Appeal No. UKEAT/0022/18/OO

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 March 2018

Before

JOHN CAVANAGH QC (DEPUTY JUDGE OF THE HIGH COURT)

(SITTING ALONE)

MR W N DOBSON — APPELLANT

PRICEWATERHOUSECOOPERS LLP — RESPONDENT

Transcript of Proceedings

JUDGMENT

Revised

APPEARANCES

For the Appellant	MR NEIL DOBSON (The Appellant in Person)
For the Respondent	MS LAURA BELL (of Counsel) Instructed by: PricewaterhouseCoopers LLP 1 Embankment Place London WC2N 6RH

SUMMARY

PRACTICE AND PROCEDURE - Case management

PRACTICE AND PROCEDURE - Disclosure

Though this appeal was in form an appeal against a ruling by Employment Judge Crosfill on 13 December 2017, in substance the issue was a question of construction of a case management ruling by Employment Judge Sage on 21 April 2016, following a case management hearing on 19 April 2016. The central question was whether or not paragraph 2 of the Judge's Order was an Order for standard disclosure, as the Appellant contended it was. The matter was complicated by the fact that, in subsequent correspondence, at different times, Employment Judge Sage had indicated both that she had not ordered standard disclosure, and that she had done so. Employment Judge Crosfill took the view that Employment Judge Sage had not ordered standard disclosure and also decided that, if he was wrong and she had done so, he would revoke it, on the basis that it was not necessary or proportionate as there was a pending strike-out action which might substantially reduce the scope of the Respondent's disclosure obligations. In deciding to revisit and revoke the Disclosure Order (if, contrary to his primary view, there had been such an Order) Employment Judge Crosfill relied upon the judgment of the EAT in **Serco v Wells** [2016] ICR 768.

The Appellant filed an affidavit with the EAT in which he gave evidence that Employment Judge Sage had said orally that she was ordering standard disclosure at the hearing on 19 April 2016.

The appeal was dismissed. The EAT held that the nature and scope of any Orders made at a case management hearing must be identified from the written Order that is made following the hearing, rather than from anything that is said orally during the hearing. Moreover, the EAT held that it was not appropriate to admit affidavit evidence of what was said at the hearing to assist in the interpretation of the written Order. The EAT held that Employment Judge Crosfill

had been right to find that, on its true interpretation, the case management Order of 21 April 2016 had not contained an Order for standard disclosure. However, the EAT said that if Employment Judge Sage had made an Order for standard disclosure in April 2016, the principles set out in **Serco v Wells** would not have permitted another Employment Judge subsequently to set it aside because the second Employment Judge disagreed with it.

JOHN CAVANAGH QC (DEPUTY JUDGE OF THE HIGH COURT)

Introduction

1. This is the transcript of the reasons for dismissing this appeal that were given orally at the hearing on 20 March 2018. The transcript was amended on 22 August 2018, following an application for a review made by the Appellant, in order to correct some clerical errors. The Respondent was given an opportunity to make representations on the application for a review. The Claimant asked for changes to be made at nine places in the Judgment. The Respondent agreed that eight of the nine proposed changes should be made, and the Claimant withdrew his request for the ninth change. The changes that I have made by way of review are the eight changes which both parties agree should be made. There are corrections to dates in paragraphs 16, 31, and 39, a correction at paragraph 58, to clarify the professional status of the PWC representative, and there are also corrections by way of deletion to paragraphs 20 and 22, and addition to paragraph 41.

2. In this appeal, the Appellant (Mr Dobson) has brought a protected disclosure claim against his employer (PWC). The ET1 was presented to the Tribunal on 22 February 2016 - more than two years ago - but the case is not yet close to a Full Hearing.

3. This appeal concerns disclosure. The Appellant contends that Employment Judge Sage made an Order for general or standard disclosure in these proceedings at a Preliminary Hearing on 19 April 2016, recorded in writing in a written Order dated 21 April 2016. The Respondent denies that any Order for general disclosure was made on that occasion.

4. The issue of disclosure was considered again by another Employment Judge (Employment Judge Crosfill) at another Preliminary Hearing on 24 November 2017, by a Judgment dated 13 December 2017 and sent to the parties on 3 January 2018. His conclusion was that, on its true interpretation, the Order made by Employment Judge Sage did not amount to an Order for general disclosure. He further ruled that if he was wrong about it, he would revisit and revoke the Order for general disclosure primarily on the basis that it would have been an extensive and expensive exercise for the Respondent to comply with such an Order, and it was not a necessary or proportionate exercise to undertake in advance of the forthcoming hearing of the Respondent's application for a Deposit Order and strike out of a substantial or significant part of the Appellant's case.

5. This appeal is against the Order of Employment Judge Crosfill. Mr Dobson filed his Notice of Appeal on 8 January 2018. On 30 January, His Honour Judge Peter Clark ordered that the appeal be set down for a Full Hearing. Very helpfully, His Honour Judge Peter Clark summarised the issues for this appeal as being the following:

> **"(1) Was Employment Judge Crosfill entitled to conclude, as a matter of construction, that the 'Sage Order' of 21 April 2016, paragraph 2, did not order standard disclosure; see paragraphs 2.3 and 2.4 [of that Order].**
>
> **(2) If not, was it open to [Employment Judge Crosfill] to vary the Sage Order and revoke the standard disclosure made, if it was, bearing in mind the principles summarised in Serco v Wells [2016] ICR 768?"**

6. Mr Dobson, who qualified as a solicitor but who is not practicing, has represented himself in this appeal. Ms Laura Bell of counsel has appeared for PWC. Both of them have provided me with written and oral submissions, and I am grateful to them both for their submissions which have been of a high quality.

7. Before addressing the issues in this appeal, it is convenient first to refer to the sequence of events and the key documents, and to read the relevant parts of Employment Judge Sage's Order of 19 April 2016 and the relevant part of Employment Judge Crosfill's Order of 13 December 2017.

The Sequence of Events

8. I start then with 19 April 2016. The hearing of 19 April 2016 was the first case management hearing in this case. In the case management agenda document, which he filed in advance of the case management hearing, Mr Dobson sought standard disclosure from the Respondent. Mr Dobson has provided me with an affidavit in which he says that the Judge had said orally that she was ordering standard disclosure at the hearing on 19 April 2016.

9. On this occasion, there was also an application for a strike out by the Respondent on the ground that part of the claim was out of time and that the whole of the claim had no reasonable prospect of success. At paragraph 7.2 of her Order, Employment Judge Sage refused the strike out and Deposit Order applications, but on the basis that she made an Order for a forensic expert to produce a report on a laptop and on a mobile phone and that there would then be a further strike out hearing to consider the application for a strike out or to make a Deposit Order in respect of parts of the claims; that is those parts relating to allegations of covert surveillance and of vandalism by the Respondent and also to do with the time points. It follows that there was still a live issue as regards whether parts of the claim were to be struck out.

10. Employment Judge Sage listed a further hearing to deal with this matter on 30 September 2016. That hearing was also to deal with an application for third party disclosure relating to documents held by HMRC, and (at paragraph 7.4.4) it was said that the further

hearing in September would "*make any other orders and directions required for listing the matter for a full hearing, if appropriate*". Other Orders were made on 19 April 2016, but, as I have said, this was against the background that there was to be a further strike out and Deposit Order hearing in the future.

11. At paragraph 11 of her Order, Employment Judge Sage said, "*I made the following case management orders by consent*", then in brackets she added, "*(Insofar as they are not made by consent, reasons were given at the time and are not now recorded)*".

12. The paragraph within the case management Order that is of direct relevance for present purposes is paragraph 2, "*Disclosure of documents*", which I will read in full:

> **"2.1. There was an issue regarding discovery and the parties had written in on the matter. The Claimant wanted to request e-disclosure and was ordered to produce a request for documents that was relevant to the issues in the case by the 17 May 2016. The Respondent is ordered to provide a response to this request by the 28 June 2016. The Claimant also requested documents in relation to the issue of the £200,000 referred to in [his] letter dated the 6 April 2016 to the Tribunal, the Respondent refused to produce this documentation saying that it was a fishing expedition. The Claimant was ordered to request disclosure of specific documents that were relevant to the issues in the case and if relevance could be shown then disclosure may be given. The parties were encouraged to seek to resolve disputes on disclosure without the need for further Tribunal involvement (or to add these matters on to the agenda for the Preliminary Hearing in September).**
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> **2.2. The Claimant also indicated that he was intending to apply for a number of Third Party Disclosure orders but he was encouraged to apply for the evidence to the Third Party on a voluntary basis before seeking an order.**
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> **2.3. This order is made on the standard civil procedure rules basis which requires the parties to disclose all documents relevant to the issues which are in their possession, custody or control, whether they assist the party who produces them, the other party or appear neutral.**
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> **2.4. The parties shall comply with the date for disclosure given above, but if despite their best attempts, further documents come to light (or are created) after that date, then those documents shall be disclosed as soon as practicable in accordance with the duty of continuing disclosure."**

For obvious reasons, Mr Dobson relies in particular on paragraph 2.3, which states that, "*This order is made on the civil standard civil procedure rules basis*".

13. There were other directions made, as I have said, including an Order for a bundle of documents for the September Preliminary Hearing and directions for expert forensic evidence.

14. After this hearing, there followed correspondence between the parties and the Tribunal. On 17 May 2016, Mr Dobson submitted a request for disclosure of specified electronic documents in accordance with paragraphs 2.1 and 2.2 of the April Order. Then on 23 June, the Employment Tribunal wrote to the parties, making an observation about joint instruction of the expert witness, and then saying these words:

> **"With reference to the email from the Claimant dated 3rd June 2016, the request for specific disclosure should be dealt with at the same time as the general order of disclosure which is to be complied with by the 28th June. Any outstanding issues can be dealt with after that date."**

15. On 28 June 2016, Employment Judge Sage ordered that there should be a further case management hearing to deal with the many case management issues that had arisen. The parties, for example, had been unable to agree on the letter of instruction for the forensic expert.

16. Additionally, on 28 June 2016, Mr Dobson provided a list of documents that he would be relying on to the Employment Tribunal. In other words, he gave general disclosure. The Respondent provided him with two lever arch files of documents which dealt with the electronic disclosure. These were a response to the request for electronic disclosure envisaged by paragraph 2.2 of the 19 March Order. On 2 August 2016 - two days before the next case management hearing - PWC said for the first time that, in its view, there had been no general Order for disclosure made previously.

17. The next case management hearing took place on 4 August 2016. Paragraph 4 of the Judgment handed down on that occasion by Employment Judge Sage observed that the Respondent had provided disclosure of two lever arch files of documents, and at paragraph 6

she said it was decided that no further Disclosure Order will be made in this case until the outcome of the Preliminary Hearing is known. This, on the face of it, does not suggest that the Judge was taking the view that there had already been a failure to comply with an existing general Disclosure Order.

18. On the same day, 4 August 2016, Mr Dobson wrote to the Tribunal to point out that at the hearing on 4 August Employment Judge Sage had said that there had been no Order for general disclosure by the parties in these proceedings so far. He referred to paragraphs 2.3 and 2.4 of the 19 April Order, and said that his understanding was that an Order for standard disclosure had been made which was required to be complied with by 28 June. He said, also, that this was consistent with comments that had been made by the Judge orally at the hearing on 19 April and indeed with the Tribunal's letter of 23 June.

19. In response to this letter, on 18 August 2016, the Tribunal responded in the following terms:

> **"Dear Sir / Madam,**
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> **Employment Judge Sage has asked me to write to you.**
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> **The orders made in the Preliminary Hearing on the 19 April 2016 related to the issues that were identified in that hearing namely the issue of strike out or deposit order. There has been no general order of disclosure at this time in relation to the substantive issues in this case and they will not be made until the outcome of the preliminary hearing is known. To make a general order for disclosure before that time would be disproportionate."**

The letter goes on to deal with another topic.

20. On the face of it, this letter appears to suggest that, at least so far as the Judge understood the position, no general Order for disclosure had been made in April 2016. In the event, the September 2016 Preliminary Hearing did not go ahead.

21. Some three months later, on 22 November 2016, Mr Dobson wrote again to the Tribunal asking it to explain the meaning of paragraphs 2.3 and 2.4 of the Order of April 2016. That letter was couched in terms of seeking clarification. In substance, however, I think he was querying what had been said in the letter of 18 August that I have just referred to.

22. Mr Dobson did not receive any reply from the Employment Tribunal to this letter. He wrote again on 17 May 2017, about six months later. The delay in the meantime had been because of the appeal to the EAT about third party disclosure. In this letter of 17 May 2017, he pointed out that he had not received a response, and he asked the Employment Tribunal to clarify the scope of the Order. One observation he made in this letter was as follows:

> **"If the Tribunal were to conclude, on reflection, that paragraphs 2.3 and 2.4 of the CMO do impose an obligation on both parties to give "standard disclosure" (as defined in the Civil Procedure Rules) of the substantive issues in the case to which the Respondent's applications on 19th April 2016 related, there should be sufficient time for the obligations to be performed [which are likely to be after a forthcoming EAT hearing]. …"**

23. On 23 May 2017, the Employment Tribunal replied saying:

> **"Judge Sage confirms that paragraph 2.3 and 2.4 of the Case Management Order made at the preliminary hearing on the 19 April 2016, equates to standard disclosure in the Civil Procedure Rules (CPR).**
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> **(Governed by rules 31.6 and 3.17)."**

This time, the letter appears, on the face of it at least, to suggest that Employment Judge Sage believed she had given standard disclosure at the meeting at the Preliminary Hearing on 19 April 2016.

24. Three months later, on 25 August 2017, Mr Dobson wrote to the Employment Tribunal again, partly to resist an application for an Unless Order that had been made by the Respondent in relation to the preparation of an expert's report, and partly to seek an Order that the Respondent complied with the obligation to give standard disclosure under paragraphs 2.3 and

A 2.4 of the Order of 19 April 2016. It was in this letter, not the 17 May letter, that he asked that the applications be dealt with at a Preliminary Hearing

B 25. On 12 September 2017, the Respondent replied by email saying that it had complied with the Orders for disclosure that had been made on 19 April 2016, saying that it would not be appropriate for an Order for general disclosure to be made until after the strike out application had been heard and the case had been listed for a Full Hearing and case management directions made.

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D 26. On 18 September 2017, Employment Judge Sage listed the matter for a further Preliminary Hearing to consider a number of matters, including the question of further Orders as to disclosure of documents. On 12 October, the Tribunal wrote again to say that Employment Judge Sage instructed that all discussions about the Order for disclosure should be dealt with at the Preliminary Hearing which was to be listed for three hours. However, on 31 October 2017, Mr Dobson wrote again to the Tribunal to ask for an Unless Order to be made against the Respondent on the basis that the Respondent had failed to comply with the Order for general disclosure in paragraphs 2.3 and 2.4 of the 19 April 2016 Order.

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F 27. This brings me to the Preliminary Hearing in front of Employment Judge Crosfill. This took place on 24 November 2017. As I say, it was not in front of Employment Judge Sage but in front of Employment Judge Crosfill. At paragraph 6 of his Decision, he observed that the claim had been issued some 19 months previously and expressed the view that a robust approach to case management was required and that he was intending to make what he regarded as firm but fair case management Orders in the light of his conclusions on the applications that

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were before him. He also observed, fairly, that many of the difficulties in the case arose in the wake of the Order that Employment Judge Sage had made on 19 April 2016.

28. The first issue that he had to deal with, which is not the issue before me, was what Employment Judge Sage had decided in relation to the strike out. There was some ambiguity, in that she had appeared in April 2016 at one and the same time to reject the strike out and the Deposit Order application and yet simultaneously to fix it for hearing on a later occasion. Employment Judge Crosfill decided that what had happened was that she decided to make no strike out or Deposit Orders except perhaps in relation to the allegations relating to surveillance and vandalism, in respect of which the applications would be considered at a later date.

29. At paragraph 12 of his Decision, Employment Judge Crosfill said this:

> **"12. Mr Dobson has provided the skeleton arguments deployed at that hearing and indeed an affidavit setting out his understanding of the orders made which I have read. It may assist Mr Dobson to know that there is absolutely no need in an employment tribunal for any evidence to be given by affidavit in relation to any interlocutory matter. Indeed, their use is now rare in the civil courts. I do not believe that it would ever be appropriate to deal with the question of what an order means by having regard to the evidence [of] either party. I accept that it may assist to have regard for the arguments deployed and so I have read the skeletons."**

30. He then raises the question of whether an Order had been made for standard disclosure. Again, I am going to read the key paragraphs. He said this:

> **"16. Mr Dobson, in his arguments and affidavit tries valiantly to persuade me that EJ Sage made an order for standard disclosure whereby the parties would disclose all of the documents they have in their power possession and control relevant to any issue in dispute.**
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> **17. I do not accept that is the case. Paragraph 2 is again unfortunately drafted. Again, the last two sub-paragraphs do not sit easily with the first two. The first question is whether the first paragraph contains any order for disclosure at all. The answer is that it does not. It provides for a request for documents and a response. It does not oblige the Respondent to disclose anything at all but suggests that there is some co-operation between the parties. Mr Dobson is adamant that he asked for standard disclosure and I am sure that is right, but that is not what has been ordered. Had EJ Sage given any thought to ordering disclosure she would have included provisions as to whether disclosure was to be given by list or by copies. She would have included a date by which disclosure should be given. I do not accept that is what she has done.**
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> **18. My interpretation of paragraph 2.1 is that EJ Sage has, perhaps unwisely, left it to the parties to co-operate on giving disclosure. I believe that the final two paragraphs of paragraph 2 are simply debris from a standard template. They do not amount to an order for disclosure as they give no date for compliance and they do not elevate paragraph 2.1 into such**

> **an order because that is not what that paragraph says. Taking a different view, it may be that the paragraphs were intended to clarify how any voluntary disclosure under paragraph 2.1 should be dealt with.**
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> **19. In the case management hearing that took place on 4 August 2016[, the] issue of disclosure had been revisited. The CMO made on that date records at paragraph 6:**
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> > **"*It was decided that no further order for disclosure would be made in this case until the outcome of the preliminary hearing is known ……. It will be for the Judge at the preliminary hearing to decide on whether further orders need to be made.*"**
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> **20. I am reinforced in my view of that order by the letter sent to the parties on 18 August 2016 which, perhaps unlike the order, could not be clearer. In response to a query by the Claimant EJ Sage responded:**
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> > **"*the orders made in the Preliminary Hearing on 19 April 2016 related to the issues that were identified in that hearing namely the issue of strike out or deposit order. There has been no general order of disclosure at this time in relation to substantive issues in this case and they will not be made until the outcome of the preliminary hearing is known. To make a general order for disclosure before that time would be disproportionate*"**
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> **21. It seems to me quite clear that a sensible case management decision was taken that there would be no general disclosure prior to the final determination of the application to strike out and or for deposit orders in respect of certain aspects of the claim.**
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> **22. The Claimant has persisted in asserting that an order for standard disclosure was made and relies upon later letters from the tribunal which in my view, are ambiguous. However, I do not find that there has been any order for standard disclosure of all relevant documents. That appears a very sensible approach to me. It seems quite clear that there may be many thousands of documents in this case if all the allegations survive. In any event the search would have to be extensive. It would almost never be appropriate to make an order of such potential magnitude in advance of an application under rules 37 and 39. Such applications are not intended to be and should not become a mini trial. The key documents will usually be the pleadings and contemporaneous documents.**
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> **23. If I am wrong about this, I believe that the genuine uncertainty and the fact that that uncertainty has caused or contributed to months of delay means that, in any event, having regard to the guidance in *Serco v Wells* … I would be entitled to revisit, and if I felt appropriate revoke, the order that had been made. The matters cannot drag on any longer. I would revoke any general order for disclosure for the reasons set out in the paragraph above. I would expect that, if a disclosure exercise has to take place over the period relevant to the surveillance and vandalism complaints, it will be an extensive, and accordingly expensive, obligation. Even if it turned up very few documents. It is not a necessary, or proportionate, exercise in advance of an application for a deposit/strike out. The possibility that documents might exist is a matter that can be canvassed in such a hearing. Any order for disclosure that will be made following that hearing will be limited to the issues that remain."**

31. There is one final matter I should mention. This is that on 19 August 2017, Mr Dobson appealed against the letter from Employment Judge Sage dated 18 August 2017, and one of the rulings appealed against was that no Order for standard disclosure would be made in advance of the Preliminary Hearing to deal with the strike out. This appeal was rejected on the sift by His Honour Judge David Richardson as being totally without merit. Judge Richardson regarded it as a challenge to the 18 August letter rather than the ruling after the 4 August Preliminary Hearing.

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32. Mr Dobson says that his other appeal was actually a challenge to the 4 August ruling and that Judge Richardson did not appreciate the key ground of appeal which was because Judge Richardson mistakenly thought that what was being asked for was a further Order for disclosure when, in fact, what Mr Dobson was seeking was an Order from the EAT overturning any revocation that had been made of the Order of 19 April 2016. As a result, Mr Dobson said, Judge Richardson, in coming to his conclusion, had not considered the meaning and effect of the 19 April Order.

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Mr Dobson's Submissions

33. In his submissions before me, Mr Dobson has made a number of points, and, if I may say so, made them very clearly. I am just going to summarise the key points. He said that the Order in April 2016 had been made orally. It is the oral Order that is the key Order; the written Order was simply a confirmation of an Order that had already been made by consent. He said that, in any event, the written Order was clear. He pointed out that he had provided me with an affidavit as to what had been said by Employment Judge Sage on 19 April 2016 and that the Respondent had not provided any evidence in reply on that matter. He said that, on its true construction, paragraphs 2.3 and 2.4 of the Order of 19 April 2016 consisted of an Order for general disclosure. He pointed out that this was consistent with what he had asked for in his agenda and, as I have said, he said it was completely consistent with what he said in his affidavit as to what the Employment Judge had said orally.

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34. He also pointed out that the Employment Judge confirmed that she had given general disclosure in her letter of 23 May 2017 which was unequivocal but was also consistent with the Employment Tribunal's earlier letter of 23 June 2016. He recognises that there is an inconsistency between the 23 May 2017 letter and the 18 August 2016 letter from Employment

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A Judge Sage, in that the August 2016 letter suggests there was no general Order for disclosure and the May 2017 letter suggests that there is. However, he says that the May 2017 letter is clearer and is to be preferred. He says that Employment Judge Crosfill therefore erred in law in finding that Employment Judge Sage had not made an Order for general disclosure.

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35. He also said that Employment Judge Crosfill should have been very careful before declining to give effect to an Order that was made by another Employment Judge, and should have been very hesitant before relegating it to the status of a clerical error. He said that is especially so as, on the face of it, the same clerical error would have had to have been made twice more in June 2016 and May 2017. He said that Employment Judge Crosfill erred in failing to mention and appearing to ignore the 23 May 2017 letter. As regards the arguments of interpretation that Employment Judge Crosfill relied upon, Mr Dobson says that there is nothing significant in the order of the paragraphs; simply, the Judge had said that there should be e-disclosure and standard disclosure for the same date. As I have said, he accepted that there were contradictions in the letters that emanated from Employment Judge Sage after the event, but he said that the clearest and most well-reasoned of them is the May 2017 letter which supports his interpretation.

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36. He says also that there is no problem with an Order for general disclosure being made at a time when a further strike out hearing was envisaged, because there is always the possibility for a Tribunal to entertain an application to strike out at any stage in proceedings as the evidence develops. Also, he says that Judge Crosfill erred in law in failing to take account of the fact that neither party had raised a problem with the meaning of the April 2016 Order until a letter arrived from PWC in August 2016.

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37. As for the question of the power to vary, if the Order had originally been made, Mr Dobson accepted that there was no apparent misdirection by Employment Judge Crosfill as regards **Serco v Wells**, but he submits that authority was misapplied. As he put it, by the time he came to look at the **Serco v Wells** issue, Employment Judge Crosfill was in a substitution mindset. He said that Employment Judge Crosfill erred in law in treating the variation issue as if it was a discretionary decision, when **Serco v Wells** makes clear that it is not the right approach and it will be far more likely to arise only in very rare cases.

The Submissions on Behalf of PWC

38. As for the submissions made by Ms Bell on behalf of PWC, she submits that the key to this appeal is the meaning of the ruling made by Employment Judge Sage on 19 March 2016. She submits that no error was made by Employment Judge Crosfill; that none of the paragraphs in the Sage Order amounts to an Order for standard disclosure; and that the test that I should apply is whether Employment Judge Crosfill was entitled to conclude, as a matter of construction, that there had been no Order for standard disclosure. The answer to that, she says, is that he was so entitled.

39. She says that PWC does not accept the account in Mr Dobson's affidavit of what was said on 19 April 2016, but that, in any event, it is not appropriate to determine matters such as these on the basis of affidavit evidence. There is a good reason why PWC did not raise the issue of the meaning of the Order in the months following the April 2016 Order and that is because they were sure of what it actually meant. She submits that the proceedings and the hearing on 4 August 2016 strongly support the Respondent's case. It is common ground between the parties that at that hearing Employment Judge Sage had said that there had been no Order for standard disclosure.

40. In the alternative, Ms Bell submits that Employment Judge Crosfill was entitled to set aside any such Order if it had been made. She submits that this was a rare case in which, because of uncertainty, the Order should be set aside in the interests of justice. At the very least, the Order was uncertain and gave rise to arguable contrary interpretations, and the very fact that Employment Judge Sage herself appears to have understood it differently on different subsequent occasions makes this an exceptional case.

Discussion and Conclusions

41. I now come on to my conclusions. I will first deal with the significance of Judge Richardson's ruling in the EAT. I accept that Mr Dobson is right that this is not relevant to the question before this EAT and, indeed, Ms Bell did not seek to argue otherwise. The point about the appeal before Judge Richardson is that he did not deal with it on the basis that the central issue was the consideration of the meaning and effect of the 19 April Orders. That is the issue before me, and therefore I do not think that there is any issue of *res judicata* or that I should allow Judge Richardson's view to influence my conclusions.

42. The first question, I think, as a matter of logic, that I need to consider, is whether what was said orally at the case management hearing on 19 April 2016 is what matters or, rather, what was written down in the Order that was made in light of the hearing. That will also have an influence on whether I should pay attention to the affidavit that has been filed by Mr Dobson. In my judgment, Employment Judge Crosfill was right to take the view that, where an Employment Judge makes a written Order immediately following a Preliminary Hearing, it is the written Order not what he or she said orally at the hearing that matters. More than that, I also agree with Employment Judge Crosfill that it is not appropriate for a party to challenge, seek to interpret, or affect the interpretation of, what was said in a written Order by means of

affidavit evidence of what the Judge might have said at the hearing itself. However, I do accept that one of the considerations that should be taken into account in interpreting the Order is the fact that Mr Dobson did ask for standard disclosure at the Preliminary Hearing.

43. The next issue that I come on to consider is my approach to this appeal. It seems to me that the central issue in this appeal, on the construction point, is what the Order of 19 April 2016 actually means. As for that, there are only two possible alternatives: either the relevant part was an Order for general disclosure or it was not. The interpretation of a document is a matter of law and it seems to me that this applies even if the document is a Court Order rather than a contract or a statute. In this case, as I have said, the relevant part of the Order has to mean one thing or the other.

44. It follows, in my judgment, that there is only one right answer and so if Employment Judge Crosfill was wrong in the conclusion that he reached on his interpretation, then his decision would have to be set aside. It follows that I do not entirely agree with Ms Bell that the role of the Appeal Tribunal is simply to conduct a review of the conclusions reached by Employment Judge Crosfill. In essence, in my judgment, what I have to do is decide whether Judge Crosfill erred in law in the interpretation he applied to the earlier Order of Employment Judge Sage.

45. I come on then to my conclusion on the key point of interpretation. The first point I have to make is that paragraphs 1 through to 2.4 of the Order of Employment Judge Sage are undoubtedly ambiguous and they are undoubtedly confused. I can readily see how Mr Dobson came to the view that he has come to. However, in my judgment, the right interpretation is that

there was no Order for general disclosure, and I am now going to set out the reasons that have led me to come to this conclusion.

46. The first is this, as Employment Judge Crosfill said, it would be very surprising indeed if a Judge, at this stage, were to Order general disclosure before a strike out issue had been decided. That is because, depending on the outcome of the strike out application, it may turn out that the general disclosure would have been unnecessary. Mr Dobson says, well, a strike out application can be made at any stage. Of course, in theory, he is right, but in practice if there has been an unsuccessful strike out application, the prospects of a further strike out application being made are slim in the extreme. What follows from that is that if it is known to all concerned that a strike out application is pending, it would be surprising, as I have said, if the Employment Judge were to make an Order for general disclosure.

47. Secondly, and perhaps the key point, in my judgment, is this: the language of the relevant paragraphs does not contain an Order for general disclosure. There are difficulties with the language, undoubtedly, but if one breaks it down, paragraph 2.1 - the first paragraph - does not make an Order for disclosure at all. What it does is make a number of Orders which will lead up to a point at which the parties will either have provided disclosure or have discovered the extent to which they disagree about their disclosure obligations. In paragraph 2.1, there is a reference to Mr Dobson being ordered to produce a request for documents by a certain date, then there is an Order that PWC provides a response to that request by a date about six weeks later. There is further an Order for Mr Dobson to request disclosure of specific documents, albeit that no date is given by which that must be done. And finally, there is reference to the time-honoured desire on the part of the Employment Judge for the parties to seek to resolve amicably disputes on disclosure without the need for further Tribunal

involvement. Therefore, whilst in paragraph 2.1 there are Orders relating to disclosure, there are not actually any Orders for disclosure at all.

48. In paragraph 2.2 there is simply not really an Order at all. There is a reference to the fact that Mr Dobson had indicated that he intended to apply but had not yet applied for a number of Third Party Disclosure Orders.

49. We then come to paragraphs 2.3 and 2.4. Paragraph 2.3 begins, "*This order is made on the standard civil procedure rules basis which requires the parties to disclose all documents relevant to the issues*". Now that is, in my judgment, a somewhat circular statement because what does this Order refer to? It is unlikely and, in my view, not right to interpret that to mean that this Order is a reference to an Order made in paragraph 2.3 itself, because no such Order is made in paragraph 2.3. If it were, then there would have to be reference to the deadline by which disclosure is to be made and also as to whether disclosure is made by copy or list or matters such as that. Equally, the words "*This order is made ...*" cannot refer back to paragraph 2.1, because, as I have just indicated, paragraph 2.1 does not, in fact, make an Order for disclosure at all.

50. Then we have paragraph 2.4 which says that the parties should comply with the date for disclosure given above. The difficulty with that is, in fact, no date for disclosure has been given above, and therefore there is nothing for the obligations set out in paragraph 2.4 to attach to. In my judgment, the best interpretation of this, therefore, is that Employment Judge Crosfill was right to take the view that paragraphs 2.3 and 2.4 were the relics of a standard template which, in fact, had no purpose to serve in light of the unusual Orders that were made in paragraph 2.1

and the absence of any Order at all in paragraph 2.2. It is akin, in my judgment, to what was said in paragraph 11 on the preceding page in Judge Sage's Judgment, where she said:

> **"11. I made the following case management orders by consent. [*Insofar as they are not made by consent, reasons were given at the time and are not now recorded.*]"**

51. In oral argument, I asked Mr Dobson what that second sentence referred to and expressed the view, which I think is quite right, that that was probably just something that was left over from the template that the Judge was using to write up her Orders.

52. I think there is one other indication, on the face of this document, that it was not intended to be an Order for general disclosure. That is that, in paragraph 7.4.4, reference is made to the case having been listed for a further one-day hearing, in fact in September, to consider *inter alia* to "*make any other orders and directions required for listing the matter for a full hearing, if appropriate*". That appears to me to be a reference to Orders and directions relating to matters such as disclosure and witness statements that are traditionally made in order to set the case down and prepare a case for hearing.

53. Therefore, in my judgment, looking at Employment Judge Sage's Order in isolation, it does not contain an Order for general disclosure. I think, however, it is helpful also to look at the next Order that she made in this matter on 4 August 2016. In that Order, at paragraph 6, she said it was decided that "*no further disclosure order will be made in this case until the outcome of the preliminary hearing is known*". Now, whilst I acknowledge that that might be a reference to no further specific Disclosure Order being made, the obvious inference from that Order, in my judgment, is that her understanding is that no Order has yet been made to cover full disclosure and that will not happen until there has been a decision made on the strike out and Deposit Order applications. It seems to me that it is appropriate to take account of the content

of the subsequent Order in shedding light on a prior Order that was made by the same Judge in the same proceedings.

54. However there are, as both parties have made clear, other subsequent communications from the Tribunal which have sent mixed messages, to say the least. These were letters from the Employment Tribunal; some of which were plainly not Orders, and some of which were if not drafted by then commissioned by Employment Judge Sage. Two of them appear to support the conclusion that an Order for general disclosure had been made, and one of them appears to support the exact opposite conclusion.

55. The first one is the 23 June 2016 letter which states that the request for specific disclosure should be dealt with at the same time as the general Order of disclosure which was to be complied with by 28 June 2016. Very fairly, Mr Dobson acknowledged there is nothing on the face of this letter that indicates that it was written by Employment Judge Sage, and it seems to me that the most likely interpretation is that this was an official of the Employment Tribunal who, understandably perhaps, was confused by the terms of the April 2016 Order and had thought that it contained a general Order of disclosure.

56. More significant are the next two communications. As I have said, they point in different directions. The next one is the letter of 18 August 2016 from the Judge, in which she says "*There has been no general order of disclosure at this time in relation to the substantive issues in this case and they will not be made until the outcome of the preliminary hearing is known*". It seems to me that that is wholly unequivocal in stating that there is no Order for general disclosure. The complicating factor is that nine months later, on 23 May 2017, Employment Judge Sage stated what appears to be the exact opposite. Employment Judge Sage

confirms that paragraphs 2.3 and 2.4 of the case management Order made at the Preliminary Hearing on 19 April equates to standard disclosure in the **Civil Procedure Rules**. Both parties have, very cleverly if I may say so, suggested that there was ambiguity in one of those two letters, the one that does not support them. In practice, it seems to me that neither of them is really ambiguous, they are just wholly inconsistent with each other.

57. It seems to me, however, that the true interpretation of something that has the status of an Order of the Employment Tribunal cannot depend upon subsequent comments by a Judge, even the same Judge, in a letter to the parties. In any event, even if they were to be taken into account, they cancel each other out and therefore the Order must be interpreted on its own merits, but neither of the letters to which I have just referred purports to be a formal Order clarifying or enlightening us upon the content of the Order made on 19 April 2016.

58. I do not think it is significant that the parties did not query the Order of April 2016 until August 2016, because that is explained by the fact that, understandably, in both cases, they thought they understood it, albeit that their understanding was different. Mr Dobson refers to a PWC letter of 11 May 2016 - so less than a month after the Employment Judge Sage Order was made - in which PWC say, through their lawyer, that the Respondent is of course aware of its ongoing duty to disclose information relevant to the Claimant's claims. I do not think that could be relied upon or should be relied upon as an implicit admission by PWC that there had already been an Order for general disclosure. I say that in particular because on the preceding page (the first page of the letter) the PWC lawyer says that "*If the claims do go ahead, further case management orders and directions will be made at this stage in respect of disclosure of relevant information*". For what it is worth, it seems to me that PWC's letter is entirely consistent with the conclusion that PWC thought there was no general Order for disclosure.

But, in any event, it is not what the parties think that actually matters, it is what the Order actually objectively means.

59. For the reasons given above, which are broadly the same as the reasons given by Employment Judge Crosfill, in my view there has been no Order for standard disclosure made in these proceedings. In light of that, the question of whether Employment Judge Crosfill was right in the alternative to vary the Order of Employment Judge Sage does not arise. I will not deal with it in much detail, but I will give my answer or my view upon it given that it was the subject of considerable argument.

60. Employment Judge Crosfill said that if the Order had been an Order for general disclosure, he would have set it aside. He said this because of the general uncertainty that it has generated, the months of delay, and because, in his view, disclosure at this stage in the proceedings would be substantial, expensive and disproportionate. The parties are in agreement as to what the test is and that is the test that was set out by Judge Hand in **Serco v Wells** in this Appeal Tribunal in 2016, and it is also set out in Rule 29 of the **ET Rules**. An Employment Tribunal can set aside an Order already made in the same proceedings by the Employment Tribunal if it is necessary to do so in the interests of justice, and Judge Hand explained that that means there are really three sets of circumstances in which this might legitimately happen: first is if there is a material change of circumstances since the Order was made; second, if the Order had been based on the material omission or misstatement of fact or law; and third, if some other substantial reason exists necessitating interference. However, this Rule should be applied consistently with what is done in the High Court in the **Civil Procedure Rules**, and that means that the cases in which a subsequent Tribunal will set aside the original Tribunal's Order will be rare and out of the ordinary. In my judgment, it is clear that the power to vary an Order is not

akin to a right of appeal. If, as in this case, a second Employment Judge has come on the scene, the fact that the second Employment Judge thought that the first Employment Judge had been wrong is not a good enough reason in itself to set aside the prior Order.

61. If I had taken a different view of the construction issue - so, had I taken the view that Employment Judge Sage had ordered general disclosure - I would have allowed the appeal on this ground. In my judgment, Employment Judge Crosfill erred in law by purporting to set aside the Order.

62. For what it is worth, I share Employment Judge Crosfill's view that it would have been a mistake, if it had been done, to Order general disclosure as early as April 2016, but that of itself is not a reason to set it aside. In my judgment, there has been no material change of circumstances and no misdirection of fact or law by Employment Judge Sage. The delay that has taken place is not, of itself, usually a change of circumstances. As Mr Dobson pointed out, Judge Hand dealt with this in **Serco v Wells** and said that if it were otherwise than the mere effluxion of time would mean that all Orders of the Tribunal were up for re-examination. It seems to me that this is especially so where, as here, the main reasons for the delay are not connected with these particular directions. In this case, most of the delay that has taken place since April 2016 was to do with the appeal against the Order in relation to third party disclosure and the rest, it is fair to say, is due to some doubt as to what the Order meant. As regards uncertainty, it seems to me the difficulty with that argument is that I would only have been addressing the **Serco v Wells** argument if I had come to the view that the correct interpretation of the Order was that it had been an Order for general disclosure. If the right interpretation was that it was indeed an Order for general disclosure, then it seems to me the fact that it was not as

clear as it might have been is not of itself a good reason for setting it aside. The fact that it would be inconvenient to maintain the Order is not, of itself, a good reason to set it aside.

63. Therefore, for all of those reasons, this appeal is dismissed.