



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss S Bharaj

**Respondent:** Santander UK Plc (1)  
Mrs Alison Simmons (2)  
Mr Dean Robinson (3)

**Heard at:** London Central      **On:** 14 October 2019

**Before:** Mr N Deol (Employment Judge)

## Representation

**Claimant:** Mr C Glynn QC (Counsel)  
**Respondent:** Mr P Nicholls QC (Counsel)

# JUDGMENT

The Claimant's application for specific disclosure is allowed.

- (i) The order for disclosure set out in the Case Management Order dated 30 May 2019 is not restricted to the tabled document that the Respondent has already disclosed. It extends to the documents related to the grievance where they are relevant to the issues in these proceedings.
- (ii) The investigation into the whistleblowing claim should also be disclosed, where it is relevant to the issues in these proceedings.

## REASONS

1. This is a Preliminary Hearing to address outstanding issues in relation to disclosure before the main hearing which is listed to be heard over 20 days from 17<sup>th</sup> February 2020.
2. The issue of disclosure came before this Employment Tribunal recently at a preliminary hearing before Employment Judge Elliott on the 28 May 2019, leading to Case Management Orders for specific disclosure, sent to the parties a few days later on 30 May 2019.
3. The relevant case management orders from the May hearing are set out in paragraphs 1.2.3; 1.2.4 and 1.2.5 of that Case Management Order (the “May Order”) which, for ease of reference, is appended to this Judgment.
4. Some of the documents that fall within the scope of the May Order are:
  - (i) the Claimant’s grievance, the grievance outcome and the appeal outcome once it is produced.
  - (ii) any part of the grievance documentation that pertains to matters in issue for the tribunal, including but not limited to the complaints of sex discrimination and sexual harassment.
  - (iii) any investigation documents [in relation to the Claimant’s e-mail of 27 July 2018] that are relevant to the issues in these proceedings by specific reference to the agreed list of issues.

The order in relation to the documents in class (ii) was limited to notes of investigatory interviews including any statements collected by e-mail or written answers to questions, any investigation report prepared by the investigating officer and notes of the grievance hearing and the outcomes of both first stage and appeal once determined.

5. The Claimant argues, at this hearing, that the Respondent has adopted too restrictive an approach to disclosure and that documentation that has not been disclosed may be relevant to these proceedings. The Respondent disagrees; it argues that it has complied with the May Order, and that the Claimant is now simply

seeking to have the May Order varied.

6. The law on disclosure is set out clearly in the written submissions from the Claimant's representative and not disputed by the Respondent. These submissions are adopted by this Tribunal as a helpful summary of the legal principles to be followed, acknowledging that the summary in relation to the issue of legal advice and/or litigation privilege is no longer relevant.
7. As regards the grievance process itself the Respondent has disclosed a summary of the grievance process in tabular form. It has not disclosed documents that are referred to within that table or e-mails sent as part of that grievance process.
8. As regards the investigation documents the Respondent had originally refused to disclose these, relying upon arguments of legal advice and/or litigation privilege, an argument that was not pursued at this hearing. Instead the Respondent now suggests that these documents were simply not relevant to the issues to be determined.
9. Before coming to the Claimant's application, it is helpful to make some general obligations about disclosure and the approach to it, mainly to avoid further peripheral disputes before or at the main hearing in February 2020.
  - (i) The process of disclosure requires careful analysis of the issues in each case and disputes between parties over relevance are common. Those disputes often result in some compromise between the parties, allowing for some "margin of relevance" – leading to the inclusion of documents that one side feels are more relevant than the other party does.
  - (ii) Many of documents that end up before an Employment Tribunal are not "on point" with the specific issues. Employment Tribunals are often taken to very few of the documents from voluminous bundles, even where they have been collated with the agreement and co-operation of legal professionals on both sides.
  - (iii) The "margin of relevance" is even more challenging in complex cases where there are allegations of discrimination and/or whistleblowing and significant disputes over the facts. There will often be strong differences of opinion as to whether a particular document is relevant or not, often played out before the Tribunal in the questioning of witnesses. In some cases documents that are not directly relevant to the specific

legal issues will have some value in relation to the background to the dispute and have some indirect evidential value.

- (iv) An Employment Tribunal will decide which documents are relevant or not at the hearing, and what weight to give documents when it comes to its decision. The Judgment may settle disputes over relevance that have been played out in proceedings, either directly or by implication.
- (v) Preliminary hearings are not the best place for specific disclosure applications to be fully addressed. It is not clear by this stage how each party intends to pursue their case, what witnesses will be called, what the document says, what the witnesses will say about that document and what focus will be given to parts of their evidence. In any event the general duty of disclosure and the fact that this obligation continues is not normally curtailed by a preliminary order.
- (vi) It is the interests of justice that a “margin of relevance” exists and that a party is not precluded from having “potentially” relevant documents before the Tribunal. It is fairer that a potentially relevant document is included and not relied upon by the Employment Tribunal than for a potentially relevant document to be excluded from the proceedings altogether.
- (vii) The overriding objective applies in all cases and requires that matters are handled in a way that is proportionate to the complexity or importance of the issues; that is expeditious and fair; saves expense and ensures that the parties are on an equal footing. Both parties are required to assist the Tribunal with achieving this objective.
- (viii) The issue of confidentiality is an important one, given that potentially relevant documents may well contain irrelevant and potentially sensitive or confidential information. It is clear and recognised in the May Order that such information can be redacted.
- (ix) A party that takes an overly restrictive approach to disclosure runs the risk that inferences may be drawn from the absence of information that one would normally expect to exist. It also runs the risk of failing to comply with its obligation to assist the Employment Tribunal in its pursuit of the overriding objective by taking technical procedural points to disrupt proceedings.

## Decision

10. The grievance documentation sought by the Claimant is relevant and caught by the May Order. The Respondent has adopted a very narrow interpretation to exclude documentation that is referred to in the notes of the grievance process. Indeed, the reference to them in the document that has been disclosed suggests that they are, at the very least, potentially relevant.
11. The same applies to the e-mails sent with the documents/statements relevant to the grievance process and these should also be disclosed. The Respondent's objections to disclose such documents have no doubt peaked the Claimant's interest in them. This is not, on its own, a reason to order that these documents be disclosed, but neither can the Respondent's bare assertion that they have no relevance to be accepted at face value.
12. The investigation report is potentially relevant to the issue of "reasonable belief", an issue which remains live for the main hearing, and is clearly set out in the agreed list of issues. The conclusions of that report may support the Claimant's position, or not. If there are any aspects of that report that go wider than the specific issues these can be redacted and if there are disputes about redaction these can be addressed at the main hearing. The investigation report is also covered by the original May Order, was discussed at that hearing and should be disclosed.
13. The documents sought by the Claimant fall comfortably within the scope of the May Order. Even if they did not, they may fall to be disclosed as part of the continuing obligation on both parties to disclose relevant documents. The May Order resolved the issues addressed at the case management hearing, rather than applying a strict limitation on the disclosure obligation going forward.
14. The Respondent sought to have the Tribunal analyse whether the report was "on point" with each of the alleged protected disclosures, a task that was impossible without sight of the investigation report itself. The arguments that the Claimant's complaint leading up to the investigation was not a protected disclosure and that the alleged detriments predated the Claimant's letter were ventilated and considered at the CMD in May and addressed in the May Order.
15. It is not for the Employment Tribunal to determine the relevance, or lack of relevance of specific documents at a preliminary hearing; it

is a task that, in this case, the Respondent's solicitor should undertake when complying with the May Order. In undertaking that task that solicitor should not take an overly technical or restrictive approach and should consider whether there is an argument that the document is potentially relevant, or whether that is an argument that their opponent may say it is relevant.

16. Ultimately a party that decides not to disclose a document on the grounds of relevance takes some risk in doing so. If the issue remains contentious a Tribunal may decide to make an order for discovery mid-hearing or may be prepared to draw an inference on a particular issue or in relation to certain evidence because there is an obvious omission in the documents before it. It may decide to adjourn the hearing to allow for such disclosure, and in these cases there may also be cost consequences.
17. The Respondent has understandably not relied on arguments of proportionality or cost to resist the Claimant's application. The volume of the documentation sought is not significant and the nature of the documents is such that they are potentially relevant to the issues to be determined and would ordinarily, in proceedings of this nature, come before a Tribunal. The Respondent would not be put to an onerous task to locate and disclose these documents.
18. The Tribunal rejects the Respondent's argument that the Claimant is now seeking to broaden the scope of the May Order. It is the Respondent that has taken an overly technical approach to unreasonably restrict the scope of the May Order.
19. As in most proceedings, the parties need to try to agree what is relevant and what is to be included in the bundle, and some allowance must be made for the fact that the parties will not necessarily have the same view on relevance and the matter requires consideration at the main hearing.

### **Case Management Directions**

20. The Respondent or ordered to disclose the relevant documentation to the Claimant within **14 days** of the date of this Judgment.
21. The Claimant to send her proposed amended index to the Respondents by **3 December 2019** and an agreed index to be produced by **9 December 2019**.
22. The Respondent to send the Claimant a hard copy and an electronic copy bundle by **16 December 2019**.

23. Witness statements to be simultaneously exchanged by **17 January 2019.**
24. Updated Schedule of Loss to be served on the Respondent by **31 January 2019.**
25. All other previous directions are unchanged.

Employment Judge Deol

Date 12/11/2019

JUDGMENT SENT TO THE PARTIES ON

12/11/2019

FOR THE TRIBUNAL OFFICE