Appeal No. UKEAT/0075/20/LA(V)

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 15 October 2020

Before

THE HONOURABLE MR JUSTICE LINDEN

(SITTING ALONE)

SANTANDER UK PLC & OTHERS — APPELLANTS

MISS S BHARAJ — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellants	MR PAUL NICHOLLS (One of Her Majesty's Counsel) Instructed By: EMW LLP Seebeck House 1 Seebeck Place Milton Keynes MK5 8FR
For the Respondent	MS SALLY ROBERTSON (of Counsel) Direct Public Access Scheme

SUMMARY

PRACTICE AND PROCEDURE

WHISTLEBLOWING, PROTECTED DISCLOSURES

The Claimant applied for specific disclosure in relation to documents arising from an investigation into a "Post Termination Whistleblowing Document" submitted by her after the termination of her employment. The Respondents maintained that no relevant documents arose from investigation. The Employment Judge made an order for disclosure of such documents in this category as were relevant.

The Respondents appealed on the grounds that the Employment Judge had failed to determine whether the documents were relevant but had nevertheless made an order for specific disclosure.

Held: appeal allowed. Guidance as to the determination of applications for specific disclosure where relevance is disputed.

THE HONOURABLE MR JUSTICE LINDEN

Introduction

1. This is judgment after the Full Hearing of an appeal from a Case Management Order of Employment Judge Deol in respect of disclosure, which was sent to the parties on 20 November 2019 following a Preliminary Hearing on 14 October 2019.

2. The Hearing was conducted by Microsoft Teams but was a public Hearing. Mr Nicholls QC appeared for the Respondents. Ms Sally Robertson appeared for the Claimant who has been conducting the litigation in person and from time to time with the assistance of barristers. I am grateful to Mr Nicholls and Ms Robertson for their submissions.

Background

3. The Claimant was employed by the First Respondent as a "Senior Manager Policy Implementation" from June 2017. On 8 January 2018, she resigned on notice and her employment came to an end on 2 April 2018. According to the Respondents' pleaded case, part of the Claimant's role was to work with members of the First Respondent's financial crime team "to identify gaps in the First Respondent's financial crime processes and develop policy and other solutions to fill those gaps".

4. On 16 April 2018, the Claimant issued proceedings in the Employment Tribunal ("ET"). In those proceedings she now alleges automatic unfair constructive dismissal on the basis of a number of alleged detriments which she says amounted to direct sex discrimination, victimisation

contrary to the **Equality Act 2010** ("EqA") and Section 47B of the **Employment Rights Act 1996** ("ERA") (whistleblowing), and harassment related to her sex contrary to the **EqA**. Her case is that the detriments which she alleges are actionable in themselves but that they also amounted to a breach of the implied duty of mutual trust and confidence which founds her case that she was constructively dismissed.

5. For the purposes of the Claimant's whistleblowing claims under Sections 47B and 103A of the **ERA**, the Claimant relies on nine alleged protected disclosures which she says she made between June and November 2017. I will call these "the protected disclosures" as shorthand, although each of the protected disclosures has yet to be proved.

6. In very broad terms, the pleaded protected disclosures raised issues about the First Respondent's anti bribery and corruption processes, its anti money laundering processes its processes for detecting sanctions busting by Iranian clients and other processes for the prevention of crime and the enforcement of regulatory requirements. The Claimant's case is that these disclosures fell within Section 43B(1)(a), (b) and (f) of the **ERA**. She says that they were therefore "qualifying disclosures", as defined, which were protected by virtue of Sections 43C to H. The relevant parts of Section 43B provide as follows:

> **"43B Disclosures qualifying for protection.**
>
> **(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—**
>
> **(a) that a criminal offence has been committed, is being committed or is likely to be committed,**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,…..**
>
> **(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."**

7. The Claimant's claims are all disputed by the Respondents. But the relevant claims for the purposes of this are appeal are her whistleblowing claims, where the Respondents dispute her case that she made protected disclosures and, in any event, deny that she was subjected to detriment or constructively dismissed by reason of any protected disclosures which she made.

8. The particular issue in the underlying litigation which has led to the issues in this appeal is as to whether, in respect of any of the disclosures which the Claimant alleges she made, she reasonably believed that any information which she disclosed tended to show any of the matters falling within Sections 43B(1)(a)(b) or (f) as she contends. The Respondents have put this in issue in relation to all nine of her protected disclosures.

9. There have been five Preliminary Hearings in the proceedings so far and the Full Merits Hearing has been postponed twice. It is currently listed for 20 days starting on 4 January 2021.

10. There have been various issues in relation to the Respondents' disclosure. The present appeal is concerned with one of those issues, that is, the disclosure and inspection or otherwise of documents considered or created by the Respondents in the course of an investigation which was carried out by the First Respondent in response to a very detailed 31-page document created by the Claimant and entitled "Post-termination whistleblowing document". This document was sent to the First Respondent on 27 July 2018 under cover of an email of that date. I will call the documents in respect of which there is an issue as to disclosure "the Investigation Documents", which is a wider category of documents than any report which was created as a result of the investigation. For example, the expression includes any witness interview notes or statements and any other documents considered by the investigator or investigators.

11. The Claimant does not rely on the post-termination whistleblowing document as itself being a protected disclosure which was a reason for any detrimental treatment of her, not least because it was sent after the termination of her employment. What she says is that this document raised issues which were the subject of her alleged protected disclosures and that therefore the Investigation Documents will almost certainly include documents which are disclosable in relation to her whistleblowing claims. In particular, her position is that insofar as the Investigation Documents include documents which support the concerns that she raised in the course of her employment, those documents will support her case that her beliefs as to what her disclosures tended to show were reasonable, and therefore support her case under Section 43B(1). Such documents, she argues, should therefore be disclosed.

12. In the light of **Darnton v University of Surrey** [2003] ICR 615 EAT and other authorities, the Respondents do not dispute the proposition that any Investigation Documents which supported the case that the Claimant's beliefs were reasonable would be disclosable. Their position in relation to whether any Investigation Documents are in fact disclosable has altered in the course of the litigation, but it is currently that the concerns raised by the Claimant in the post-termination whistleblowing document are not the same as those which her pleaded protected disclosures allegedly raised. They say that logically an investigation of the concerns in the post-termination whistleblowing document therefore would not produce documents which were relevant to the reasonableness of the Claimant's beliefs.

Legal framework

13. In order to understand the appeal, it is necessary to explain the relevant aspects of the interlocutory history in a little more detail. Before doing so, however, I make the following points about the relevant law.

14. Rule 31 of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013** provides that: "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."

15. Although Ms Robertson sought to persuade me otherwise by reference to the somewhat broader formulations in the "Employment Tribunals (England and Wales) Presidential Guidance - General Case Management 2018", in my view the effect of Rule 31 is that the powers in respect of disclosure which the ET has are as set out in CPR Part 31. It therefore is not open to an ET to order the disclosure of documents which would not be disclosable under the Civil Procedure Rules. In any event, I am bound by Court of Appeal authority as to the powers of the ET to order specific disclosure, as Ms Robertson ultimately accepted. The question of specific disclosure is what is at issue in the present case.

16. In my view, CPR Part 31 and the accompanying Practice Directions 31A and 31B contain a very helpful and clear statements of the principles which should be applied in relation to disclosure in order to achieve a fair disposal of the issues between the parties which is in accordance with the overriding objective. The Rules themselves contain a clear account of the obligations of the parties and the powers of the court or tribunal, and the Practice Directions give

clear guidance as to how the Rules should be applied in practice. Although there is a greater degree of informality in proceedings before the ET, and this should no doubt continue to be the case, parties to the litigation in the ET, and perhaps the ETs themselves, may in practice pay too little attention to these materials.

17. There is a range of different approaches to the scope of disclosure and courts or tribunals therefore may or may not order standard disclosure (see CPR Rule 31.5). Where standard disclosure is ordered, or the agreed approach is that the parties will undertake standard disclosure, CPR Rule 31.6 sets out the obligation of the parties as follows:

> **"31.6 Standard disclosure requires a party to disclose only–**
>
> **(a) the documents on which he relies; and**
>
> **(b) the documents which –**
>
> **(i) adversely affect his own case;**
>
> **(ii) adversely affect another party's case; or**
>
> **(iii) support another party's case; and**
>
> **(c) …."**

18. As Lewison LJ said in relation to this test in **Shah v HSBC Private Bank (UK) Limited** [2011] EWCA Civ 1154 at paragraph 25:

> **"It is notable that the word 'relevant' does not appear in the rule. Moreover the obligation to make standard disclosure is confined 'only' to the listed categories of document. While it may be convenient to use 'relevant' as a shorthand for documents that must be disclosed, in cases of dispute it is important to stick with the carefully chosen wording of the rule..."**

19. Thus, the test under Rule 31.6 is not one of relevance, although documents which satisfy the Rule 31.6 test will by definition be relevant. Relevance is a more flexible and potentially broader concept and, obviously, there are degrees of relevance: see the discussion in **HSBC Asia Holdings BV & Anor v Gillespie** [2011] ICR 192, particularly at paragraph 13(2). For this reason, I will use the term "disclosable" rather than "relevant" where I am referring to documents which the parties are required to disclose pursuant to their duty of disclosure.

20. Still less does CPR 31.6 require disclosure of documents which are not even relevant or merely "potentially relevant", as Lewison LJ emphasised at paragraph 39 of his Judgment in the **Shah** case, endorsing the following passage from the judgment of Leggatt LJ in **GE Capital Corporate Finance Group Ltd v Bankers Trust Co** [1995] 1 WLR 172, albeit referring to inspection and redaction and in the context of the broader **Peruvian Guano** approach to disclosure which applied before the introduction of the Civil Procedure Rules in 1998:

> **"The judge made several references to these details as being "at least potentially relevant." That is not the test. The test is whether it is not unreasonable to suppose that the passages blanked out do contain information which may, either directly or indirectly, enable Arthur Andersen either to advance their own case or to damage the plaintiffs' case."**

21. Lewison LJ said:

> **"The phrase "at least potentially" is very close to the test applied at first instance in GE Capital which, even on the Peruvian Guano test, Leggatt LJ said unequivocally was wrong."**

22. Any duty of disclosure continues until the proceedings are concluded: see CPR rule 31.11. In addition to this, however, Rule 31.12 provides a power to order specific disclosure – that is, an order to disclose what documents in a given category or categories are or have been in the respondent's possession or control etc - and it sets out the types of order which may be made as follows:

> **"31.12 Specific disclosure or inspection**
>
> **(1) ….**
>
> **(2) An order for specific disclosure is an order that a party must do one or more of the following things –**
>
> **(a) disclose documents or classes of documents specified in the order;**
>
> **(b) carry out a search to the extent stated in the order;**
>
> **(c) disclose any documents located as a result of that search."**

23. Rule 31.12(3) also provides for orders for specific inspection (see also Rule 31.19 which deals with claims to withhold disclosure or inspection). As I have said, Practice Directions 31A

and 31B contain helpful guidance as to how these powers should be exercised in relation to hard copy and electronic disclosure respectively. These Practice Directions emphasise the need for a proportionate approach and explain how the overriding objective should be applied in this context.

24. As is well known, in **Canadian Imperial Bank of Commerce v Beck** [2009] IRLR 740 CA, Wall LJ said this at paragraph 22:

> **"In our judgment, the law on disclosure of documents is very clear, and of universal application. The test is whether or not an order for discovery is 'necessary for fairly disposing of the proceedings'. Relevance is a factor, but is not, of itself, sufficient to warrant the making of an order. The document must be of such relevance that disclosure is necessary for the fair disposal of the proceedings. Equally, confidentiality is not, of itself, sufficient to warrant the refusal of an order and does not render documents immune from disclosure. 'Fishing expeditions' are impermissible."**

25. In applying this passage, ETs should bear in mind what was said by Mr Justice Eady in **Flood v Times Newspapers Ltd [2009] EMLR 18** about the approach to applications for specific disclosure, correctly using the terminology of CPR Rule 31.6 rather than the potentially broader and less precise concept of relevance:

> **"23. The first requirement is that any documents sought must be shown to be likely to support or adversely affect the case of one or other party. Thus, the question to be asked in each case is whether they are likely to help one side or the other. The word "likely" in this context has been considered in the Court of Appeal and is taken to mean that the document or documents "may well" assist: see e.g. *Three Rivers District Council v Governor and Company of the Bank of England (No 4)* [2003] 1 WLR 210.**
>
> **24. Secondly, the hurdle must be overcome of demonstrating that disclosure of the documents sought is 'necessary' in order to dispose fairly of the claim or to save costs. This only arises for consideration if the first hurdle has been surmounted. Unless the documents are relevant in that sense, it is not necessary to address the test of necessity.**
>
> **25. Thirdly, there is a residual discretion on the part of the court whether or not to make such an order - even if the first two hurdles have been overcome … It is at this third stage that broader considerations come into play, such as where the public interest lies and whether or not disclosure would infringe third party rights in relation, for example, to privacy or confidentiality. If so, the court must conduct a careful balancing exercise …"**

26. I entirely agree and note that these passages were adopted by the Employment Appeal Tribunal at paragraph 24 of its decision in **Birmingham City Council v Bagshaw and others** [2017] ICR 263.

a. There can be no order for specific disclosure unless the documents to which the application relates are found to be likely to be disclosable in the sense that, in a standard disclosure case, they are likely to support or adversely affect etc the case of one or other party and are not privileged. Similarly, if disclosure is sought in relation to a category of documents, it must be shown that the category is likely to include disclosable documents.

b. Even if this question is answered in the applicant's favour, specific disclosure will only be ordered to the extent that it is in accordance with the overriding objective to do so. The "necessary for the fair disposal of the issues between the parties" formulation in **Beck**, and the formulation in paragraphs 24 and 25 of **Flood** cited above, are shorthand for this second question.

c. **Beck** also effectively makes the point that the greater the importance of the disclosable documents to the issues in the case, the greater the likelihood that they will be ordered to be disclosed, but subject always to any other considerations which are relevant to the application of the overriding objective in the circumstances of the particular case and in particular the principle of proportionality.

27. The next point which I would make is that applications for specific disclosure in the ET should normally be supported by evidence. This need not be in the form of a witness statement in every case, but the burden is on the applicant to put materials before the ET which establish the case for an order. The evidence should therefore address the question why it is believed that the documents sought are likely to be disclosable and, where possible, issues which are relevant to the application of the overriding objective such as proportionality, cost etc.

28. Similarly, it may well behove a respondent to such an application to put in evidence or other materials which will assist the ET to decide whether the application should be allowed. If it is being said by the respondent to an application for specific disclosure that there are no documents in a given category, or that the documents in that category have been considered but none are disclosable, this may need to be proved. If it is being said that disproportionate expense would be incurred relative to the importance of the issues to which the documents relate, again there may need evidence. What precisely needs to be proved and how it should be proved, in terms of what evidence is put before the ET and in what form, will obviously depend on the circumstances of the application.

29. The final point I will make in the light of the arguments in the present case is that it is emphatically not the position that the questions whether documents are likely to be disclosable, or are disclosable, or can be inspected by the other side, can only be decided if the court or tribunal is able to read them for itself. There may be cases in which that is so, but generally the evidence about the documents or categories of documents will enable a decision to be made by reference to the pleaded issues in the case. Helpful guidance in this regard was provided by Ramsey J in **Atos Consulting Limited v Avis Plc** [2007] EWHC 323 (TCC) at paragraph 37(1) to (5), albeit in relation to an application to withhold inspection rather than specifically in relation to disclosure. He said:

> **"I accept and adopt the principle that looking at the documents should be a matter of last resort. In my judgment the appropriate course to be adopted in an application under rule 31.19 (5) where the right being relied on is privilege or irrelevance, is for the Court to proceed by way of stages as follows:**
>
> **(1) The Court has to consider the evidence produced on the application.**
>
> **(2) If the Court is satisfied that the right to withhold inspection of a document is established by the evidence and there are no sufficient grounds for challenging the correctness of that asserted right, the Court will uphold the right.**
>
> **(3) If the Court is not satisfied that the right to withhold inspection is established because, for instance, the evidence does not establish a legal right to withhold inspection then the Court will order inspection of the documents.**

(4) If sufficient grounds are shown for challenging the correctness of the asserted right then the Court may order further evidence to be produced on oath or, if there is no other appropriate method of properly deciding whether the right to withhold inspection should be upheld, it may decide to inspect the documents.

(5) If it decides to inspect then having inspected the documents it may invite representations."

The Hearing before Employment Judge Elliott

30. At a Preliminary Hearing on 9 November 2019, Employment Judge Henderson made a general order for disclosure within a specified time.

31. At what was the third Case Management Hearing on 28 May 2019, EJ Elliott then dealt with a number of case management issues. These included an application by the Claimant for specific disclosure in relation to a substantial number of documents or categories of documents. The categories of documents included items 94 to 96, which related to grievance documentation in respect of which an order for disclosure was made. In summary, EJ Elliott's Order was to disclose relevant documents and relevant parts of the documents falling within this category.

32. The application for specific disclosure before EJ Elliott also included an application in respect of the Investigation Documents. In relation to these documents the Employment Judge ("EJ") made the following findings: .

> **"43 Category 97: The Clamant sent an email on 27 July 2018 to first respondent's Chief Legal Officer Mr John Collins, concerning her disclosures and was told they would be investigated under the Whistleblowing Policy. She says she heard nothing more and seeks the emails following on from her email. The 27 July email is not relied upon as a protected disclosure."…**
>
> **45 The respondent could not say for certain whether an investigation had taken place as result of the 27 July 2018 email. An order is made below restricting the scope of the disclosures to be provided."**

33. EJ Elliott then made the following Order:

> **"1.2.5 Category 97: The respondent shall inform the claimant as to whether an investigation took place in response to her email of 27 July 2018. If so, the respondents shall disclose to the claimant any investigation documents that are relevant to the issues in these proceedings by specific reference to the agreed list of issues." (emphasis in the original)**

34. This was to be done by 18 June 2019. I will refer to this Order as the "May Order" as this is what is called by EJ Deol.

35. Mr Nicholls points out that EJ Elliott referred to the test in **Beck** in making her Decision and says that therefore her Order was not challenged by the Respondents. However, as he also points out, her Order was made on the basis that at that stage it was not known whether the investigation which had taken place had in taken place in response to the post-termination whistleblowing document, and it was for that reason that her Order was provisional. Mr Nicholls contrasts the situation at the time of the May Order with the situation before EJ Deol to which I will come.

The *inter partes* correspondence after the May Order

36. On 18 June 2019, the solicitors acting for the Respondents wrote to the Claimant as follows:

> **"CMO1.2.5**
>
> **The Respondents can confirm that an investigation did take place in response to your email dated 27 June 2018. That investigation was subject to legal privilege and is therefore privileged from production because,**
>
> 1. **any documents created as part of the investigation were created in contemplation of legal proceedings and are therefore subject to litigation privilege; and**
> 2. **the investigation is subject to Solicitor and Own Client Privilege, the same being conducted under the direction of the Chief Legal & Regulatory Officer to inform whether there were any gaps in the banks processes.**
>
> **The First Respondent is not prepared to waive privilege over any part of the investigation."**

37. I note that it was not denied that the Investigation Documents were relevant: quite the contrary. The fact that the investigation took place in response to the Claimant's email of 27 July 2018 and the reference to litigation privilege would tend to suggest that those documents were

highly relevant. Unless this was some other litigation, and Mr Nicholls appeared to accept that it was not, it appeared to be being said that an investigation for the purposes of providing advice in relation to the Claimant's claim in the ET had been carried out. The statement that this had been under the direction of the Chief Legal and Regulatory Officer "to inform him whether there were any gaps in the bank's processes" tended to reinforce this impression given that the protected disclosures alleged by the Claimant did indeed relate to the bank's regulatory processes.

38. As noted above, the Claimant's position at the Hearing before EJ Elliott was that she was told that the concerns which she raised on 27 July 2018 would be investigated under the whistleblowing policy. She says that these concerns were the same as those which she raised in the post-termination whistleblowing document. This was also evidence which was relevant to the question whether the post termination investigation was likely to have considered or resulted in disclosable documents.

39. On 22 July 2019, the Claimant wrote to the Respondents' solicitors setting out detailed arguments as to why the claim for legal privilege was wrong. By letter dated 5 August 2019, the solicitors for the Respondents did not concede that they were wrong, but they argued in addition that the May Order was to disclose "documents relevant to the issues in these proceedings and that the investigation documents were not relevant." Their argument was as follows:

> **"Whistleblowing matters**
>
> **As we have previously stated, the investigation into your email dated 27 July 2018 was to inform the Chief Legal Officer whether there were any gaps in the First Respondent's processes. The investigation was not to determine whether you made any or all of the 9 alleged protected disclosures or whether you were subject to detriments as consequence. The issue of whether it was subsequently discovered that there were not gaps in the First Respondent's processes is not a matter which is relevant to the matters in issue in the Tribunal proceedings. What is relevant is your belief as to the state of affairs as it existed at the point that the alleged protected disclosures were made not subsequently. In fact, that exact point was made by EJ Elliot at paragraph (23) of the Tribunal's Record of Preliminary Hearing, discussing disclosures request 26 and 27, when she stated, *"..the reasonableness of the belief is a matter for claimant's state of mind at the time she made the disclosure and not what has been discovered subsequently."***
>
> **Therefore in simple terms, the investigation into your email dated 27July 2018 is about something different to the matters that are before the Tribunal and we are instructed that there**

> **are no documents arising from that investigation** ***"that are relevant to these issues in these proceedings by specific reference to the agreed list of issues."***

40. It is to be noted that this argument appears to ignore the possibility that documents produced in the course of an investigation which takes place after a protected disclosure may be relevant to the question whether a Claimant's beliefs at the time of the disclosure were reasonable, as Mr Nicholls accepts they may be. Nor does it explain why any findings by the Chief Legal Officer that there were gaps in the bank's processes would not be relevant to this question, given that the assertion in the second paragraph is based on an incomplete statement of the issues. It also appears from the words "we are instructed", in the second paragraph, that the solicitors had not themselves looked at any Investigation Documents.

The Hearing before Employment Judge Deol

41. The Claimant therefore applied for specific disclosure by letter sent under cover of an email dated 3 September 2019. Her application related to grievance appeal documents and the investigation report and it was explained in the application itself. The Order which she asked for specifically sought disclosure of the investigation report as opposed to the wider category of Investigation Documents.

42. The application was supported by a skeleton argument dated 3 September 2019, which had been prepared by Mr Casper Glynn QC, who also appeared at the Hearing before EJ Deol on 18 October 2019. Both the application and Mr Glynn's skeleton set out the background as they saw it, as well as relevant passages from the decision of the House of Lord in **Science Research Council v Nasse** [1980] AC 1028. **Beck** was not cited but the passages from **Nasse** covered the relevant ground.

43. The thrust of the Claimant's position was that the Respondents were deliberately being difficult in relation to disclosure. It was said that they were refusing to answer questions about their disclosure in relation to the grievance documents, which were subject to the May Order, and that they had offered shifting and misconceived explanations for not disclosing any investigation documents. Under heading "The Respondents' approach to disclosure of the whistleblowing investigation" paragraph 17 of Mr Glynn's skeleton argument reprised the May Order.

44. The history in terms of the Respondents' position as to why there was nothing to disclose was then summarised. At paragraph 25, Mr Glynn said the following, which was taken directly from the Claimant's application letter:

> **"25. The issue raised in the Post Termination Whistleblowing Documents are substantially the same ones which this Tribunal was try (sic). The disclosures included various different ones including that the Claimant believe (sic) that the Bank's money laundering processes were deficient, that it was operating in breach of sanctions in respects of Iran and that its processes to detect and discourage financial crime were not fit for purpose."**

45. There was also a table which sought to illustrate this point. This table cross-referred the pleaded protected disclosures in the agreed list of issues to certain paragraphs in the post-termination whistleblowing document which, it was said, referred to these issues. The skeleton argument argued that it was necessary for the Claimant to prove the reasonableness of her beliefs and that the investigation into gaps in the bank's procedures was directly relevant to that issue. At paragraph 30 it concluded as follows:

> **"30. We would, therefore, ask that the investigation into the Post Termination Whistleblowing Document is disclosed."**

This request is not entirely clear but it appears to be a request for a wider category of documents than merely the investigation report.

46. At the Hearing before EJ Deol, Mr Nicholls appeared for the Respondents. He did not submit a skeleton argument. However, I understand that he did not pursue any argument based on privilege but did resist disclosure on the basis that the Investigation Documents could not be relevant or disclosable. His basis for saying so was that, he said, the concerns raised in the post-termination whistleblowing document were not the same as the concerns raised in the Claimant's alleged protected disclosure. His position was that therefore documents produced in the course of the investigation of the former logically could not shed light on the reasonableness of concerns raised in the latter.

47. I understand that Mr Nicholls asked EJ Deol to undertake a detailed analysis of the post-termination whistleblowing document and to compare it with the pleaded case in relation to the nine protected disclosures on the basis of which he invited the EJ to conclude that the Investigation Documents could not support the relevant aspects of the Claimant's case. Mr Nicholls confirmed to me that the Respondents did not put in any evidence other than the correspondence and the post-termination whistleblowing document itself. Their case was based on submissions in relation to these documents, which of course were themselves evidence.

48. EJ Deol was therefore faced with a dispute between the Claimant, on the one hand, who said that the post-termination whistleblowing document raised all of the issues which she raised in her nine protected disclosures and challenged the integrity of the Respondents' claim that there were no documents on which the May Order "bit" because there were no relevant Investigation Documents. Moreover, the Respondents' approach in the correspondence between the May Order and the Hearing before Employment Judge Deol, as summarised above, did give rise to at least a basis for this challenge. On the other hand, the Respondents submitted that they had

complied with the May Order, that there were no relevant documents, and that no further Order should therefore be made.

49. However, there was no evidence as to what the scope of the investigation carried out by the Chief Legal and Compliance Officer had been, nor as to who, if anyone, had considered the Investigation Documents for the purposes of discharging the Respondents' disclosure obligations. Nor was there evidence, beyond that which I have summarised, that having considered the Investigation Documents there were no disclosable documents. The Respondents' position was, in effect that there was no need to consider the Investigation Documents because the investigation was into different matters to those which were raised in the alleged protected disclosures.

50. I will turn to EJ Deol's Reasons in a moment but at this stage I note that his Judgment stated the following:

> **"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."**

51. On the face of it, then, he allowed the application for specific disclosure and his order went no further than the May Order. In relation to the grievance document, he clarified what had been ordered. In relation to the Investigation Documents, he effectively restated what EJ Elliott had ordered. The Judgment therefore did no more than require the disclosure of documents created or considered in the course of the Chief Legal and Compliance Officer's investigation insofar as they are relevant to the issues in the proceedings.

52. Consistently with this view, in his case management directions, EJ Deol said this:

> **"20. The Respondent or ordered to disclose the relevant documentation to the Claimant within 14 days of the date of this Judgment." (emphasis in the original)**

53. He therefore set a timetable of 14 days for the disclosure of such documents as were required to be disclosed pursuant to his Judgment. I will call is the Deol Order.

The Hearing before Employment Judge Davidson

54. This interpretation of the Deol Order tends to be confirmed by what happened next. Upon the Respondents not providing any further documentation or disclosure in relation to any further documentation, the Claimant applied for an Unless Order on the basis that the Respondents were alleged to have failed to comply with the Deol Order. That application came before EJ Davidson on 17 February 2020 and it was dismissed.

55. Mr Nicholls confirmed to me that no further evidence was put in by either side. Mr Nicholls appeared for the Respondents at that Hearing and the Claimant appeared in person. Mr Nicholls's position was recorded as follows at paragraph 5 of the EJ's Reasons:

> **"In relation to the post-termination whistleblowing complaint EJ Deol's order is subject to an appeal to the EAT but, in any event, there are no documents which fall into that category which are 'relevant' to the issues in this case. Therefore the order has been complied with. The respondents invited the tribunal to address the matter notwithstanding the pending EAT appeal on the basis that any order would be conditional on the appeal not being successful".**

56. In other words, his case was that the correct interpretation of the Deol Order was that the Respondents were only required to disclose such Investigation Documents as were relevant. Since none were, there was no breach of the Deol Order in failing to provide any such documents to the Claimant. This argument is recorded further at paragraphs eight to 10 of the Reasons for her Decision which were given by EJ Davidson:

> **" 8. The respondents' position is that it is not appropriate to issue an unless order. It is their position that the order has been complied with. As EJ Deol pointed out in his order, it is for**

> **the respondents' solicitors to take a view regarding relevance, in the knowledge of the risk of the document being found to be relevant by the tribunal at the final hearing.**
>
> **9. Although it is an option to disclose the documents and then dispute relevance at the hearing, in this case the volume of documents which would be involved would significantly increase the number of documents in an already document heavy case.**
>
> **10. Following the authority in Lonhro v Fayed (no 3) 1993 Lexus citation 1614, it is submitted by the respondents that the statement made on behalf of the respondents as to disclosure are conclusive at the preliminary hearing state and can only be challenged at trial."**

57. The Claimant's argument was recorded as being that the Respondents should not be believed when they said that there were no relevant documents. She did not argue that the documents were required to be provided to her in any event. In other words, it was common ground that the Deol Order merely required the disclosure of such Investigation Documents as were relevant with inspection of the disclosed documents thereafter.

58. EJ Davidson explained their rejection of the Claimant's application as follows:

> **"11. I find that it would not be appropriate to take issue an unless order (sic). The respondents' position is that it has complied with the orders and therefore there can be no penalty for non-compliance. The claimant has not satisfied me that their respondents' solicitors have failed to comply with the order by failing to consider what documents are relevant to the issue in the case and I do not have the sufficient evidence to conclude that there has been a breach of their obligations."**

The appeal

Is the appeal academic?

59. Against this background I was concerned that the appeal may be academic. Before me, Mr Nicholls maintained the interpretation of the Deol Order, which he had advanced and which had been accepted by EJ Davidson, that is to say that it does not require his client to do anything more than the May Order required. At that Hearing, he also maintained his position that the Order had been complied with as I have noted.

60. Ms Robertson ultimately agreed before me that, taken at its highest, the Deol Order merely required disclosure of such Investigation Documents as are relevant. On this basis, EJ Deol effectively rejected the Claimant's application insofar as it was an application for inspection or the provision of copies of the Investigation Documents. The Claimant did not appeal his Order. The Claimant's challenge to the Respondents' position that there are no relevant documents failed before EJ Davidson on the basis that she was not satisfied that there had been a failure to comply with the Deol Order and that Decision has not been appealed by the Claimant either. The current state of play is therefore that the Respondents are not required to disclose any investigation documents, pursuant to the Order of EJ Deol at least, and the Claimant has made no further application for them to do so.

61. Having heard submissions on both sides, however, I am satisfied that the appeal is not academic. Mr Nicholls submits, and I accept, that EJ Deol made a further order for specific disclosure against the Respondents which is therefore properly the subject of an appeal. This is apparent from:

a. Firstly, the fact that the EJ made an order rather than declining to make any order as he might have if his position was simply that the May Order stood.

b. Secondly, the fact that EJ Deol said in terms in his Judgment that he allowed the Claimant's application for specific disclosure, albeit it is apparent that he did not order the actual production or inspection of any documents.

c. Thirdly, the EJ's Reasons, which purport to reject the Respondents' arguments and uphold the Claimant's and which clearly contemplated that a further exercise would be undertaken by the solicitors for the Respondent in which the question of relevance

would be reconsidered and a more generous approach taken to this question in the light of the guidance which the EJ provided.

62. Precisely what this exercise would entail is, with respect, not entirely clear from EJ Deol's Reasons as he effectively left this to the good sense of the Respondents' solicitors. Although I understood Mr Nicholls to accept in his initial submissions that the Deol Order did not in fact require the Respondents to do anything further, in his reply to Ms Robertson he clarified his position and submitted that the Deol Order required the Respondents to apply their mind – "to perform the intellectual exercise", as he put it – to the question whether there were any disclosable documents and, if so, to disclose them and permit inspection.

63. Ms Robertson did not disagree. She characterised the Deol Order as requiring the Respondents to "go back to the drawing board" which may have entailed searches and did entail reading the documents as opposed to merely comparing the post-termination whistleblowing document with the pleaded protected disclosures and concluding that there could not be any Investigation Documents which were relevant. I agree with her.

64. As I read paragraph 18 of EJ Deol's Reasons, the criticism of the Respondents that they had taken "an overly technical approach to unreasonably restrict the scope of the May Order" and the observation at paragraph 17 that there was no objection to the Claimant's application based on proportionality or the volume of the documents entailed in the application, taken in the context of the Reasons as a whole, was a rejection of Mr Nicholls's "logical" approach based on comparing the pleaded disclosures with what was said in the post termination whistleblowing document, concluding that they did not raise identical issues and reasoning from this that therefore there could not be any disclosable Investigation Documents.

65. On balance, I also agree with Ms Robertson that the Deol Order referred to all of the Investigation Documents rather than just the investigation report. Whilst it is not absolutely clear what EJ Deol had in mind, and whilst paragraph 12 of the Reasons, in particular, would indicate that the issue was the investigation report, the use of the plural "documents" at various points in the Reasons (for example, at paragraphs 9 and 17) suggests that he was ordering disclosure in relation to all Investigation Documents albeit not using my shorthand.

66. This, then, was an order for specific disclosure, and it was an order which required the Respondents to do something more within a specified deadline. It is clear enough from his Reasons that EJ Deol did not consider that there had been adequate consideration of the question of relevance and that he required the Respondents to consider this matter again and disclose any documents which, in the light of this exercise, they now accepted were relevant.

67. The matter is not is academic because the Respondents may or may not have performed the exercise which the EJ contemplated. On the evidence I do not know. Moreover, one does not know what forensic capital will be made at trial from the fact that a second order for specific disclosure was made in relation to this category of documents, what further applications may be made in relation to this issue by the Claimant and/or whether further allegations will be made by the Claimant that the Respondents have failed to comply with the Deol Order and their disclosure obligations more generally.

68. Having accepted that the Deol Order was a second order for specific performance, I also accept that therefore the test in **Beck**, as explained above, applied to the decision whether to make such an order. If that is right, as I have pointed out, EJ Deol first had to decide whether the

Investigation Documents were likely to include disclosable documents pursuant to CPR 31.6 and then whether it was in accordance with the overriding objective that they be disclosed.

The Grounds of Appeal

69. The first ground of appeal ("Ground 1") is that the EJ failed to apply the test in **Beck** and to ask and decide whether the Investigation Documents were likely to include documents which were disclosable and, if so, whether an order for specific disclosure was "necessary for the fair disposal of the issues between the parties."

70. Here, Mr Nicholls acknowledges that at paragraph 6 of his Reasons, EJ Deol said this:

> **"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."**

71. Although Mr Glynn's skeleton did refer to the **Nasse** case and did not refer to **Beck**, it set out the relevant passages in **Nasse** and these passages were the basis for the **Beck** test and made the key points for the purposes of the present appeal. However, Mr Nicholls points out that the test was not stated by EJ Deol anywhere in his Reasons. He also argues that EJ Deol never actually decided whether the Investigation Documents were likely to include disclosable documents. Nor did he ask himself, at least in terms, whether disclosure was necessary for the fair disposal of the issues.

72. Mr Nicholls argues that, on the contrary, the EJ effectively stated that it was not for him to make an assessment of, as the EJ put it, "relevance". The EJ made a number of general observations about disclosure at paragraphs 9(i) to (ix) of his Reasons, which did not refer to the **Beck** test, but instead made a number of general points to the effect that there was a margin of

relevance; that documents may be potentially relevant and that a party which adopts an unduly narrow approach to the question of relevance risks the drawing of adverse inferences at trial. At paragraph 9(v) the EJ said, "Preliminary Hearings are not the best place for specific disclosure applications to be fully addressed" because of the difficulties in forming a final view on the question of relevance before trial. His view therefore appears to have been that it was not appropriate for him decide the question of relevance at a Preliminary Hearing.

73. That, I am bound to say, is a view with which I disagree. There may be cases in which the better course from a case management point of view is to leave this type of issue to the trial of the claim, but in many cases it will assist the parties and indeed the court or tribunal which has the conduct of the trial for issues of disclosure to have been resolved before the trial takes place. Indeed, as is well known, it is a routine matter in the courts for applications for specific disclosure to be decided at preliminary hearings.

74. Under the heading "Decision" at paragraph 14, the EJ said in terms that it was "impossible" for him to decide whether the investigation report was "on point":

> **"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."**

75. At Paragraph 15 he said this:

> **"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."**

Consistently with this, the EJ made other references to the documents being "potentially relevant" (for example, paragraphs 12 and 17) but he never actually decided whether they were likely to be relevant or disclosable.

76. That being so, submits Mr Nicholls, the EJ did not make the finding which was a necessary but not sufficient foundation for an order for specific disclosure.

77. The second complaint made by Mr Nicholls ("Ground 2") is that the EJ Deol misunderstood or misapplied the May Order. In his oral argument Mr Nicholls summarised his point as being that EJ Deol apparently considered that he was doing nothing more than ordering inspection of documents which he considered were disclosable pursuant to the May Order. Since the documents which were disclosable pursuant to the May Order were limited to relevant documents, EJ Deol could only order inspection if he first found that the documents were relevant. Since he did not make this finding his Order was misconceived.

78. For her part, Ms Robertson submitted that the **Beck** test was in effect adopted by EJ Deol at paragraph 6 of the Reasons and that he should be taken to have had it firmly in mind when he made his decision. She submits that it is implicit that EJ Deol applied the **Beck** test, given that he rejected the Respondents' arguments about the scope of the May Order and accepted the Claimant's argument. Given that he allowed the application for specific disclosure and made an order, she submits that he was also right to take the view that the May Order required the order which he made.

Discussion and conclusions

79. I accept Mr Nicholls's submissions on Ground 1 as summarised above. It is clear from paragraphs 14 and 15 of his Reasons, read in the context of his other observations, that EJ Deol expressly disavowed any determination of the issue of "relevance" or likely "relevance". He left

this to the solicitors acting for the Respondent but on the basis that they should consider disclosure of documents in respect of which there is an "argument" that they were "potentially relevant".

80. Arguably the EJ did have the second question, whether disclosure was in accordance with the overriding objective, in mind when he said at paragraph 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." (emphasis added)**

81. However, the reference in this paragraph to the documents being "potentially relevant" demonstrates the error of law which Mr Nicholls alleges. Unless the Investigation Documents were likely to include documents which were disclosable as defined by CPR Rule 31.6, there could not be and order for specific disclosure in relation to them. Yet the EJ declined to decide this issue. Still less could documents be ordered to be disclosed if they were no more than "potentially relevant.".

82. It follows from this that this part of the Deol Order will be set aside, that is to say paragraph (ii) of his Judgment.

83. It also follows that the second ground of appeal advanced by Mr Nicholls is academic. For completeness, however, I reject Ground 2. If EJ Deol had ordered inspection pursuant to the May Order, then his failure to determine the issue of relevance would have been an error of law because the May Order only required disclosure of relevant documents, as I have pointed out. However, that was not his order, as I have pointed out. Instead, he ordered disclosure so far as relevant and left the question of relevance to the solicitors.

84. I therefore allow the appeal.

Disposal

85. Mr Nicholls's avowed objective was to persuade me to carry out the exercise which EJ Deol declined to carry out; that is to make a detailed comparison between the post-termination whistleblowing document and the pleaded protected disclosures and to conclude that "logically" the Investigation Documents could not include any disclosable material. He therefore sought to illustrate the correctness of his approach by conducting this exercise before me by reference to a sample of four of the alleged protected disclosures (1, 2, 4 and 5), with a view to convincing me that I could reach a firm view that no order for specific disclosure should be made.

86. For her part, Ms Robertson argued that Mr Nicholls's "logical" approach was unsound but, if it was sound, I should make an order for specific disclosure. She therefore made the same comparison in relation to the eighth protected disclosure and responded to Mr Nicholls on disclosures 1,2, 4 and 5.

87. Ultimately, I was not at all convinced that Mr Nicholls's approach was correct or logical.

a. Without finally deciding the matter, on an examination of the two documents, it seemed to me that there clearly was a significant overlap between the matters raised in the protected disclosures and the matters raised in the post-termination whistleblowing document.

b. Unless it could be said that the post-termination whistleblowing document and the pleaded protected disclosures were about entirely unrelated matters, which they plainly were not, it seemed to me that I could not logically conclude that there could

not be any disclosable Investigation Documents without evidence which explained what investigation had been carried out by the Chief Legal and Compliance Officer and into which issues, what consideration had been given to whether the he considered or created disclosable documents and (if this was the case) confirmed that there were none.

c. I also did not accept that, as a matter of approach, I or the ET could simply ignore the facts that the Claimant's job was to identify gaps in the First Respondent's financial crime and regulatory processes; that she submitted the post-termination whistleblowing document after she had issued proceedings in the ET which alleged that she had made protected disclosures; that she said that the post-termination whistleblowing document was raising the same issues (which was, in effect, her evidence on the point); that the investigation was by the Chief Legal and Compliance Officer and was said to be into whether there were gaps in the Respondents' processes and that it was initially claimed to be protected by litigation privilege, the litigation referred to apparently being this litigation. It therefore seemed to me that the question whether there was or was not an overlap between the concerns raised in the post-termination whistleblowing document and the pleaded protected disclosures would require witness evidence (whether written or oral) and that that evidence was likely to be in dispute.

d. Indeed, it might well be the case that more detailed evidence as to the contents of the Claimant's protected disclosures was required, given that she was saying that the post-termination whistleblowing document covered the same ground. It appeared to me that in a number of instances Ms Robertson was submitting that the pleaded protected disclosures were essentially the headings in terms of the subject matter of the

Claimant's concerns and that the 31-page document contained both the headings and the examples of the issues under these headings, which she intended to give to the ET as part of her evidence as to the protected disclosures which she says she made.

88. To this extent and for these reasons, I was inclined to agree with EJ Deol's view that the Respondents' approach to the issue of "relevance" was too narrow and overly technical. The error of law which he made was not to go on to make his own finding on the issue of whether there were likely to be disclosable Investigation Documents. I also considered that I was not in a position to reach a firm view one way or the other as to whether an order for specific disclosure should be made, given the absence of the sort of evidence which I considered was needed, and also given the lack of time.

89. At the end of Mr Nicholls's reply, I therefore made the point that the heat might well be taken out of this particular disclosure issue if the Claimant's concerns about the veracity of the claim that there were no disclosable documents were laid to rest. This might be achieved if there were a statement from his instructing solicitors which explained the evidential matters which I have indicated. It might also reduce the risk of further applications and save time at trial in that it might reduce the scope for cross-examination of the Respondents' witnesses with a view to establishing that they had something to hide and had gone as far as to breach orders for specific disclosure (I emphatically make no finding one way or the other as to that question).

90. Mr Nicholls said that he would instructions and very sensibly proposed an order which, in broad terms, I am inclined to make subject to submissions as to drafting. Somewhat looking a gift horse in the mouth, the Claimant has asked me to make a more lengthy and detailed Order, but I am not at the moment inclined to do so, albeit I will hear submissions. What I am inclined to do is to hear submissions as to amendments to Mr Nicholls's proposed draft order and then,

subject to what transpires in the submissions, to record that this order was made by consent, given that it was volunteered by the Respondents.

Post Script

91. Having heard submissions I made set aside the Deol Order and made an order in the following terms, which is a modified version of the order proposed by Mr Nicholls:

> BY CONSENT IT IS ORDERED that the Respondents will, within 14 days, provide a statement supported by a statement of truth setting out what searches they have carried out in relation to documents arising from the investigation in response to the Claimant's "Post Termination Whistleblowing Document" and at the same time the Respondents will also provide a statement confirming whether there are any documents relevant to the pleaded protected disclosures arising from those searches which fall to be disclosed in accordance with CPR 31.6 and shall disclose the same to the Claimant, to the extent that they have not already been disclosed.