Appeal Nos. UKEAT/0252/19/LA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 23 April 2020
Judgment handed down
On 6 May 2020

Before

THE HONOURABLE MR JUSTICE KERR

(SITTING ALONE)

MR TIM SARNOFF — APPELLANT
(Tenth Respondent below)

YZ — RESPONDENT
(Claimant below)

(1) THE WEINSTEIN COMPANY LLC — (Respondents below)
(a Delaware limited liability company)
(2) THE WEINSTEIN COMPANY (UK) LIMITED
(3) HARVEY WEINSTEIN
(4) ROBERT WEINSTEIN
(5) DAVID GLASSER
(6) LANCE MAEROV
(7) RICHARD KOENIGSBERG
(8) TARAK BEN AMMAR
(9), (11), (12) *Deleted*
(13) JEFF SACKMAN
(14) *Deleted*

JUDGMENT

APPEARANCES

For the Appellant (Tenth Respondent below)	MS DIYA SEN GUPTA (One of Her Majesty Counsel) Instructed by: Latham & Watkins LLP, 99 Bishopsgate, London EC2M 3XF
For the Respondent (Claimant below)	MR JONATHAN COHEN (One of Her Majesty Counsel) MR CHRISTOPHER MILSOM (of Counsel) Instructed by: BlackLion Law LLP, 15-17 Grosvenor Gardens, London SW1W 0BD

SUMMARY

PRACTICE AND PROCEDURE – Disclosure
PRACTICE AND PROCEDURE – Case management

An order for disclosure under rule 31 of the 2013 Employment Tribunal Rules of Procedure can be made against a person who is not physically present in Great Britain at the time when the order is made.

The words in rule 31: "*[t]he Tribunal may order any person in Great Britain to disclose documents or information to a party …*" refer to the place where disclosure takes place and where the employment tribunal is located, not to the place where the disclosing party is located.

THE HONOURABLE MR JUSTICE KERR

Introduction

1. This appeal arises from a provision in rule 31 of the 2013 Employment Tribunal Rules of Procedure (**the 2013 ET Rules**) found in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. Under the heading "Case Management Orders and Other Powers", rule 31 provides (with my emphasis):

> **"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 or, in Scotland, by a sheriff."**

2. The appellant (the tenth respondent below) argues that he cannot be ordered to give any disclosure in the proceedings because he was not in Great Britain when the employment judge made a disclosure order against him. He does not work or live in Great Britain and contends that he could only be ordered to give disclosure in the proceedings if and while physically present on this island. His argument is, essentially, that the words "any person in Great Britain" mean what they say and must be interpreted literally.

3. The respondent to the appeal is the claimant below. Her claim arises from alleged sexual harassment. I order anonymity in respect of her identity, as the tribunal did. She must not be identified by any means. She submits that the tenth respondent's construction is absurd and unjust and would mean many thousands of disclosure orders have been wrongly made against claimants and respondents alike, who happen to have been outside Great Britain when the orders were made.

4. The claimant submits that the words "in Great Britain" do not cut down the general case management power in rule 29 to make "a case management order"; as rule 29 goes on to state, "the particular powers in the following rules do not restrict that general power". Alternatively, the words "in Great Britain" are bad drafting and a consequence of unified procedure rules in employment tribunals throughout Great Britain from 2004; to make sense, the words must refer to the location of the employment tribunal, not of the party against whom an order is made.

5. Both parties referred me to well recognised canons of statutory construction derived from the usual textual sources. For the tenth respondent, I was reminded that statutory language must mean something; that general provisions do not override specific provisions; that the legislator intends words to mean what they say; that words used more than once in the same instrument are likely to bear the same meaning; that different words normally bear different meanings; and that legislation is presumed not to apply extra-territorially.

6. For the claimant, I was reminded that the court should strive to avoid a construction that is unjust or absurd. A strained construction may be required. I was asked to read the words "in Great Britain" in such a way as to avoid an affront to fair trial rights under the European Convention, the Equal Treatment Directive, the EU law principle of effectiveness and the EU Charter of Fundamental Rights. The latter instrument, the claimant submitted, should impel me if necessary to disapply the words "in Great Britain", if rule 31 would otherwise bear the meaning advanced by the tenth respondent.

Background Facts

7. The claimant presented a claim in December 2017 against 14 respondents. The third respondent was (and is) Harvey Weinstein, who is currently serving a prison sentence in the USA for sex offences. The claimant alleges in her claim that she was sexually assaulted and harassed by Mr Weinstein.

8. The other respondents are companies with which he is or was associated and individuals alleged to work or have worked for or in association with Mr Weinstein. The claim has been withdrawn against four respondents. As against the remaining individual respondents, the claim is that they knowingly helped Mr Weinstein carry out the unlawful acts of assault and harassment. The tenth respondent denies doing so.

9. Various of the respondents filed ET3 response forms, contesting the claim on numerous grounds. Among them, the tenth respondent entered a response asserting that he lives and works in the USA and that the tribunal does not have territorial jurisdiction to determine the dispute as against him. He also contended that the ACAS early conciliation procedure had not been properly operated and that the complaints against him were out of time.

The Proceedings

10. On 12 July 2018, a case management hearing took place before Employment Judge Tayler. Numerous issues were identified. I need not mention them all. Among them were whether early conciliation requirements had been complied with; whether the claims were brought in time and, if not, whether time should be extended; whether the tribunal had territorial jurisdiction against each respondent; whether the claimant suffered the acts of discrimination and harassment of which she complained; and whether the individual respondents were liable for knowingly helping, under section 112 of the **Equality Act 2010**.

11. Various of the respondents sought a preliminary hearing to determine various of the points taken by them. The tenth respondent sought a preliminary hearing or hearings to determine territorial jurisdiction, effectiveness of service, compliance with the early conciliation procedure, the time point and an application to strike out the claim on the ground that it had no reasonable prospect of success. He contended that on each of those issues he had what the judge called a "succinct knock out point".

12. The judge refused a preliminary hearing, by a reserved decision sent to the parties on 7 August 2018. His reasons were to the effect that a preliminary hearing would be a false short cut that would more likely than not increase rather than reduce the burden and expense of the proceedings. He noted that the claimant had been based in this country and that the argument for territorial jurisdiction was quite strong even in the case of the respondents based abroad. He considered that a full merits hearing including all issues was the most effective way forward.

13. At a further case management hearing on 17 September 2018, a telephone hearing for listing and other case management purposes was fixed for 21 September 2018. At that telephone hearing, a full merits hearing was fixed by the judge for 9-24 September 2019, nearly a year later. He recorded in his written order that the respondents had variously reserved their positions on numerous preliminary points including those already mentioned: territorial

jurisdiction, time, compliance with early conciliation requirements and whether the tribunal had power to order disclosure against the respondents.

14. In a table attached to the judge's written order setting out his directions, he included at item 5 a direction that all parties must "send a list of any documents you have that are relevant to the issues to the other party …", whether the documents assist or are adverse to the disclosing party. A rider was added: "[i]f any of the Respondents decline to disclose any documents they must state the reason and seek an urgent Preliminary Hearing for Case Management".

15. There were then some further case management orders arising from insolvency proceedings in the USA concerning corporate respondents with which Mr Weinstein (the third respondent) was or had been associated. This prompted renewed efforts by some respondents to persuade the judge to convene a preliminary hearing. The tenth respondent, for his part, did not give disclosure. He sought a preliminary hearing to consider territorial jurisdiction and, in accordance with the tribunal's direction to do so, to consider whether the tribunal had power to order disclosure against a person outside Great Britain such as himself.

16. At a preliminary hearing eventually held on 18 June 2019 EJ Tayler heard argument on a number of matters including the latter issue. Among other matters I need not mention, he heard the tenth respondent's application for a further preliminary hearing to consider territorial jurisdiction, which he refused. He also heard and refused the tenth respondent's application to set aside or suspend or revoke orders made for disclosure on the ground that the tribunal lacked the power to make those orders.

17. He gave a reserved judgment sent to the parties on 17 July 2019. On the latter issue, the judge referred to section 7 of the Employment Tribunals Act 1996 (**the ETA**), conferring power on the minister to make procedural rules. He noted that in the ordinary courts it was commonplace to order disclosure against parties situated abroad, even in advance of jurisdiction over claims against them being established. He referred to the Employment Tribunal Rules of Procedure 2004 which had introduced the added words "in Great Britain" after the words conferring the power to order disclosure against "any person".

18. The judge found this anomalous, though he recognised that the EAT sitting in Scotland in **Weatherford UK Ltd v. Forbes** (UKEATS/0038/11/BI) "did appear to accept that the effect of the rule was that the order could only be made against a person in Great Britain" ([60]). He then commented on the 2013 ET Rules and noted that the "unambiguous" words "person in Great Britain" had been included within them.

19. The judge decided that he had power to make an order for disclosure against a person outside Great Britain; the original limitation in 2004 to a person in Great Britain "may have been a drafting error …." which was then transposed into the 2013 ET Rules. He relied on the generality of the power in rule 29 to make case management orders, stating that "the particular powers identified in the following rules do not restrict that general power" ([71]).

The Grounds of Appeal

20. There are four grounds of appeal. The first is that the judge misinterpreted rule 31 of the 2013 ET Rules. The second is that he misinterpreted rule 29. The third is that he

approached the issue of disclosure as though the tenth respondent were a party to the proceedings, even though the issue of territorial jurisdiction had not been determined. The fourth is that he wrongly concluded that he had power to order disclosure against the tenth respondent, despite the latter being outside Great Britain and continuing to contest territorial jurisdiction against him.

21. I can dispose of the third ground of appeal in short order. The tenth respondent filed an ET3 form setting out his defence to the claim. It included a challenge to territorial jurisdiction. He asked the tribunal to determine that issue early in the proceedings. When the tribunal refused, he did not appeal against that decision. He remains a party to the litigation, albeit one who contests the jurisdiction of the tribunal to determine the dispute as against him. He relies also on other defences, should that one fail.

22. There is no principle of law or obligatory case management requiring a tribunal to determine territorial jurisdiction in advance of determining other preliminary or substantive issues, jurisdictional or otherwise. Challenges to jurisdiction are, as Mr Jonathan Cohen QC for the claimant points out, commonplace and may or may not be determined separately from the merits.

23. I accept that territorial jurisdiction ought frequently to be determined early in the proceedings, so that parties are not unnecessarily required to take part in proceedings outside their home country. But that is not invariably so. If the tribunal had been bound to determine the issue of territorial jurisdiction separately and in advance of other issues, the tenth respondent would no doubt have appealed the judge's decision declining to do so. He cannot now mount a collateral attack on that unappealed decision.

24. The fourth ground of appeal depends for its success on the proposition that the judge assumed a power to order disclosure which he did not possess. Whether he did so depends on the meaning and effect of the 2013 ET Rules. So there is really only one issue in this appeal: whether or not the judge had the power to order disclosure against the tenth respondent without him setting foot on this island. I will concentrate on that issue, taking the first and second grounds of appeal together.

Historical Context

25. I start by noting certain historical matters drawn to my attention during the course of argument. Certain procedural rules governing industrial tribunal proceedings before the passing of the ETA were made under the **Employment Protection (Consolidation) Act 1978** and earlier legislation. Historically, there were separate procedure rules for tribunals in England and Wales and for tribunals in Scotland.

26. When the ETA was enacted and entered into force, the enabling legislation for procedural rules became section 7 of that Act, as EJ Tayler noted. That provision, like the rest of the ETA, applies to Scotland as well as to England and Wales. Thus, it applies throughout Great Britain (but not Northern Ireland; see section 47).

27. Section 7(3)(d) and (e) of the ETA provide (as amended but not materially) that employment tribunal procedure regulations may include provision:

"(d) for requiring persons to attend to give evidence and produce documents and for authorising the administration of oaths to witnesses,

(e) for enabling an employment tribunal, on the application of any party to the proceedings before it or of its own motion, to order—

(i) in England and Wales, such discovery or inspection of documents, or the furnishing of such further particulars, as might be ordered by the county court on application by a party to proceedings before it, or

(ii) in Scotland, such recovery or inspection of documents as might be ordered by a sheriff …".

28. The first sets of procedural rules under the ETA were, for England and Wales, found in the Schedule to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001. Those regulations did not apply in Scotland. There were separate rules for tribunals in Scotland (see the Employment Tribunals (Constitution and Rules of Procedure) (Scotland) Regulations 2001).

29. In the **2001 Rules** applicable to England and Wales, the relevant rule governing case management including disclosure provided as follows:

"4.—(1) A tribunal may at any time, on the application of a party or of its own motion, give such directions on any matter arising in connection with the proceedings as appear to the tribunal to be appropriate.

…

(5) A tribunal may, on the application of a party or of its own motion,—

(a) require the attendance of any person in Great Britain, including a party, either to give evidence or to produce documents or both and may appoint the time and place at which the person is to attend and, if so required, to produce any document; or

(b) require one party to grant to another such disclosure or inspection (including the taking of copies) of documents as might be granted by a court under rule 31 of the Civil Procedure Rules 1998."

30. The equivalent rule in Scotland was rule 3:

"3.—Power to require attendance of witnesses and production of documents, etc

(1) A tribunal may on the application of a party made either by notice to the Secretary or at the hearing—

….

(b) require one party to grant to the other party such recovery or inspection of documents as might be ordered by a sheriff; and

(c) require the attendance of any person as a witness or require the production of any document relating to the matter to be determined,

A …. ."

31. Thus, the position in England and Wales largely reflected the position under the Civil Procedure Rules 1998: the tribunal could order disclosure of documents by a person located outside the jurisdiction but could not summon a witness outside Great Britain (though it could summon a witness in Scotland as well as in England and Wales) to attend (with or without documents) and give evidence. In Scotland, the power to order disclosure was aligned with the power of a sheriff to do so in ordinary proceedings, while the power to summon witnesses was not (at any rate expressly) limited to witnesses present within the jurisdiction.

B

32. In 2003, a consultation exercise was carried out with a view to introducing rules that would apply to the whole island of Great Britain and would be applied alike by the employment tribunals in Scotland and those sitting in England and Wales. A rule relating to disclosure and the summoning of witness was proposed, in draft, in the following terms:

C

> **"Witness orders and disclosure of documents**
>
> **13.(1) A direction made under rule 10 *[general power to manage proceedings]* may:**
>
> **(a) require the attendance of any person in Great Britain, including a party, either to give evidence or to produce documents or both and may appoint the time and place at which the person is to attend and, if so required, to produce any document; or**
>
> **(b) require any person in Great Britain, including a party, to grant to a party such disclosure or inspection (including the taking of copies) of documents; provided that the direction made does not require a person to do something which they could not be required to do under part 31 of the Civil Procedure Rules or, in Scotland, which they could not be required to do by order of a sheriff.**
>
> **(2) A direction to require a person other than a party to grant disclosure or inspection of documents may be made only where the disclosure sought is necessary in order to dispose fairly of the claim or to save expense.**
>
> **… "**

D

E

F

33. The rules that emerged from that exercise were those scheduled to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (**the 2004 Rules**), which included the following rule:

> ***"CASE MANAGEMENT***
>
> **General power to manage proceeding**
>
> **10.—(1) Subject to the following rules, the chairman may at any time either on the application of a party or on his own initiative make an order in relation to any matter which appears to him to be appropriate. Such orders may be any of those listed in paragraph (2) or such other orders as he thinks fit. …. .**
>
> **(2) Examples of orders which may be made under paragraph (1) are orders —**
>
> **…**

G

H

(c) requiring the attendance of any person in Great Britain either to give evidence or to produce documents or information;

(d) requiring any person in Great Britain to disclose documents or information to a party to allow a party to inspect such material as might be ordered by a County Court (or in Scotland, by a sheriff);

…. ."

34. Thus, in respect of both England and Wales, and Scotland, what appeared to be a new territorial limitation was introduced; a person ordered to disclose documents or information to allow a party to inspect such material (not being a person required to attend as a witness) must be "in Great Britain". This territorial limitation, if read literally, could hamper the ability of both sides to obtain disclosure. A claimant outside Great Britain would be as immune from disclosure as would a respondent or other person (corporate or individual) outside Great Britain.

35. In 2011, the government asked Underhill J (as he then was) to review the rules. He and his working group issued a consultation paper in 2012, attaching draft rules of procedure. The draft rules included, under the heading "Case Management Directions and Other Powers", the following:

"26. *General rule*. The Tribunal may at any stage of the proceedings, on its own initiative, or on application, give case management directions, including directions varying, suspending or setting aside an earlier direction. ….

27. *Disclosure of documents and information.* The Tribunal may order any person to disclose documents or information to a party or to allow a party to inspect such material (by providing copies or otherwise) as might be ordered by a county court (or, in Scotland, by a sheriff).

28. *Requirement to attend to give evidence.* The Tribunal may order any person to attend to give evidence and produce documents at a hearing."

36. There was, thus, no mention of Great Britain in those draft rules dealing with disclosure and attendance of witnesses. The references to Great Britain in rule 10(2)(c) and (d) of the 2004 Rules were dropped. Following that review, the 2013 ET Rules were enacted, scheduled to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. They apply to the whole of Great Britain. Rule 29 provides (as amended):

"29. Case management orders

The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. Subject to rule 30A(2) and (3) [*which deal with postponements*] the particular powers identified in the following rules do not restrict that general power. …. ."

37. Rules 31-33, as since amended, provide:

"31. Disclosure of documents and information

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 or, in Scotland, by a sheriff.

32. Requirement to attend to give evidence

The Tribunal may order any person in Great Britain to attend a hearing to give evidence, produce documents, or produce information.

33. Evidence from other EU Member States

The Tribunal may use the procedures for obtaining evidence prescribed in Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters."

38. Thus, the references to Great Britain continued to appear in the 2013 ET Rules, as they had in the 2004 Rules, although not appearing in the draft versions annexed to the 2012 consultation paper. There was also a new power to obtain evidence using powers derived from EU law on cooperation between the courts of member states.

Submissions of the Parties

39. The parties made detailed and helpful submissions. I have already mentioned the canons of statutory construction on which they relied, which I need not repeat. Those apart, their main submissions were in summary as follows.

40. For the tenth respondent, the main points advanced by Ms Diya Sen Gupta QC and explored during the course of oral argument and in subsequent written submissions, can be paraphrased as follows:

(1) Under rule 31 of the 2013 ET Rules disclosure can only be ordered against a person who is physically in Great Britain at the time the order is made. An order could, therefore, be made against a person fleetingly present in Great Britain; but an order made prior to the person's arrival and served while he or she is in Great Britain would not be valid.

(2) The decision of the EAT sitting in Scotland in **Weatherford UK Ltd v. Forbes** is authority for the proposition that the tribunal does not have power to order disclosure against a person located outside Great Britain.

(3) A person outside Great Britain who chooses to make voluntary disclosure relevant to a particular issue (such as extra-territorial jurisdiction) may not "cherry pick" selective documents favourable to their case; the disclosure must be balanced and include adverse as well as favourable documents (**Birds Eye Walls Ltd v. Harrison** [1985] ICR 278).

(4) A person outside Great Britain – who could be a claimant as well as a respondent - who failed to respect that obligation and made selective disclosure could be subject to sanctions such as striking out or debarring, but could not be ordered to disclose the adverse documents necessary to restore the balance and comply with the obligation not to cherry pick documents.

(5) Rule 31 cannot be read as permitting an order for disclosure against a person not physically present in Great Britain when the order is made. The words are clear and must be taken to mean what they say. The same limitation applies to summoning witnesses under rule 32. A separate power exists to obtain evidence under rule 33, from other EU member states.

(6) There can be no separate power to order inspection of documents under rule 31 as against a person outside Great Britain when the order is made. Inspection follows disclosure and only relates to documents that are disclosed. The issue of inspection could only arise if, which is not the case, the power to order such disclosure existed.

(7) The judge impermissibly rewrote rule 31 because he found it inconvenient. He acknowledged that the words were not ambiguous and that the *Weatherford* case stood as authority against his recasting of the provision, ignoring the words "outside Great Britain". It was not open to him to treat those words as a "drafting error".

(8) The generality of the power in rule 29 to make case management orders does not override the particular powers in rules 31 and 32 to order disclosure and summon witnesses. If it did, the words "in Great Britain" would have no meaning and rule 33, dealing with obtaining evidence from other EU member states, would be unnecessary and redundant.

(9) The territory of the general power in rule 29 is the making of case management orders not specifically covered elsewhere by other rules; for example, an order staying proceedings or joining multiple sets of proceedings, orders for expert evidence, the use of interpreters and the like.

(10) The judge's concern that the tenth respondent's interpretation of rule 31 would make it very difficult to litigate against a person located outside Great Britain, was misplaced. There are other ways of obtaining evidence from non-EU member states: e.g., the Hague Convention on the Taking of Evidence in Civil or Commercial Matters 1970; the taking of evidence via a consular official; or the issue of a letter of request to a foreign court.

(11) Contrary to a suggestion made by the claimant, a person cannot be treated as "in Great Britain" by participating in proceedings in Great Britain. A respondent does not choose to be proceeded against and has to take part to some degree, if only to defeat territorial jurisdiction.

(12) The scope of the enabling power to make procedural rules, section 7 of the ETA, does not assist the claimant. It confers no power on any tribunal to order disclosure or do anything else. It confers power on the minister to make rules. The tribunal can only do what the rules permit, not what they could have permitted but do not.

(13) The words "in Great Britain" may not be disapplied, whether by invoking EU law rights, article 6 of the European Convention or the EU Charter of Fundamental Rights. A duty to give disclosure is, at best, unlikely where a person has no connection with Great Britain. Legislation is prima facie territorial and persons are normally entitled to be sued in the courts of their domicile.

(14) The historical material deployed by the claimant does not support her construction of rule 31. The reference to Great Britain in the 2004 Rules was included in the draft rule on disclosure and summoning of witnesses debated in the 2003 consultation exercise preceding the 2004 Rules. The tests derived from Lord Nicholls' speech in **Inco Europe Ltd v. First Choice Distribution** [2000] 1 WLR 586, HL, are not close to being met; there is no room for a rectifying construction founded on a clear drafting error. To remove the words "in Great Britain" from rule 31 would cross the line that separates interpretation from legislation.

(15) The review by Underhill J and the working group provides no support for the claimant's interpretation. The draft rules omitted the references to Great Britain but they were inserted into the final versions of what became the 2013 ET Rules. There were also references to "Great Britain" in the old rules that applied in only parts of Great Britain. The retention of the references to "Great Britain" from the 2004 Rules notwithstanding their omission from the draft rules emanating from the "Underhill review" indicates an intention to retain them, not the opposite. They must be given their plain meaning.

41. For the claimant, the main submissions advanced by Mr Cohen QC and Mr Christopher Milsom, explored in oral argument and subsequent written submissions, may be paraphrased as follows:

(1) Section 7 of the ETA, the 2004 Rules and the 2013 ET Rules all contemplated that the tribunal's power to order disclosure should, in England and Wales, mirror that of the county court which clearly enjoys power to make disclosure orders against parties overseas. The decision of the EAT in Scotland in **Weatherford** took a different approach but was decided under the 2004 Rules, related to the power of a sheriff in Scotland and is not authoritative or, alternatively, is wrong and should not be followed.

(2) The overriding objective in the 2013 ET Rules is (under rule 2) "to enable Employment Tribunals to deal with cases fairly and justly". The rules contemplate proceedings in England and Wales against persons domiciled overseas (see rule 8(2)(d)) where the tribunal has jurisdiction to determine the claim by virtue of a connection with Great Britain "and the connection in question is at least partly a connection with England and Wales."

(3) In that context, the judge below was right to decide that the general power in rule 29 to make case management orders was not subject to the particular power in rule 31 to make disclosure orders against a person (not necessarily a party) inside Great Britain. The reference to a "person" in rule 31 is wider than a "party". In line with the position in the county court, rule 31 only prohibits disclosure against a non-party outside Great Britain. Disclosure against a party could be ordered under rule 29.

(4) Alternatively, the phrase "in Great Britain" in rule 31 must refer to the location of the employment tribunal making the order, not to the location of the person against whom the disclosure order is made. The drafting arises from unification from 2004 of the rules applying in the whole island of Great Britain, comprising the two jurisdictions (England and Wales, and Scotland) in which the 2013 ET Rules apply.

(5) Thus, the introduction of the reference to Great Britain in rule 31 is required to show that the power is exercisable throughout Great Britain even though the extent of the power

differs as between Scotland, on the one hand, and England and Wales, on the other. The rule should be read as though there were a comma after the word "person"; so that the sense is that the Tribunal may, in Great Britain, order any person to disclose documents, etc.

(6) It is inconceivable that the 2004 Rules should suddenly and without explanation create a new limit on a power that had existed without territorial limitation for some 40 years in previous versions of the rules going back to 1965. The absence of any territorial limit in the draft rules emerging from the "Underhill review" of 2011-12 indicates that the inclusion of an apparent territorial limitation on disclosure in the 2004 Rules was an aberration and that the draft rules were intended simply to reiterate the existing power, considered not to have any territorial limitation despite the reference to Great Britain in the 2004 Rules.

(7) Alternatively, the judge was right to decide that there was a drafting error. The court should adopt a rectifying construction in accordance with the threefold test derived from Lord Nicholls' speech in the *Inco Europe* case (see the discussion in the judgment of Underhill LJ in **Rowstock Ltd v. Jessemey** [2014] ICR 550, CA, at [50]ff). The three requirements are all satisfied here: the court can be abundantly sure of the intended purpose of the provision; that by mistake the legislature failed to give effect to it; and the substance of the provision the legislature would have made if the error had been noticed; viz., omission of the words "in Great Britain" from rule 31.

(8) The parties would be on an unequal footing, contrary to the overriding objective, if the tenth respondent's interpretation was correct. The tenth respondent would, in this case, have an unfair advantage by being exempt from disclosure. He could decide what disclosure to give voluntarily, if any, and could not be ordered to provide more if what he gave was selective and unbalanced.

(9) That would be contrary to article 6 of the European Convention (see **Avotiņš v. Latvia**, 17502/07 at [119]); contrary to the recast Equal Treatment Directive (Directive 76/54/EC), which requires effective implementation of the principle of equal treatment, including adequate judicial procedures for enforcement (see recitals 28 and 29, articles 17 and 18; cf. **Kelly v. University College Dublin** [2012] ICR 322, at [29]); contrary to the EU Charter of Fundamental Rights, articles 21 and 47; and contrary to the principle of effectiveness (see **R (Unison) v Lord Chancellor** [2017] 3 WLR 409, per Lord Reed at [106]-[109]).

(10) The 2013 ET Rules should be interpreted in line with the enabling legislation (section 7 of the ETA) which envisaged that the disclosure power would mirror that of the county court. Furthermore, the court should adopt a construction of the rules which is in harmony with EU rights (applying the *Marleasing* principle) and not inconsistent with them.

(11) If that was not possible, the words "in Great Britain" in rule 31 should be disapplied by horizontal direct effect of the EU Charter of Fundamental Rights; see **Benkharbouche v. Embassy of the Republic of Sudan** [2016] QB 347, CA (affirmed on appeal to the Supreme Court ([2017] UKSC 62), per Lord Dyson MR giving the judgment of the Court of Appeal, at [80]-[81]): the right to an effective remedy is a fundamental principle of EU law such that contrary provisions must be disapplied when falling within the ambit of EU law.

Reasoning and Conclusions

42. I come to my reasoning and conclusions on whether the employment judge had power to make the disclosure order he made, as against the tenth respondent. I will start with the language of rule 31. I accept that the plain words of the provision, on a straightforward reading, point firmly in the direction of the interpretation contended for by the tenth respondent. An ordinary person reading the words would conclude that disclosure can only be ordered against a person physically present in Great Britain when the order is made.

43. Next, I consider some of the consequences of that literal construction. They are odd. If Ms Sen Gupta's plain and ordinary meaning is the correct one, Mr Cohen must surely be right that many thousands of wrong orders for disclosure have been made by tribunals against persons not present in Great Britain when the orders were made. In my experience, such orders are commonplace and tribunals often do not trouble to ask themselves where the disclosing party is. That does not rule out the literal construction but is a noteworthy consequence of it.

44. If the tenth respondent is right, Ms Sen Gupta accepts that the geographical barrier to disclosure applies equally to a claimant as it does to a respondent. That is right; the rule cannot bear one meaning for a party claiming and another for a party defending or, indeed, a non-party. A further bizarre consequence of the literal interpretation, therefore, is that a person may bring a claim, leave Great Britain, pursue it from abroad and thereby avoid giving disclosure.

45. It is true that a party, whether claimant or respondent, seeking to avoid disclosure by leaving Great Britain, or giving "cherry picking" self-serving and selective disclosure, could be subject to procedural sanctions such as striking out a claim for abuse of process or debarring from defending. Those draconian remedies would be available while the lesser and more obviously proportionate remedy – an order for specific disclosure – would not be. That is an unsatisfactory feature of the literal construction.

46. Next, the literal construction can produce arbitrary and fortuitous results. A tribunal can make an order for disclosure against a person fleetingly in transit at Heathrow airport. The same person cannot be ordered to disclose if the order is made before the aircraft lands or after it takes off for Paris, Belfast or Shanghai with the person on board. A tribunal could, in theory, be specially asked to sit and make a disclosure order at a time when the person is known to be temporarily in Great Britain. A person who comes from overseas to give live oral evidence at the tribunal can be ordered to make disclosure; while the same person cannot be ordered to make disclosure if he or she gives evidence from abroad over a video link.

47. Those strange consequences of the literal interpretation may have to be tolerated if, linguistically, it can bear no other meaning. The Appeal Tribunal in Scotland in the **Weatherford** case accepted a literal interpretation when considering its similarly worded predecessor in the 2004 Rules. EJ Tayler in this case correctly recognised **Weatherford** as supporting the tenth respondent's literal construction of rule 31.

48. In **Weatherford** the claimant was employed by a UK based subsidiary of a Bermuda parent company with its headquarters in Texas, USA. In his unfair dismissal claim, he sought and obtained an order for disclosure of documents including notes of an interview of him by US attorneys appointed by the parent company to investigate the alleged wrongdoing which had

caused the claimant's departure (either by dismissal as he claimed or resignation as the respondent claimed).

49. The employment judge found that Scots law applied and rejected an assertion of legal professional privilege but recognised that he could only order the disclosure as against the respondent UK subsidiary, not as against the parent because it was outside Great Britain. He appears to have made the order on the basis that the UK based respondent could obtain the documents from the parent overseas and the respondent could then disclose them.

50. On appeal, aside from arguments about choice of law and privilege, Lady Smith said (at [52]-[56]) that the judge had been right to decide that he could only order such disclosure as a sheriff could order "save that, unlike the sheriff, he is not prevented from doing so by reason of the fact that the haver is in England and Wales" ([54]). That was because under Scots procedural law applicable in the sheriff's court, the sheriff could not order disclosure ("recovery") against a person ("the haver") in England and Wales but outside Scotland.

51. The effect of rule 10(2)(d) of the 2004 Rules was, therefore, held to have added to the disclosure power exercisable by the sheriff in the ordinary court by extending it, in the case of an employment tribunal, to a person located in England and Wales, against whom a sheriff could not make a disclosure order. The sheriff, furthermore, "cannot … order the production of documents outwith Scotland" ([55]). A letter of request procedure would have to be used for documents elsewhere in the UK (under the Evidence (Proceedings in Other Jurisdictions) **Act 1975**). For documents in the USA, the sheriff would have to use "a letter of request procedure".

52. Lady Smith went on to say at [58] that the judge had erred in making the order as against the respondent UK subsidiary because he had recognised that he could not make the order as against the parent company and there was no evidence that the documents were in the possession or under the control of the respondent. The recovery order should therefore be discharged and the respondent's appeal was allowed on that ground, among others.

53. It was not argued in **Weatherford** that the employment tribunal could make a disclosure order against a person (the respondent's Bermuda parent company) located outside Great Britain. Nor was the sheriff in the same position as a judge of the county court in England and Wales. It was not disputed in this present appeal that a judge of the county court may, applying the Civil Procedure Rules, make an order for disclosure of documents located outside Great Britain and may make an order for disclosure against a person located outside Great Britain.

54. The decision in **Weatherford** may not be sufficient to answer the question raised in the present appeal, where an alternative non-literal construction of the current rule is relied on by the claimant. I turn next to consider the alternative interpretations offered by Mr Cohen on her behalf. The first is that rule 31 of the 2013 ET Rules governs disclosure orders made against non-parties, while the general case management power in rule 29 enables a tribunal judge to make a disclosure order against a *party* located outside Great Britain.

55. I cannot accept that interpretation. It seems to me clear that rule 31 is intended to govern the making of disclosure orders against parties as well as against non-parties. Disclosure is a central part of litigation procedure, both in the ordinary courts and in employment tribunals. It is invariably the subject of bespoke rules and not conducted in

accordance with generic case management rules. The cross-reference to the power of the county court and in Scotland the sheriff supports that approach.

56. Ms Sen Gupta is correct to submit that the generic case management power in rule 29 is there to enable case management decisions to be made which are not the territory of bespoke rules. I do not agree with Mr Cohen that the words of rule 29 ("the particular powers identified in the following rules do not restrict that general power") give the tribunal *carte blanche* under rule 29 to make orders for disclosure and the summoning of witnesses beyond the powers conferred by rules 31, 32 and 33. Those words in rule 29 are there to preclude an argument that the absence of an express rule governing a particular type of case management decision – such as a stay, joinder or severance– negates the power of a tribunal to make order of that type.

57. I also reject the suggestion advanced in Mr Milsom's skeleton argument that for the purposes of rule 31, a person may be taken to be "in Great Britain" by virtue of that person taking part in the litigation in Great Britain. It is unrealistic to argue that the bringing of a claim against a person located outside Great Britain notionally drags that person onto this island against his or her will by some kind of litigious magnetic force. The foreigner sued here but resident abroad does not choose to be sued and must react to the claim even if only to deny jurisdiction, or risk a default judgment.

58. Thus far, I am left with the unsatisfactory consequences of the literal construction, not answered by the alternatives advanced by the claimant. I do not think the consequences are adequately mitigated by the alternatives to ordinary disclosure relied upon by Ms Sen Gupta: the Hague **Convention of 1970**, the letters of request procedure, a request made through a consular official and, in the case of evidence from EU member states, an application under rule 33 to obtain evidence through the court of another member state. Those procedures are cumbersome, slow and expensive. Litigation in employment tribunals is intended to be swift, normally "costs free" and relatively informal.

59. I agree with Ms Sen Gupta that section 7 of the ETA does not take the matter further. It is consistent with both sides' arguments. It confers no power on employment tribunals. It confers a rule making power only on the Secretary of State. The tribunals can only make orders which the Secretary of State decides the rules should empower them to make. The rule making power does envisage that the rules may align the powers to order disclosure with those of, in England and Wales, the county court; but that does not mean the Secretary of State has necessarily decided to align the tribunal's powers in that way.

60. I come next to the historical materials, already mentioned. They are equivocal. It seems to me likely, as a starting point, that references in the 2004 Rules to Great Britain were influenced by the decision to enact a single set of rules applicable to tribunals sitting throughout Great Britain. That is borne out by the **Weatherford** case, demonstrating that the 2004 Rules removed the prohibition (that would apply in a sheriff's court) against a tribunal in Scotland ordering disclosure against a person located in England and Wales or of documents located in England and Wales.

61. In the case of England and Wales, the pre-existing position under rule 4(5)(b) of the 2001 Rules was that there was no prohibition against ordering disclosure by a person outside Great Britain: the disclosure that could be ordered was "of documents as might be granted by a court under rule 31 of the Civil Procedure Rules 1998". If a literal construction of the 2004

Rules is adopted, they introduced, as foreshadowed in the 2003 consultation exercise, a new geographical barrier to disclosure orders made in England and Wales.

62. The incongruity between that proposition, on the one hand, and the scheme of the legislation envisaging alignment with the powers of the county court, on the other, raises the possibility mentioned by the judge that the 2004 Rules introduced a "drafting error", later carried into the 2013 ET Rules. The suggestion could be that in rule 10(2)(d) of the 2004 Rules, the reference to a person "in Great Britain" ought to have been confined to Scotland, where it had the effect of expanding the tribunal's disclosure power beyond that of the sheriff, and ought not to have extended to England and Wales, where it had the effect of curtailing the tribunal's disclosure power, making it less than that of the county court.

63. This suggestion is undermined, as Ms Sen Gupta points out, by the point the 2004 Rules are in line with the draft versions discussed during the consultation exercise in 2003 which preceded the 2004 Rules. That point must be borne in mind when considering whether the theory of a drafting error can survive the rigours of Lord Nicholls' threefold *Inco Europe* test.

64. I do not think it can. The historical material is, as I have said, equivocal. The later review of the rules carried out by Underhill J, as he then was, produced draft rules which lacked any reference to Great Britain for tribunals in Scotland as well as for those in England and Wales. The reference to Great Britain was then restored in what became rule 31 of the 2013 ET Rules, both for Scotland and for England and Wales.

65. It is difficult to say whether including the reference to Great Britain in the final version was deliberate or accidental and whether there was any conscious decision to convey any meaning or merely a continuation by default of the 2004 wording. The explanation may be that the drafters of the various versions did not adequately think through the potential effects of the wording used.

66. The (objectively ascertained) intention of the legislature is, therefore, opaque. But there is real force in the claimant's submission that the tenth respondent's construction of rule 31 is not in harmony with the overriding objective of dealing with cases fairly and justly. I accept the submission that the literal construction of rule 31 produces injustice and something close to absurdity, for the reasons I have already stated.

67. I find some force also in the submissions advanced by Mr Milsom that the literal construction would clash with the international obligations of the United Kingdom, under the international instruments mentioned in his skeleton argument, which I paraphrase in shorthand as an obligation to ensure fair trial rights as between the parties. The force of that submission is somewhat diminished, however, by the point that a claimant can resort to a foreign bolt hole to avoid giving disclosure just as much as a respondent can.

68. I would not go as far as to disapply the words "in Great Britain" in rule 31, if the literal construction were the only permissible one. But I would accept the invitation of the claimant to adopt an alternative and more sensible and just construction – in line with the *Marleasing* principle – if I can do so without crossing the line that separates interpreting legislation from rewriting legislation.

69. In the end, I have concluded that I should accept the claimant's strained construction to avoid the unjust and near absurd consequences of the literal construction. In my judgment, the words "in Great Britain" in rule 31 must be taken to refer to the location of the employment tribunal making the disclosure order, not to the location of the person against whom the order is made.

70. I take the reference to Great Britain in rule 31 as indicating that the power is exercisable throughout Great Britain even though the extent of the power differs as between Scotland, on the one hand, and England and Wales, on the other. The words are capable of bearing the unusual meaning that the reference to Great Britain is to the seat of the tribunal under whose auspices the disclosure is made, the geographical jurisdiction in which the disclosure falls to be made and the place where the tribunal is located.

71. I adopt that construction because the words of rule 31 are linguistically capable of bearing that meaning, albeit straining the language used; and because it accords with the overriding objective in rule 2 of the 2013 ET Rules, while the tenth respondent's literal construction does not. The claimant's construction avoids the arbitrary and unjust consequences I have highlighted and, in my judgment, should displace the canons of statutory construction urged on me by Ms Sen Gupta in support of the literal construction.

72. The claimant's construction also has the virtue of good sense because it replicates the position under the Civil Procedure Rules, whereby a court in England and Wales may order disclosure against a person outside the geographical jurisdiction of the court but may not summon a witness from outside the jurisdiction to attend and give evidence.

73. It follows that under rule 31 of the 2013 ET Rules, the person ordered to give disclosure need not be physically present in Great Britain at the time when the order is made. Under rule 32, by contrast, an order can only be made for the attendance of a witness who is present in Great Britain.

Conclusion

74. For those reasons, which are not the same as the reasoning of the judge below, I think he was correct to decide that he had power to order disclosure against the tenth respondent. The appeal is therefore dismissed.