Case No: 1303946/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr K Wyness

Respondent: Aston Villa Football Club Limited

Heard at: **Birmingham** **On:** 24 September 2019

Before: **Employment Judge Flood (sitting alone)**

Representation
Claimant: Mr Pilgerstorfer (Counsel)
Respondent: Mr Reade QC (Counsel)

DECISION ON PRELIMINARY HEARING

1. The claimant's application for an Order as set out in the draft submitted on 24 September 2019 is refused.

REASONS

Background

(1) The claimant was employed by the respondent, a company which operates the business of Aston Villa Football Club as chief executive from 15 August 2016 until 8 June 2018. By a claim form presented on 24 August 2018 he brought a complaint of unfair dismissal under section 103A Employment Rights Act 1996 ("ERA"). The claimant alleges he made a series of protected disclosures, the first of which is said to have taken place on 10 October 2017 and the last on 4 June 2018. The claimant claims that his suspension by the respondent on 5 June 2018 and other conduct of the respondent around this time amounted to a breach(es) of the implied duty of trust and confidence and that this was solely or principally caused by the making of one or more of the protected disclosures.

(2) The respondent contends that no such disclosures were made and there were no breaches of the said implied term nor were any such disclosures that were made the reason for the respondent's actions in any event.

(3) The claim has been listed for final hearing on 4, 5, 6, 7, 12, 13, 14, 21 and 22 November 2019. At a Preliminary hearing held on 27 February 2019 Employment Judge Butler declined the claimant's application to include a claim of detriment pursuant to section 47A of the ERA and to add Mr Jian Tong Xia as a second respondent. Employment Judge Butler also dismissed the respondent's application to strike out parts of the particulars of claim on the grounds of legal advice privilege.

(4) At a further Preliminary hearing held on 9 May 2019, Employment Judge Dean made case management orders including the following:

> **"3 *Documents***
>
> *3.1 On or before 30 May 2019 the claimant and the respondent shall send each other a list of all documents that they wish to refer to at the final hearing or which are relevant to any issues in the case, including the issue of remedy. They shall send each other a copy of any of these documents if requested to do so.*
>
> *3.2 This order is made on the standard civil procedure rules basis which requires the parties to disclose the documents on which they rely, as well as the documents which may adversely affect their own case, adversely effect another party's case or support another party's case. The parties are required to make reasonable and proportionate steps to search for such documents."*

(5) Employment Judge Dean also listed the case for a short telephone preliminary hearing on 18 September 2019 to resolve any outstanding case management prior to the hearing. A List of Issues has now been agreed between the parties (page 69-72 of the Preliminary Hearing Bundle).

(6) There have been difficulties with the disclosure process and there has been a raft of correspondence between the parties, much of which has been copied, perhaps unnecessarily, to the Tribunal. The parties were reminded by a letter sent by Employment Judge Findlay on 7 August 2019 that correspondence between the parties should not be copied to the Tribunal and that "*They should co-operate to further the overriding objective*". It is noted that the tenor of the correspondence has not always been conducive to this aim. The hearing listed for 18 September was extended in length to 3 hours, converted to an in person hearing and moved to 24 September 2019 and hence this came before me today.

(7) The purpose of the hearing was therefore to deal with the various outstanding applications in relation to the disclosure process and, if time permitted, to make any further case management directions for the final hearing.

(8) Counsel produced comprehensive and helpful skeleton arguments. I listened to and took careful note of the oral submissions made, the documents referred to by either party in the Preliminary Hearing Bundle and the specific authorities relied upon, copies of which were helpfully produced

by Counsel today. The hearing was adjourned at 12.05pm for a reserved decision to be made.

(9) The parties agreed that further case management may be required depending on the outcome of the application, but they were hopeful that most matters could be agreed between the parties including the possibility of an agreed core bundle. It was agreed today that the date for exchange of witness statements would be put back until 21 October 2019.

The Issues

(10) The issues in dispute between the parties relating to disclosure had been narrowed and a number had been resolved by agreement. The remaining issues were set out in the claimant's skeleton argument (a draft of the Order sought had been attached) which could be summarised as follows:

a. Redactions
The claimant seeks unredacted copies of all documents previously disclosed and any further documents which the respondent has been ordered to disclosure or is under a continuing duty to disclose.

b. Scope of e-disclosures
The claimant seeks either a copy of an Anexys report detailing the parameters of the respondent's search for electronic documentation carried out, or a witness statement from the respondent detailing the extent of the search for electronic documentation, addressing the matters referred to in CPR PD31BS9.

c. Tony Xia's chats
The claimant seeks an order that the respondent "*require pursuant to his duties as a statutory director and/or agent, that Tony Xia provide to it all WhatsApp chat data and WeChat chat data concerning the issues relevant to these proceedings*".

d. Messrs Samuelson and Banfill
The claimant seeks an order that the respondent conduct a search of its servers, including any backup data stores, for any documents sent to or from Christopher Samuelson and/or Jamie Banfill which are relevant to the issues, the scope of the search to include Mr Samuelson's e mail account at the respondent, if available and the e mail accounts of: Tony Xia, Tracy Gu, Ian Hopson, Victoria Wilkes, Luke Organ, Tommy Jordan and Rongtian He.

(11) The respondent no longer sought any orders in respect of disclosure.

(12) The key question I must ask myself in each application made is fundamentally whether the order sought is necessary in order fairly to dispose of the proceedings.

Relevant legal principles

(13) **Rule 2** of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 ("ET Rules")** provides:

"The overriding objective of these Rules is to enable Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as is practicable-
(a) ensuring that the parties are on an equal footing;
(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
(c) avoiding unnecessary formality and seeking flexibility in the proceedings;
(d) avoiding delay, so far as is compatible with proper consideration of the issues; and (e) saving expense.
A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal (r 2)."

(14) **Rule 31** provides:

"A 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 (or in Scotland, by a sheriff)"

(15) The power under r 31 is limited to persons in Great Britain (Weatherford UK Ltd v Forbes UKEAT/0038/11 (20 December 2011, unreported)).

(16) Science Research Council v Nassé and BL Cars Ltd (formerly Leyland Cars) v Vyas [1979] 3 All ER 673, [1979] IRLR 465, [1979] ICR 921 confirmed that confidentiality alone is not a legitimate basis for avoiding discovery. Relevance alone, though necessary, does not provide an automatic test for ordering discovery. The test is whether discovery is necessary for disposing fairly of the proceedings.

(17) Canadian Imperial Bank of Commerce v Beck [2009] EWCA Civ 619, [2009] IRLR 740 per Wall LJ (at para 22):

"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."

(18) GE Capital Corporate Finance Group v Bankers Trust Co [1995] 1WLR 172

"*It has long been the practice that a party is entitled to seal up or cover up parts of a document which he claims to be irrelevant*"

(19) GHLM Trading Limited v Anila Kumar Maroo and others [2012] EWHC61 Ch per Newey J (at para 195)

"*it can be incumbent on a fiduciary to disclose matters other than wrongdoing. The "single and overriding touchstone" being the duty of a director to act in what he considers in good faith to be in the interests of the company….there is no reason to restrict the disclosures that can be necessary to misconduct. Were a director subjectively to consider that it was in the company's interests for something other than misconduct to be disclosed, he would, it appears, commit a breach of his duty of good faith if he failed to do so*"

(20) Matthews and Malek on Disclosure (Fifth Edition 2017) (extract provided)

"…*a party's obligations to disclose documents in his control naturally extends to documents which are or have been in the control of any agent for him. Similarly, a party may be compelled to disclose information obtainable from his agent where the agent is in possession of information obtained in his capacity as such agent. If the agent refuses to disclose such documents and information to his principal, the latter may have to take proceedings against the former for the purpose. However documents belonging to the agent, which are not in control of the principal, are not disclosable by the principal*."

Conclusions a. Redactions

(21) Mr Pilgerstorfer submitted that large portions of the documents disclosed had been redacted (with some pages completely blacked out) and that this was done before copies were provided to the claimant and without a Tribunal order as to how redaction should be carried out. He points to correspondence between the parties' solicitors and says that the respondent gave the impression that some of the redacted documents containing confidential information also contained relevant information. He points to an e mail of 4 June 2019 (page 127 of the Preliminary Hearing Bundle) where the respondent solicitors state that:

"*Unnecessary personal data or unnecessary financial information in otherwise relevant documents would be redacted*"; and
"*a number of the Respondent's disclosure documents contain confidential financial information about the Respondent which is arguably relevant to the issues in dispute and as such as been included in the disclosure documents. We propose to put all financial information which is relevant to the issues and therefore cannot be redacted in a confidential bundle*"

and then went on to refer to a letter of 7 June 2019 (page 149) where the respondent's solicitors confirmed that it intended to redact "*material that is either irrelevant to the litigation or is sensitive commercially and where the case does not require that particular piece of information to be disclosed in unredacted form*"

It is contended that this correspondence shows that the respondent intended to avoid disclosing unredacted copies of documents where it acknowledged itself that at least some of the redactions were of relevant information. The claimant says that until he sees the documents in an unredacted form, he cannot realistically take a view of relevance, particularly in a claim where inferences will be important.

(22) He also doubts that all the information is truly confidential, given the fact that the claimant is likely to have been privy to at least some of the redacted documents in his capacity as CEO, and points to the passage of time and the fact that the information is likely to be in the public domain. He points out that confidentiality is not of itself a legitimate basis to avoid disclosure (Science Research Council v Nassé as above).

(23) The claimant suggests a way forward is that unredacted documents be sent to the claimant and then a process take place whereby the parties attempt to agree which elements can remain redacted, have the redaction removed or indeed disclosed in a confidential bundle, with any disagreements dealt with at the outset of the final Tribunal hearing.

(24) Mr Reade for the respondent replied stating that the correspondence referred to above does not give the impression the claimant suggests and is a misreading, conflating two statements in the first e mail of 4 June that relate to different issues. He states that the respondent has never suggested that redactions would be made to relevant material on the basis that it was confidential. Rather that this information would be placed unredacted into a confidential bundle. He contends that the correspondence consistently confirms that redactions have only been made to irrelevant or unnecessary personal data or financial information. He says that the letter of 7 June 2019 confirms again that this is the case. He accepts that confidentiality of the information is insufficient to resist disclosure and that the respondent does not rely on this to do so.

(25) He also points out that the application for redaction to be removed is being made wholesale covering all documents, not just specific documents of concern, and this was made before any of the documents were seen. He says this is shows objection in principle to something that is perfectly proper and normal practice. He points to the GE Capital Corporate Finance Group v Bankers Trust Co case referred to above and notes that irrelevant material may properly be redacted in the disclosure of a document. He notes that no specific document disclosed with redactions has been raised by way of example or to show that redactions have rendered something unintelligible that appears to contain relevant or necessary information. He points to the relatively narrow list of issues in this claim, i.e. that protected disclosures are alleged to have taken place, one in October 2017 but the rest in a space of 2 ½ weeks in May/June 2018; and the conduct relied upon as being a breach of trust and confidence caused by the disclosures is alleged to have happened between 5 and 7 June 2018. He reminds me that the Tribunal made a standard order for disclosure and the claimant did not seek any direction or order at the time as to how that should take place or as to how redaction should be carried out.

(26) I prefer the respondent's submission and do not make any such order in relation to redaction as requested by the claimant. There is no reason in principle why redaction of documents cannot take place before they are disclosed, if such redaction complies with the principle of being relevant and necessary for the disposal of proceedings. I do not accept that the correspondence implies that some relevant material has been redacted

purely because it is confidential. That interpretation of the e mails by the claimant is overlaying meaning to statements made that is simply not there.

(27) Moreover, if there are any documents disclosed containing redacted material about which the claimant has a specific concern, this should be discussed between the parties and if not resolved, can and should be raised at the outset of the Tribunal hearing. The claimant, I was told, had started to undertake the exercise of reviewing each document to see if there were specific concerns but that this process had stopped due to what is said to be the extensive nature of the redactions. However, this is the appropriate way to approach this matter. The Tribunal, which is seized of the issues at the hearing, will be able to assess at the relevant time whether a specific document or part of document should have been redacted. The Tribunal can, as a matter of judgment, determine the extent of redactions necessary and make specific orders. It is not appropriate for this to be done wholesale in advance as it is necessary in the interests of justice or indeed proportionate in accordance with the overriding objective.

b. Scope of e disclosure searches

(28) Mr Pilgerstorfer stated that the respondent's e-disclosure is a "*cause for real concern*" and points out that 41,114 of the documents uploaded after the respondent's first e disclosure search have not been ultimately provided. He points to the Protocol to the Civil Procedure Rules ("CPR") concerning electronic disclosure (PD31B) and suggests that the respondent did not "*follow the spirit*" of the Protocol by discussing the use of technology with it in advance of carrying out the process. He acknowledges that this may not strictly apply to proceedings in the Tribunal, but points to the linking between the CPR and ET Rules in Rule 31 which empowers the Tribunal to make disclosure and inspection orders "*as might be ordered by a county court*". He contends that the claimant needs assurance that a reasonable search has been conducted and what the scope of such search was and applied for an Order requiring the report of the e-disclosure firm Anexys to be disclosed or in the alternative a witness statement setting out the extent of the search be provided.

(29) Mr Reade submits that the Protocol to the CPR simply does not apply as the order made on 9 May was a standard order for disclosure. He states that the claimant has not pointed to any specific relevant document which he asserts exist and which is said not to have been disclosed, even though the claimant was a very senior employee during the relevant period and involved in much of the activity at the time.

(30) I do not accept that the Tribunal is required to follow the CPR Protocol in question when e-disclosure issues arise before it. Whilst there is a linking between the CPR and the ET Rules in Rule 31 giving the Tribunal the power to make orders "*as might be ordered by a county court*", this does not mean that the Tribunal is bound to make such orders, nor that all of the rules and protocols of the CPR are somehow incorporated into orders that are in fact made by the Tribunal. No order of the nature now requested was made by the Tribunal at the preliminary hearing on 9 May 2019, nor indeed does it

appear that any such order was sought by the claimant. I go back to the terms of the order made by Employment Judge Dean that the parties disclose:

"*the documents on which they rely, as well as the documents which may adversely affect their own case, adversely affect another party's case or support another party's case. The parties are required to make reasonable and proportionate steps to search for such documents."*

It is not clear to me that there are any valid grounds for suggesting that the search carried out by the respondent does not comply with this Order to carry out a reasonable and proportionate search.

(31) If the claimant identified any document or category of document that he contends to be missing which he believes to exist, an order for specific disclosure could be considered on the usual principles. I refer again to the list of issues agreed between the parties which deals with matters over a relatively limited period during which the claimant was CEO and in communication directly with many of the main protagonists. On review of the disclosure documents already provided, if he identifies gaps or documents that appear to be missing, then a specific application can be made. It is not necessary in order fairly to dispose of the proceedings for an order for disclosure of any such report of Anexys that is said to exist to be made.

(32) I have considered whether it is appropriate to order that the respondent produce a witness statement setting out the extent of the search for electronic documentation in the terms suggested by the claimant. However, I have already concluded above that the CPR Protocol referred to does not apply. It was not part of the order for disclosure made at the time which presumably formed the basis for the respondent's search. To ask for a witness statement to be produced addressing such matters retrospectively is not in the interests of justice. I do not see how this will assist particularly in the absence of the claimant identifying any documents or categories of documents which he contends exist, but which have not been disclosed as a result of the e disclosure searches already carried out.

c. Tony Xia'a Chat Data

(33) Mr Pilgerstorfer seeks an order that the respondent require Mr Xia to provide to it all WhatsApp and WeChat data concerning the issues raised in these proceedings and then disclose this to the claimant. He relies on section 172 of the Companies Act 2006 and the fiduciary duty that Mr Xia is under to act in what he considers in good faith to be in the best interests of the company. He refers to the case of GHLM Trading Limited v Anila Kumar Maroo and others (above) and the comments of Newey J that "*Were a director subjectively to consider that it was in the company's interests for something other than misconduct to be disclosed, he would, it appears, commit a breach of his duty of good faith if he failed to do so*". He suggests that the respondent could make a request that Mr Xia provide the information and that Mr Xia was then under a duty to consider (in good faith)

whether it was in the best interests of the company for it to be disclosed. It is said that Mr Xia cannot act in good faith "*and decide other than disclosure was in the interests of the company*".

(34) It is alternatively submitted that Mr Xia was acting as agent of the respondent when having WhatsApp and WeChat conversations on relevant matters and so the respondent is entitled access such records. He submits that as a result, the records come within the power and control of the respondent and must be disclosed. Matthews and Malek on Disclosure (5th Edition) is relied upon. It is noted that as Mr Xia is outside the jurisdiction no order for third party disclosure can be made.

(35) Mr Reade submits that Mr Xia is not employed by the respondent, not a party to the litigation and is outside the jurisdiction. He does not accept that the arguments stated provide any real legal basis for suggesting that Mr Xia's personal chat data is within the respondent's power and control. With reference to section 172 and the Maroo case, he says that both provisions relied upon refer to what the director should do if he considers something to be in the company's best interest, not what a company can require a director to do. He notes that far from asking the respondent to make a request to Mr Xia to provide the data, the draft Order sought is that the respondent requires Mr Xia to provide it, despite he contends there being no explicit ability to impose such a requirement. On the agency point, he says that the chat data in question has never belonged to the respondent and that the section of Matthews and Malek relied upon goes on to state that documents "*belonging to the agent, which are not in the control of the principal, are not disclosable by the principal*". He submits that there is no basis for an order requiring the respondent to do something which it has no power to do.

(36) Mr Pilgerstorfer's arguments on section 172 are superficially attractive highlighting matters which may be relevant to Mr Xia's duties as a director. However, the extract of GHLM Trading Limited v Anila Kumar Maroo and others (above) referred to is in fact dealing with the extent to which a director can be required to disclose his own wrongdoing in the context of a claim made against a director by the company itself. This is not the same context as the current request is made. This is not directly relevant to the issues that the Tribunal will have to decide, namely whether the claimant made protected disclosures between 10 October 2017 and 4 June 2018, and whether the conduct relied upon as a breach of trust and confidence was solely or principally caused by the making of one of more of the protected disclosures.

(37) As to agency, the purported route for the respondent to require Mr Xia to disclose his chat data is tenuous at best. The chats were conducted on Mr Xia's personal devices and the starting point is that the chat data belongs to Mr Xia, not the respondent. The claimant does not point to any specific subject matter or conversation thread said to exist which suggests that such chats were carried out as agent for the respondent and that are relevant to the issues. It simply states that it is "*highly likely that Mr Xia was acting as the company's agent in relation to any relevant chat conversations he had*

concerning the issues in this case". It is hard to see how and under what powers the respondent could require Mr Xia to disclose this chat data even if he was acting as agent.

(38) It is not proportionate or necessary for the fair disposal of the proceedings for an order in the terms sought to be made.

d. Messrs Samuelson and Banfill

(39) Mr Pilgerstorfer submits that disclosure provided to date has provided the information which he sets out at paragraphs 36 a. to d. of his skeleton argument. He points to paragraphs c. and d, which he submits show that Mr Samuelson and Mr Banfill were involved in discussions around the claimant's suspension. He also refers to allegations made by Mr Samuelson on the website AstonVilla Leaks. The respondent submits that this is a fishing expedition and notes that Mr Samuelson had an e mail account with the respondent for a short period in 2016 and this has now been deleted (there is no suggestion from the claimant that it remains active). As to the other custodians named by the claimant, the respondent confirms they have already been the subject of a search and disclosure and there is no basis for a further search. It says that any relevant matters with regards to Messrs Samuelson and Banfill that appear in any of these custodian's e mail accounts, have already been disclosed.

(40) I do not see any basis for making the orders requested. The respondent e mail account of Mr Samuelson was deleted in 2016 well before the matters arose that are relevant to this claim. The claimant does not suggest that it was not deleted at this time. It is neither relevant nor in the interests of justice for this e mail account to be searched, even if it were possible. The other e mail accounts listed have all already been included in the search conducted to date. If any e mails appear in such named accounts to or from Messrs Samuelson and Banfill which contain relevant material, then this should have already been disclosed (I note that some documents of this nature appear in the Preliminary Hearing Bundle at pages 255/6; pages 220 and 221 referred to in the claimant's skeleton argument). In the absence of specific communications which are said to exist but not disclosed, the current application is purely speculative. References to matters raised on the AstonVilla Leaks website do not assist as it is acknowledged by all that the respondent has no connection to this site. It is not necessary fairly to dispose of the proceedings for an order to be made.

(41) The application made by the claimant is accordingly dismissed for the reasons set out above.

Case Management

(42) The parties agreed that the date for exchange of witness statements be varied to 4pm on 21 October 2019. Paragraph 6.1 of the Order of 9 May 2019 is amended accordingly.

Employment Judge Flood
1 October 2019

RESERVED DECISION & REASONS SENT TO THE PARTIES ON

.Kamaljit
..Sandhu.....02.10.2019.....

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FOR EMPLOYMENT TRIBUNALS