview notes or any other documents shared between the Claimant and her Union representatives, TSBU, including but not limited to Simon Reynolds, Emma Stopford and Debbie Riches from 15 July 2016 to date. We believe that these documents may contain relevant information to this case.

The Respondent also requires the Claimant's representatives to disclose all internal correspondence relevant to this case, including emails, memos, meeting or interview notes or any other documents passing between Trade Union representatives and between the Trade Union representatives and any other individuals working with or for TSBU from 20 July 2016 to date.

It is our understanding that the Claimant's Union, TSBU, has given this case a high level of attention and publicity, having written about it in its newsletters to its members on at least two separate occasions. It is, therefore, anticipated that there will be a large number of relevant emails, meeting notes and other documents which have been generated since July 2016.

Throughout her disciplinary, grievance and appeal processes, the Claimant was represented by Trade Union representatives from TSBU. Advice, discussions and correspondence between an individual and their Trade Union representative are not protected by legal privilege. The documents requested are relevant to the case and fall to be disclosed. To date, the Claimant has disclosed no correspondence between her and her TSBU advisers. As stated in our previous email, some of the pages added to the bundle by the Respondent in July were in the Claimant's possession from the outset, including letters between her and the Respondent. The Claimant did not add these to the bundle. Given the Claimant's representative's public focus on this case, we are of the view that there may well be other relevant documents the Claimant has failed to disclose.

This information is likely to be relevant to the issues in dispute and we consider that provision of this information would assist the Tribunal in dealing with the proceedings fairly and justly while avoiding delay in accordance with the overriding objective.

We confirm that we have complied with rules 30(2) of the Employment Tribunal Rules of Procedure 2013 by providing a copy of this letter to the Claimant and advising them that any objection to this application must be sent to the tribunal office as soon as possible and copied to us.

We look forward to hearing from you.

Yours faithfully

Bond Dickinson LLP."

13. That letter was responded to by Ms Stopford in the following terms:

"Dear Kate

Dhanda v TSB - Application 3 - Your Application for Disclosure

We have considered your request for disclosure of documents containing communications between Ms Dhanda and ourselves.

As a matter of principle, we are not prepared to accede to your request and so will be contesting your application to the tribunal.

We do not assert legal advice privilege. Nor do we claim litigation privilege in respect of documents predating the finalising of the Particulars of Claim (10 January 2017), although we assert litigation privilege for documents created on or after that date.

However, disclosure will only be ordered where it is necessary for the fair disposal of a case. Any exercise of discretion in ordering disclosure is subject to the provisions of the European Convention on Human Rights. Ms Dhanda has a right to respect for her privacy and correspondence (Art 8), which protects her right to communicate confidentially with her trade union. She also has a right of freedom of association and the right to join a union (Art 11). That right is impeded if she is required to disclose confidential communications with her

union. A tribunal would need to carry out a balancing act to decide whether to order disclosure of such documents, and there is significant public interest in maintaining confidentiality of communications between member and union, particularly in the context of disciplinary matters.

But leaving the matter of principle aside, we have reviewed the documents with relevance in mind, and there are no documents to disclose. We have worked on the basis that the issues in the case revolve around TSB's knowledge and reasoning, i.e. what was in the mind of the dismissal/appeal officer, did they follow a reasonable procedure, did they have reasonable grounds for their belief in guilt, was their decision reasonable? The communications between Ms Dhanda and ourselves are not relevant to the thought processes of the disciplinary and appeal officers, as they were not privy to those communications at the time. The only potential relevance would be if a document existed evidencing Ms Dhanda admitting she had amended the communications book, or admitting she had told the cleaner to remove the server (both of which would be relevant to contributory fault or to the breach of contract claim). No such documents exist.

Regards

Emma."

14. The matter then came before Employment Judge Bloom on 8 November 2017. At the time that the appeal was lodged, no Written Reasons had been prepared but these have been since. Mr Barnett points out in his skeleton argument that the Judge wrote these knowing that it was intended that there would be an appeal but to my mind nothing turns on that.

15. It has been explained to me, through a witness statement made by Ms Stopford, that Judge Bloom had a very heavy caseload before him and that although he had had a copy of the bundle, which included the email correspondence referred to above, he had not read it, other than skim-reading the pleadings and the first paragraph of Mr Barnett's skeleton argument. I have immense sympathy with the Judge who was faced with a difficult set of legal principles to deal with in a very limited time.

16. The Order complained of is at paragraph 6 of the Reasons, which reads as follows:

"6. The claimant shall on or before *22 November 2017* disclosure [sic] to the respondent all correspondence (including emails), memos, meeting/interview notes or any other documents shared between the claimant and her union representatives, TSBU, including but not limited to Simon Reynolds, Emma Stopford and Debbie Riches, covering the period 15 July 2016 to 10 January 2017 inclusive. The requirement to disclose such documents on or before *22 November 2017* shall be suspended if on or before that date the claimant submits an appeal to the Employment Appeal Tribunal against this order."

17. As far as I can see, substantially the same points are made in this appeal on behalf of the Claimant as were advanced before the Employment Judge. For that reason, I set out his Reasons as relating to this issue in full:

> **"12. The main contentious issue before me was the respondent's request that the claimant should disclose all communications between her and her union representatives covering the period 15 July 2016 until 10 January 2017. The application was opposed on behalf of the claimant. Mr Barnett's opposition to the application was helpfully set out in paragraphs 29-38 of his Outline Submissions. Ms Sheppard [sic], on behalf of the respondent, submitted that the documents she requests are not protected by either litigation privilege or legal advice privilege. Mr Barnet [sic] does not agree. I am of the same conclusion. The communications are not with any legally qualified adviser and thus are not protected by legal advice privilege. Nor were they created or entered into at the time with the sole or dominant purpose of actual of [sic] contemplated litigation. Litigation between the parties was not reasonably in prospect until after 10 January 2017. Legal privilege therefore does not attach to those communications.**
>
> **13. Rule 31 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the 2013 Regulations") states that:**
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> > **"The tribunal may order any person in Great Britain to disclose documents or information to a party (by providing copies or otherwise) or to allow a party to inspect such material as might be ordered by a County Court."**
>
> **14. Rule 2 of the 2013 Regulations states:**
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> > **"The overriding objective of these rules is to enable employment tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable - ensuring that the parties are on an equal footing."**
>
> **15. When determining any application for disclosure it is necessary to first consider if the documents sought, in this case by the respondent, are relevant to the determination of the claims to be heard at the final hearing. I remind myself that the claimant's claims are ones of unfair dismissal and breach of contract (in other words she states that she was not guilty of an offence of gross misconduct). This will require, on the particular facts of this case, a determination, inter alia, of whether the claimant was guilty of committing an offence or offences of gross misconduct. If she did it may result in her claim, at least the claim of breach of contract, failing and even if she was to succeed in her unfair dismissal claim it may result in a finding, to some extent, of contributory conduct which could have an impact on both her entitlement to a Basic Award (s.122(2) Employment Rights Act 1996) and/or a Compensatory Award (s.123(6) Employment Rights Act 1996).**
>
> **16. The respondent wishes to examine these documents to see what, if any, comments and/or admissions may have been made by the claimant to her union with regard to the allegations made against her. I conclude that there is a valid reason for the disclosure request on that basis and that the documents are relevant to these proceedings. I conclude for the same reasons that it is necessary for a fair trial for the documents to be disclosed. Disclosure of the documents, in my judgment, ensures that the parties are on an equal footing when it comes to the hearing. Thus the order for disclosure complies with the principle set out within the Overriding Objective.**
>
> **17. I am not persuaded by Mr Barnett's submissions that they should not be disclosed. I accept that by virtue of article 8 of the ECHR that an individual has a right to respect for his correspondence and that by virtue of article 11 ECHR everyone has the right of freedom of association which includes the right to join and participate in a trade union. No restrictions are to be placed on the exercise of those rights other than such as are prescribed by law. In this regard I have considered, as requested by Mr Barnett, the judgment of Her Honour Judge Eady QC in *Jet2.com Limited v Denby* [UKEAT/0070/17] ad [sic] particularly paragraph 47 of that judgment. In my judgement that case does not extend to a prohibition on disclosure of any communications between an employee and their trade union. Mr Barnett, in fairness to him, did not seek to make that point. Rather he submitted that the correct approach to any request for such disclosure is to strike a balance between the various prejudices of either ordering or not ordering as the case may be such disclosure. He went on**

> **to argue that only if a fair trial was rendered "impossible" by non-disclosure of such communications, should disclosure be ordered. I do not believe that the law goes as far as Mr Barnett's submission. As I have stated I must consider whether disclosure of these documents is relevant to the issues in the case and at the same time consider whether it is necessary for a fair trial for those document [sic] to be disclosed. In the context of this case and in order to determine those issues I consider that the disclosure of the documents sought by the respondent is necessary for that purpose and for the reasons I have set out above, I have made the consequent order for disclosure."**

18. The nub of the Claimant's case is that correspondence between her and her Union is confidential and ought not routinely to be the subject of disclosure, but Mr Barnett goes beyond that. I am not doing justice to a well-structured argument to summarise his case here and below, as being that Articles 8 and 11 of the Convention require that a Union must be able to act in the interests of its members and with their employers, and that that must require that employers cannot seek disclosure of documents arising from the exercise of that right, save in exceptional circumstances. He says, in effect, that there should be a presumption against disclosure in such circumstances and that the balancing act should have this in mind.

19. The seminal case in the area of disclosure and confidentiality remains the decision of the House of Lords in **Nassé v Science Research Council**. The copy in my bundle is from the Industrial Relations Law Report [1979] IRLR 465 and I have taken the paragraph numbers which follow from that authority.

20. Two unconnected cases were heard by the House of Lords. The first involved a request for disclosure of confidential reports on two civil servants who - unlike the Claimant in this case - had been selected for interview as part of a promotion exercise. In the second case, disclosure had been sought of information received in confidence about four men who were interviewed for a job and for the sheets on which members of the interviewing panel had recorded their views.

21. Lord Wilberforce set out his conclusions as follows, from paragraph 13:

> **"13. On these points my conclusions are as follows:-**
>
> **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 these 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.**
>
> **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 which confidential reports have been made, as well as persons reporting) may be affected by disclosure, to the interest 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 assessment.**
>
> **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. The 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.**
>
> **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.**
>
> **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.**
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> **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* 15.2.77 per Phillips J, *Oxford v DHSS* [1977] IRLR 225 per Phillips J and *British Railways Board v Natarajan* [1979] IRLR 45 per Arnold J well indicate the lines of a satisfactory procedure, which must of course be flexible.**
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> **7. The above conclusions are essentially in agreement with those of the Court of Appeal. I venture to think however that the formula suggested namely:**
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> > **'The Industrial Tribunals should not order or permit the disclosure of reports or references that have been given and received in confidence except in the very rare cases where, after inspection of a particular document, the chairman decides that it is essential in the interests of justice that the confidence should be overridden: and then only subject to such conditions as to the divulging of it as he shall think fit to impose - both for the protection of the maker of the document and the subject of it'**
>
> **may be rather too rigid. For myself I prefer to rest such rule as can be stated upon the discretion of the court."**

22. At paragraphs 16 and 17, Lord Wilberforce said this:

> **"16. No authority is needed for the negative proposition that confidentiality alone is no ground for protection - see however *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners* [1974] AC 405.**
>
> **17. English law as to discovery is extremely far reaching: parties can be compelled to produce their private diaries; confidences, except between lawyer and client, may have to be broken however intimate they may be. But there are many examples of cases where the courts have recognised that confidences, particularly those of third persons, ought, if possible, in the interests of justice, to be respected. See, for recent examples, *A-G v Mulholland* [1963] 2 QB 477, *A-G v Clough* [1963] 1 QB 773 and compare *A-G v North Metropolitan Tramways Co* [1892] 3 Ch 70. This principle was accepted by this House in *D v NSPCC* [1978] AC 171. Employment cases, and indeed all cases involving selection, involve a wide dimension of confidentiality, affecting other candidates or applicants, who may be numerous, and a number of reporting officers and selection bodies. No court attempting to administer these acts can fail to give weight to this, though it is not, as above stated, the only element. It is sometimes said that in taking this element into account, the court has to perform a balancing process. The metaphor is one well worn in the law, but I doubt if it is more than a rough metaphor. Balancing can only take place between commensurables. But here the process is to consider fairly the strength and value of the interest in preserving confidentiality and the damage which may be caused by breaking it; then to consider whether the objective - to dispose fairly of the case - can be achieved without doing so, and only in a last resort to order discovery, subject if need be to protective measures. This is a more complex process than merely using the scales: it is an exercise in judicial judgement."**

23. The principles set out in **Nassé** have been followed and procedures adapted to suit the circumstances of many cases which have followed. In **Canadian Imperial Bank of Commerce v Beck** [2009] IRLR 740, having cited certain passages of Lord Salmon's opinion in **Nassé**, Wall LJ said, at paragraph 22:

> **"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."**

24. In her skeleton argument, Miss Shepherd reminds me of the well-known principle in **O'Cathail v Transport for London** [2013] ICR 614, namely that an Employment Tribunal has exceptionally wide case management powers and its decisions can only be questioned for an error of law. This Appeal Tribunal will not, in the absence of an error of law, interfere.

25. The appeal is brought on four grounds:

> **"8.1. [the ET] failed to take into account Article 8 and/or 11 of the European Convention of Human Rights, the latter of which confers the right on individuals to join a trade union for the protection of their interests, when exercising its discretion whether to order disclosure.**
>
> **8.2. [the ET] failed to apply the correct legal test to the question of whether to order disclosure of communications between the Claimant and her trade union, namely whether a fair trial is impossible in the absence of such disclosure.**
>
> **8.3. alternatively to 8.1 and 8.2, [the ET] failed to provide adequate reasons for its decision.**
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> **8.4. in any event, [the ET] did not limit its disclosure order to relevant documents and/or failed to review any of the documents which the Claimant asserted were irrelevant to the issues in the case (and which the Claimant offered to the tribunal for inspection as to relevance, but the tribunal did not undertake that exercise)."**

26. Much of Mr Barnett's skeleton argument is devoted to the interplay between **Nassé** and the Convention rights at Articles 8 and 11 which, as he concedes, were correctly summarised by the Employment Judge at paragraph 17 of the Reasons, see above. He argues that the Employment Judge failed to carry out a balancing act between those rights and the Respondent's rights to a fair trial. He seeks a ruling from the Appeal Tribunal that **Nassé** should be regarded as modified, following the incorporation into English Law of Convention rights, and specifically Article 11, such as to create a presumption against disclosure of correspondence and the like between Union and member.

27. In the course of argument, I asked why the first three grounds needed to be determined in this case, if I was satisfied in relation to ground 4. It is the Union's case, see the email above, that it has nothing which is of relevance to the issues in the case. Mr Barnett tells me that he has read the material, which took him less than 15 minutes. He offered me the opportunity to look at the material myself, although I declined the offer.

28. His response to my question was that a similar Article 11 point arises in another case involving the same employer and Union. This issue may well have to be litigated at some point. However, I consider that an expedited appeal heard by a Judge alone is not an

appropriate forum to consider this difficult and far-reaching proposition which would be making new law in relation to Trade Unions and their members, unless necessary for the determination of this appeal.

29. It seems, therefore, appropriate to deal first with ground 4. In his skeleton argument, Mr Barnett records that there are three types of document which involve the Claimant and her Union: first, emails between the Claimant and the Union; second, texts between the Claimant and Union; and third, the Union's internal notes. Unless they were shared with the Claimant, I do not understand the third category to be covered by the Order; this was not an application for third party disclosure.

30. However, he goes on to complain that, whilst the Judge was offered sight of the documents, in order to carry out the procedure recommended in **Nassé** to decide relevance, he did not avail himself of that offer.

31. The Judge recorded at paragraph 15 of his Judgment that the first question for him was one of relevance. He said that the Employment Tribunal would require, on the particular facts of the case, a determination *inter alia* of whether the Claimant was guilty of committing an offence or offences of gross misconduct. He went on to say that the Respondent wishes to examine the documents to see what, if any, comments and/or admissions have been made by the Claimant with regard to the allegations made against her. He concluded with bare statements that there was a valid reason for the disclosure requests on that basis and that "*for the same reasons*" it is necessary for a full and fair trial for the documents to be produced.

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32. I remind myself of the opening paragraph of the email of 30 August from Bond Dickinson and its final sentence - "*We believe that these documents <u>may</u> contain relevant information to this case*" - and the penultimate paragraph which begins with the words "*This information <u>is likely to be</u> relevant to the issues*" (my emphasis).

B

33. I also look at the curious proposition in the third and fourth paragraphs of the email, that the fact that the Union had publicised the case amongst its members could give rise to a number of "*relevant emails, meeting notes and other documents*". How these could be relevant to the very live issues in dispute in this case is difficult to see and is certainly not an issue grappled with by the Judge. What is notable in the letter of 30 August is the lack of any suggestion of the one matter which the Employment Judge found to be relevant, what if any comments and/or admissions have been made by the Claimant with regard to the allegations made against her. In the words of Wall LJ in **<u>Beck</u>**, "*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*" (paragraph 22).

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34. On the footing that the Employment Judge had found that only documents which contained comments and/or admissions made by the Claimant with regard to the allegations made against her would be relevant, I find it difficult to understand how all documentation passing between Claimant and Union could be not only relevant to an issue but also necessary for the fair disposal of the proceedings. Moreover, by invoking "*the same reasons*" in respect of both limbs the Employment Judge seems to me to have failed to apply the correct test. There was no attempt by the Employment Judge in his Reasons to identify the specific disputed issues which would be live at the hearing, to which, alone, the documentation sought could be relevant.

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35. Of course an admission of wrongdoing to a Union representative - or, for that matter, a non-legally qualified consultant, correspondence with whom is similarly not covered by professional privilege - would be disclosable; that is not in dispute. I fail to see, though, how requiring disclosure of all documentation in existence simply to enable the Respondent to see whether there *might* be such a document, is other than a warrant to conduct a fishing expedition. I do not see how the Judge could legitimately have reached the decision he did without being told of the live issues and then examining the documents to assess their relevance.

36. It is not necessary, in my judgment, to rule on the Article 11 point raised by Mr Barnett, nor to comment on the interplay between Articles 6, 8, and 11 in the context of disclosure. It is enough to say that the principle of confidentiality from **Nassé** onwards is clearly engaged in relation to dealings between a Union and its members. It must have been obvious that the Articles 8 and 11 point, taken before the Judge, engaged the principle of confidentiality. In my judgment the Employment Judge clearly erred in law in making the Order that he did.

37. I therefore set aside his Order and direct that, if the Respondent wishes to renew its application, it must, in that application, identify with precision the disputed factual issues in the case that the correspondence (etc.) between the Claimant and Union could potentially go to. Any such application should then be considered by the Employment Judge hearing the case, perhaps immediately prior to the forthcoming hearing, focusing on the actual disputed issues of fact that will be live at that hearing which the Tribunal is to undertake. An inspection should then be carried out by the Employment Judge to decide what is not only relevant to issues actually in dispute but also necessary for the fair disposal of the proceedings.

38. One of the Orders made at the hearing not under appeal required a senior manager of the Respondent to attest on oath that the Respondent had complied with its disclosure obligations. Whilst entirely a matter for the parties, I would have thought a more sensible way to resolve this matter would be for a similar affidavit to be sworn on behalf of the Union. They have already confirmed this in an email.