EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr D Mele	**v**	**1. Angela Mortimer plc** **2. Mr John Mortimer** **3. Mrs Angela Mortimer**

Heard at: **Central London Employment Tribunal (CVP videolink)**

On: **28 and 29 April 2021 and 28 May 2021 in chambers**

Before: **Employment Judge Brown**

Members: **Mr P de Chaumont-Rambert**
Mr R Baber

Appearances

For the Claimant: **Mr J Susskind, Counsel**

For the Respondents: **Mr P Keith, Counsel**

COSTS JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Respondents acted unreasonably and in breach of the Tribunal's orders in failing to disclose relevant documents.

2. The Respondents shall pay the Claimant's costs in the sum of £ 20,000.

REASONS

Preliminary

1. At the remedy hearing in this case the Claimant applied for costs incurred in his application for specific disclosure made on 14 August 2020. The application had resulted in an order for specific disclosure made by EJ Stout following a hearing on 1 October 2020.

2. This was a renewed application for those costs. EJ Stout had decided that a decision on costs would be best made after the Final Hearing in the case.

3. The Respondents objected to the Tribunal making a decision on costs at the remedy hearing. They said that they had not had an opportunity to take instructions on the renewed application, which had been made when the Respondents were preparing for the remedy hearing.

4. The Tribunal decided to hear and determine the Claimant's costs application. It would save time and costs to do so. The Respondents had chosen to produce Mr Horlsey's statement for the remedy hearing very late. It was their own approach to the litigation which had resulted in them having little time to devote to costs. The Claimant should not be put to further expense and delay as a result. In any event, the Respondents had known about the costs application since it had first been made at the time of the specific disclosure application. It was fair to proceed with it. The Tribunal gave Mr Keith time to take instructions, twice, to ensure that the Respondents had a full opportunity to address the costs issues. Mr Keith then addressed the Tribunal, in detail, for more than an hour.

Background

5. The Claimant stated the background to the application as follows.

6. The Tribunal made an order for standard disclosure on 18 February 2020. This superseded all previous orders for disclosure. Lists were to be provided by 5 May 2020 and copies by 19 May 2020.

7. Disclosure by copy took place on 5 May 2020. The individual Respondents, the Second and Third Respondents, disclosed 224 documents between them. The corporate respondent, the First Respondent, disclosed none. The solicitor for the First Respondent stated her 'understanding that R2&R3's disclosure overlapped with R1's and that as a result R1 did not intend to serve its own list'.

8. The Claimant sought further disclosure and, after some further correspondence, the First Respondent disclosed 142 new documents on 24 June 2020 and 54 new documents on 6 August 2020.

9. By a letter dated 14 August 2020, the Claimant applied for specific disclosure in respect of six categories of documents:

   (a) Category 1: Documents relating to Mr Mele's Second Claim.

   (b) Category 2: Documents on R2 and R3's personal accounts and mobile devices.

   (c) Category 3: Documents relating to "investigations" of Mr Mele's protected disclosures

   (d) Category 4: Financial reports

   (e) Category 5: Redacted documents.

(f) Category 6: Redundancy documents.

10. The First Respondent disclosed 25 new documents on 20 August 2020 and 43 new documents on 28 August 2020.

11. At 19:46 on 30 September 2021, the night before the Preliminary Hearing on the disclosure application, the Second and Third Respondents served around 50 pages of new material, which they had previously said did not exist. This included the removal of some redactions which the Judge was due to scrutinise the next day.

12. The Claimant contends that these documents would not have been disclosed if the Claimant had not brought his 14 August Disclosure Application.

13. EJ Stout conducted a hearing on the specific disclosure application on 1 October 2020. Her decision, sent to the parties on 7 October 2020, said this:

> (8) So far as concerns the categories of documents considered at the hearing, the orders I made are set out below. It suffices for present purposes to record the following lest it be of relevance to the panel at the trial:
>
> (i) I made the order for disclosure of documents on the Second and Third Respondents' mobile devices and personal email addresses because it is clear from the documents already disclosed (as well as from their personal history and professional relationship) that there have been significant communications between them otherwise than on work emails, but I was not satisfied that the Second and Third Respondents had definitely carried out a search of their WhatsApp and text messages for the purposes of identifying documents relevant to these proceedings. It appeared from Mr Adams' witness statement that such a search had been carried out for the purpose of responding to the Claimant's Data Subject Access Requests (DSARs), but such a search would not necessarily have produced all documents relevant to these proceedings, and the Respondents' response to this application of 28 August 2020 did not make clear that the WhatsApp and texts for both Second and Third Respondent had been searched. Further, given that solicitors for the Second and Third Respondents had originally in an email of 7 January 2020 asserted that they did not hold any documents relevant to the case 'in a personal capacity', but had yesterday evening produced a significant number of personal emails (some rightly described by the Claimant as 'potentially prejudicial') with a somewhat unsatisfactory explanation that a particular folder in the Second Respondent's inbox had not been searched previously, I considered it appropriate to make a specific order requiring all such relevant emails to be disclosed, if they have not already been disclosed. Further, in the circumstances, there are questions in relation to the disclosure process which the Second and Third Respondents are likely to be cross-examined on at trial and the trial will run more efficiently if these matters are dealt with in witness statements. Given that Mr Keith indicated this may not happen if the matter was left on a voluntary basis, I made an order to that effect.

(ii) Documents relevant to the Respondents' investigations into the Claimant's alleged protected disclosures regarding the Second Respondent's expenses are, even if the investigations happened after the Claimant left, in my judgment relevant to the issues in the case, in particular: (i) the alleged detriment that the Respondent's failed properly to investigate the disclosures; (ii) the reasonableness of the Claimant's belief in the protected disclosures; and (iii) the issue of what the reasons were for the Respondent's treatment of the Claimant. While it is important that the trial does not turn into a trial about the reasonableness or lawfulness of the Second Respondent's expenses, it is necessary to the fair disposal of these proceedings that the Respondents should lay their cards on the table as to the investigations carried out and the views taken by the Respondents' accountants about the allegations. Mr Keith's instructions at this hearing were that there were no such documents, but that is not what the Respondents said when they responded to the application; indeed, they set out at length why the documents were not relevant and that they had disclosed those on which they 'wished to rely'. That latter is obviously not the test and in the circumstances, particularly given that it is accepted that accountants were instructed to investigate the allegations, I did not accept Mr Keith's position that there were no documents. I ordered that what there was should be disclosed.

(iii) The issue in relation to the financial reports was in the end resolved largely by agreement, following my indication that it was plainly necessary for the fair disposal of the proceedings, in the light of the Second Respondent's email of 19 December 2019 in which he suggests that the Claimant has *"made himself redundant"* because of the poor performance of areas for which he is responsible… ".

(emphasis supplied)

14. EJ Stout also considered whether redactions made to a number of documents were appropriate. She decided that some were, but a number were not.

15. EJ Stout made orders for specific disclosure accordingly.

16. EJ Stout did not make a decision on costs at that hearing. She said,

"(16)The Claimant was very critical at the hearing of the Respondents' approach to disclosure and at the end of the hearing made a costs application, although no statement of costs had been filed or served. I refused to decide that application because it is better dealt with by the Tribunal who deals with the full hearing, and which will have the benefit of hearing oral evidence from the Second and Third Respondents on all matters, including the aspects of the Respondents' disclosure process which the Claimant maintains have been unreasonable. The full Tribunal will also be much better placed to assess the ultimate significance of the disclosure issues that I have dealt with."

17. The Claimant says that the Respondents refused to provide supplementary disclosure sought in correspondence over several months, putting the Claimant

to the expense of an Application. The Claimant says that the Respondents then capitulated on almost every aspect of the Disclosure Application and, in any event, were made subject to further disclosure orders

18. He says that the authorities recognise that Claimants in whistleblowing and discrimination litigation often face an uphill struggle. The most important documents tend to be in the exclusive possession of the respondents, and litigants are often unaware that crucial documents even exist, *Eszias v The Welsh Ministers*. The Claimant says that the Respondents in this litigation sought to exploit that imbalance to their advantage, contrary to the orders of the Tribunal and the overriding objective. He says that it was particularly unreasonable for them to do so in respect of a litigant in person of limited means.

19. The Claimant also says that the Respondents used the cloak of legal privilege to conceal evidence which was relevant, prejudicial to their clients, and could not have been considered privileged. By way of example, privilege was used to hide the following remarks: Mr Mortimer telling Mrs Mortimer: 'Davide wants my blood and he doesn't care if he destroys all his previous friends. He thinks you still support him.' Mrs Mortimer telling Mr Mortimer: 'Cannot imagine what he [C] thinks he has on me…He hasn't and he certainly does not have my support.' Mrs Mortimer telling Mr Mortimer: 'The vindictive feelings you have toward each other are destroying our wonderful company.' Mr Mortimer telling Mrs Mortimer: '[C]'s out for blood…' 19.5. Mrs Mortimer telling Mr Mortimer: 'He has nothing on me that you do not know about – which is nothing – no card to play – and he is certainly not on a side I support in any way.'

20. The Claimant pointed out that these emails were referred to on multiple occasions at trial. The Claimant relies on Waite J held in *Birds Eye Walls Ltd. V Harrison* [1985] ICR 278 (emphasis supplied), 'the duty of every party not to withhold from disclosure any document whose suppression would render a disclosed document misleading is a high duty which the tribunals should interpret broadly and enforce strictly." He says that concealing prejudicial material under the guise of legal privilege is clearly unreasonable.

21.. He also contends that Mr and Mrs Mortimer were unreasonable in withholding crucial documents from their personal accounts. He says that it was apparent that such documents existed, because some were revealed by the First Respondent's disclosure. He said that they had positively represented that they did not hold these documents. EJ Stout found: "solicitors for the Second and Third Respondents had originally in an email of 7 January 2020 asserted that they did not hold any documents relevant to the case 'in a personal capacity', but had yesterday evening produced a significant number of personal emails (some rightly described by the Claimant as 'potentially prejudicial') with a somewhat unsatisfactory explanation that a particular folder in the Second Respondent's inbox had not been searched previously".

22. The Claimant contends that it was not reasonable for the Respondents, professionally represented by two firms of solicitors, to wait until 19:46 the night before the Disclosure Application hearing to serve a supplemental bundle of

118 pages, an unsigned witness statement of 41 paragraphs, and around fifty pages of new disclosure.

23. He says that, as EJ Stout indicated, the Tribunal is now in a position to consider the materiality of what was disclosed by the Respondents after the Disclosure Application was made.

24. He says that around 18 of the 92 documents that were eventually cited in the Tribunal's Judgment were only disclosed after the Disclosure Application. These were material to several key findings. For instance:

25. The Tribunal's findings at [87]: "Mr Mortimer then went on to justify various of his expenses but said, "I have heard quite enough from you in this negative vein... I will now have to take your constant negativity seriously, and deal with it. My corporate responsibility to the company now requires it."

26. The Tribunal's findings at [114]: "On 4 December 2018 Mrs Mortimer emailed Mr Mortimer, referring to Ms Burton's grievance and saying that the London office was thinly populated, and that Mr Mortimer was to blame. She said, "Bullying and harassment have become your stock response… please stop shouting at everyone."

27. The Tribunal's findings at [120]: "On 18 December 2018 Mrs Mortimer asked Mr Mortimer, in an email entitled, "Constructive dismissal", whether he had taken legal advice about the Claimant's job. She said that he did not want to make an expensive mistake…"

28. The Tribunal's findings at [134]: "On 7 January 2019 Mrs Mortimer emailed Mr Mortimer referring to the "hot topic of conversation in Wardour Street" and saying that "everyone" was talking about his indiscreet invitation to a pretty member of staff to have drinks at his home, p815:19. Mrs Mortimer was scathing in her criticism of Mr Mortimer's actions."

29. The Tribunal's findings at [136]: "On 8 April 2019 Mr Mortimer composed an email Mrs Mortimer, but sent it to himself, p903:1. It included the following comments, "..it is now clear that your conversations with Davide have been going on for a long time…Even if these conversations had not the clarity of the final putsch attempt, they were extremely successful in discrediting me, and destabilising my team, and undermining the moral position of the company"… "somebody actually succeeded in having [Jo Mortimer] loose [sic] her faith and trust in her father…it is very clear because she explained to me very clearly, that Davide fed her the disinformation" …"…as every lie from Davide is nailed, so our daughter's underlying trust in her father is beginning to return" "…her current position of compromise is that fathers and daughters should not expect to be able to work together, and to thank me for the opportunity……that you and Davide have now taken away from her.""…Davide's most outrageous behaviours, still supported by you…""I do not know when people recognise that the evil that they do is evil, however unintentionally the collateral damage. clarly [sic], for Davide, she was just a lucky opportunity to use to further his private agenda" "…the first, and will become a major witness in the proceedings which I will instruct to continue to the bitter end".

30. The Tribunal's findings at [198]: "On 3 May 2019 Mr Mortimer emailed all 3 women apologising for any "undue duress" and saying the conversation was "not intended to assert pressure", p988:1."

31. The Tribunal's findings at [200]-[203]: "200. On 13 May 2019 Mrs Mortimer sent an email to AM plc's external accountant, copied to Mr Mortimer, asking for the accountant's advice on company expenses, including Salzburg Opera tickets, holidays, wine purchases, pot plants for the home, payment of rent by the company to a staff member, p1076:3. 201. On 15 May 2019 Mr Mortimer replied Mrs Mortimer, saying, "... may I also suggest that you appear to have shared this list, or information on this list, with Davide. The information you have shared with Davide has turned into an apparently striking piece of damaging insight… This particular "insight has in fact been checked with our auditor several times. It is defamatory in its presentation by Davide, because it is in fact wrong… and is intended by Davide to cause damage. That makes it actionable", p1076:2. 202. That email of 15 May 2019 suggested a number of things… 203. Fourth, the email suggested that Mr Mortimer intended some retaliation in respect of the expenses allegations – in that he described the allegations being "defamatory" and actionable."

32. The Tribunal's findings at [240]: "On 25 June 2019 Mr Johnson wrote to Mr Mortimer about the proposal that he become involved in the Claimant's redundancy consultation, p 1188:10. He said that his contribution, "may include helping [the Claimant] create a genuinely workable plan that puts the international side back onto a sustainable footing." Mr Johnson said that the Claimant represented a significant overhead and commented, "According to the financial figures presented to me, the international business is losing money on almost every front, building an intercompany loan than needs repaying." He said of the Claimant, "I am picking up that he could prove to be a dangerous enemy... I am concerned he could create even more damage to a business...". Mr Johnson said that delay would risk "pouring oil on this raging fire"."

33. The Tribunal's findings at [270]-[271]: "271. On 1 August 2019 Mr Horsley drafted a lengthy email, setting out cost cuttings measures the Company had already undertaken and dealing with the financial positions of the Hong Kong and Sao Paulo offices, p1460.1 – 1460.4. He set out proposed wording for Ms Barnard and Mr Johnson to use in their correspondence with the Claimant, "You will be aware, and we have discussed before, that the Angela Mortimer Group has been fighting for profitability…" "For transparency we will also note that we have created a new role, my role, as Operations Manager…" … "It is a fact to say that the European operation is the least profitable out of the major recruitment team groupings…" … "It is therefore clear why the company is seeking to make cost savings in this area."… "…the company is concerned the fee income levels in the Progressis operation seem to have started a downward trend since the start of this year…." … "The company considered the roles inside the European Operation and as the primary, non-billing, non-primary client facing role also coming with the largest staffing costs, your role was considered. Upon looking at the duties that you carry out in your role, and as discussed, we believe that your duties may be primarily taken on by John Mortimer, his team and the other leaders inside the European operation." 272.

In oral evidence Mr Horsley accepted that he was "making the case for redundancy". He responded, "I can see it may be taken that way, yes".

34. The Tribunal's findings at [285]: "On Monday 12 August 2019, when the Claimant asked to come to the office in order to return AM Plc property and collect his personal belongings, Ms Barnard responded "I am in Birmingham today – I can arrange for your personal items including your Nespresso machine to be delivered to your home address today." She asked the Claimant to confirm a time when he would be available for a courier to deliver the items, p1586:2."

35. The Claimant asked the Tribunal to note that almost all of the financial documentation in the case, including the summaries of the various divisions' financial performance (and the PowerPoint presentations) referred to throughout the trial, were not disclosed until the Tribunal so ordered.

36. The Claimant contended that, without the Disclosure Application, this would have been a completely different trial: The Respondents unreasonably sought to conceal key documents from the Tribunal which ended up being critical evidence in the case.

37. The Claimant asked that the Tribunal order the Respondents to pay the whole or the majority of the costs incurred in the Disclosure Application and this Renewed Costs Application, with the amount to be paid being determined by way of detailed assessment carried out by the Tribunal in accordance with the Civil Procedure Rules 1998 (pursuant to rule 78(b).

38. Mr Keith, for the Respondents, said that the Tribunal had made findings about Mr Adams searches of emails for the DSAR request. At para [170] of its liability judgment, the Tribunal had said, "… Mr Horsley had carried out searches of Mr and Mrs Mortimer's personal email accounts and mobile phone records, as well as running reports from Navision and searching the email archive called Mimecast. Mr Adams told the Tribunal that the total amount of time spent conducting the email searches was 177.5 hours. Mr Adams described the search terms used and the problems encountered. The Tribunal was satisfied that Mr Adams and Mr Horsley conducted a thorough and conscientious search of documents and provided these to the Claimant."

39. He said that Sophie Thring, the Respondents' solicitor, had sent out a detailed response to the Claimant's specific disclosure application on 28 August 2020. He referred the Tribunal to Ms Thring's response.

40. In it, Ms Thring had said that a substantive response to the Claimant's communication on 1 July 2020 was provided on 3 July 2020. In relation to the Claimant's assertion that the Second and Third Respondent had provided no supplementary disclosure, she said, "Given that our clients are directors and shareholders of the First Respondent, any documents they have in their possession relating to the Claimant's claims are also in the possession of the First Respondent and have therefore been disclosed separately by the First Respondent. We see no merit in duplicating costs for all parties by disclosing

additional documents identical to those already disclosed by the First Respondent".

41. Ms Thring said that the Claimant had made numerous large requests for documents and that the Respondents had endeavoured to respond to such requests wherever possible.

42. She said that the Claimant was seeking disclosure of the Second and Third Respondents WhatsApp and text messages. She said that the Respondents had carried out full searches on both the Third Respondent's and Chris Horsley's mobile telephones for any reference to ''Davide' 'Mele' 'DM' 'director of international operations' in either WhatsApp or text messages and that this had been done as part of the subject access.

43. She also said, "The Second and Third Respondents have also carried out relevant searches on personal email addresses, as per the Claimant's subject access request, and confirm that all emails produced in that search have been disclosed. The Claimant is already aware of this and again appears to be simply seeking to ensure the Respondents incur further additional and unnecessary costs as part of the Tribunal process." She said that the Claimant had sight of emails already disclosed by the First Respondent so that "Disclosing these emails again separately would have been unnecessary duplication".

44. Ms Thring said that Documents relating to "investigations" of the Claimant's protected disclosures were purely contextual, and would only be relevant to the extent that they demonstrated the importance placed on allegations by the Second and Third Respondents, showing that the alleged disclosures were taken seriously.

45. She said that the Claimant had failed to take account of the Respondent's explanation of its case. She said that the Claimant had refused to confirm the relevance of the investigation documents.

46. Ms Thring said that it was clear from the Claimant's application that he was of the belief that the Second and Third Respondents were in possession of significantly more documents than they were. She said, "This has led to repeated and unnecessary requests for documents that either are not relevant, or simply do not exist."

47. Mr Keith said that, just because there has been an application for specific disclosure and an order has been made, it does not followed that costs should be awarded.

48. He said that it was obvious from the findings of the Tribunal regarding the DSAR searches that email searches were time consuming and difficult, so that the fact that documents were not provided immediately did not show a scurrilous and underhand attempt to subvert the proceedings.

49. Mr Keith said the reason that documents were provided late in the day before the Tribunal hearing on specific disclosure was that the Respondents had had a lot of requests to go through. The Claimant had sent 12 page letters.

50. He also said that it was reasonable for the Respondents to contest whether documents were relevant and/or privileged. He contended that, where parties disagree as to the relevance of documents, it necessarily falls to the ET to make a decision. That did not mean that it was unreasonable to take the position that the application was a fishing expedition.

51. Mr Keith contended that, looking back, the Tribunal should not exercise its discretion to award costs. The fact that the Claimant had made a huge number of unsuccessful claims mitigated against making a costs award in the Claimant's favour.

52. Mr Keith said that, comparing the Claimant's proposed order for disclosure and the final order issued by EJ Stout, category 1 was not ordered and was abandoned. Only 21 of 92 documents where privilege was claimed were decided to be disclosable, so that the Respondents had correctly claimed privilege in respect of more than 70 documents.

53. He said that it was reasonable for the Respondents to take a view of the relevance of the expenses documents. There was precious little discussion of the expenses themselves at trial.

54. Furthermore, Mr Keith pointed out that EJ Stout had accepted that voluminous further disclosure of financial documentation should be avoided.

55. Mr Keith said that the Respondents had produced documents on every occasion documents were sought; they had conducted searches on each occasion and had never refused to do so. He said that covid19 had inevitably interfered with disclosure and that the Respondents' solicitor had been undergoing chemotherapy.

56. Mr Keith said that the Claimant had himself failed to provide disclosure in accordance with the original disclosure order. On 17 July 2020 the Claimant had served 1000+ additional documents, after date for disclosure on 5 May.

57. With regard to the Claimant's Schedule of Costs, Mr Keith contended that no costs should be awarded in respect of requests for disclosure before 14 August 2020, as these were routine requests for specific documents. He said that Counsel's fees for drafting a disclosure request on 28 May 2020 should be disallowed as this predated a request for specific disclosure; and that, in any event, any costs before 17 July 2020 should be dismissed, as it was only on that date that the Claimant had complied with his own disclosure duties.

58. Regarding all claims for reviewing additional disclosure, Mr Keith said that the Claimant's solicitors would have had to undertake that exercise in any event.

59. Mr Keith said that the Second and Third Respondents had set out their position in a lengthy email. The fact that they disclosed documents the night before the hearing suggested that this was not a brazen and cynical attempt to avoid disclosure, but a genuine effort to comply with their duties.

60. He said that many of the documents which the Second and Third Respondents disclosed were, in fact, helpful to their own case, for example, P903 main bundle, so that it made no sense that they were trying to hide these documents.

61. In reply, Mr Susskind said that the application for Category 1 documents was not abandoned – the Claimant had then received documents, so did not need to pursue the application.

62. Mr Susskind said that the date ranges for the DSAR request meant that it was obvious that the DSAR searches would not satisfy the disclosure obligations. Parties in litigation are under duty to disclose documents where they are relevant to the issues in the claim, as opposed to relying on documents disclosed in DSAR requests.

63. He said that the fundamental point was the Respondents were saying that the documents did not exist, when they actually did.

Law

64. *Rule 76 Employment Tribunal Rules of Procedure 2013* provides as follows:

"*76 (1)A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that:*

(a) a party … has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that proceedings or part have been conducted; or

(b) any claim or response had no reasonable prospect of success. ….

….

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party."

65. The Tribunal must consider making an order for costs where it is of the opinion that any of the grounds for making a costs order has been made out.

66. Following *Hayden v Pennine Acute NHS Trust* UKEAT/0141/17, the Tribunal should take two-stage approach:

66.1. Consider whether any of the grounds in *r76(1)(a)* have been established;

66.2. Consider whether, in all the circumstances of the case, a costs award is merited, *Ayoola v St Christopher's Fellowship* UKEAT/0508/13.

Unreasonable Conduct

67. "The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the Claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had." (Per Mummery LJ in *Yerrakalva v Barnsley MBC* [2012] ICR 420 at para 41.

Decision

68. The Tribunal decided that the Respondents had acted unreasonably in the conduct of the proceedings by failing to comply with their duties of disclosure, and breaching the order for disclosure. In particular, they failed to disclose the email correspondence between the Second and Third Respondents from their personal email accounts.

69. The Second and Third Respondents must have known that this personal email correspondence existed, in that they had engaged in it at some length and in some detail. Nevertheless, they had, through solicitors, denied its existence.

70. The Tribunal noted EJ Stout's comments in this regard: "Further, given that solicitors for the Second and Third Respondents had originally in an email of 7 January 2020 asserted that they did not hold any documents relevant to the case 'in a personal capacity', but had yesterday evening produced a significant number of personal emails (some rightly described by the Claimant as 'potentially prejudicial') with a somewhat unsatisfactory explanation that a particular folder in the Second Respondent's inbox had not been searched previously, I considered it appropriate to make a specific order requiring all such relevant emails to be disclosed".

71. The Second and Third Respondents' personal email correspondence was also clearly relevant, as was apparent from the extensive references to it, throughout the Tribunal judgment, as set out by the Claimant in his costs application.

72. It does not matter that this correspondence ultimately may have assisted the Respondents' defence of the claim. It was relevant to the issues and was necessary for a fair hearing.

73. The Respondents failed in their duty to provide relevant disclosure and the Tribunal considered that they put forward no reasonable explanation for doing so. EJ Stout commented disapprovingly on the reason given to her at the specific disclosure hearing. This Tribunal also considered that it is quite clear that parties are required to make disclosure in relation to Tribunal proceedings separately from any DSAR disclosure, which will often relate to different periods and different search terms.

74. The Tribunal observed that the Claimant was, indeed, required to make an application for specific disclosure in this regard on 14 August 2020. It was clear from Ms Thring's email of 28 August 2020 that, at that point, the Second and Third Respondents continued to deny the existence of their personal email exchanges.

75. This was so, even when the Claimant had noticed that some had been revealed on the First Respondent's disclosure.

76. Ms Thring said that the Claimant had had sight of emails already disclosed by the First Respondent, so that "Disclosing these emails again separately would have been unnecessary duplication".

77. The Tribunal considered that it was plainly unreasonable for the Respondents not to check the personal email accounts for more such correspondence at that point, rather than asserting that it must have been disclosed by the First Respondent already. The fact that the Second and Third Respondents had sent some relevant emails from their personal email addresses to email addresses at the First Respondent ought to have put the Respondents on immediate enquiry as to what other relevant correspondence from these personal email addresses had been sent.

78. More broadly, EJ Stout made a very wide ranging disclosure order, even after the Respondents had produced more documents. She disagreed with the Respondents' submissions with regard to many of the categories sought by the Claimant. The Tribunal refers to her decision for its terms.

79. The Tribunal accepted that the Respondents were entitled, as Mr Keith submitted, to contest the disclosure of some documents. Nevertheless, the wide-ranging nature of EJ Stout's order, and the reasons she gave for it, indicated that the Respondents had taken an unduly restrictive approach to disclosure. This, too, was unreasonable.

80. The Tribunal was required, under *r76 (1),* to consider whether to make a costs order, in the circumstances that it did consider that the Respondents had acted unreasonably in the way that the proceedings had been conducted.

81. It decided that it would exercise its discretion to make a costs order.

82. The Claimant made a specific disclosure on 14 August 2020 after significant correspondence between solicitors had not yielded disclosure of the emails from personal email accounts.

83. The Tribunal accepted that the Claimant was compelled to incur the expense of this application by the Respondents' unreasonable failure to provide relevant disclosure hitherto. The Tribunal accepted the Respondents' submission, however, that, before the application, the parties were engaged in normal exchanges about disclosure of documents. Some exchanges about missing documents are inevitable in a case where there are thousands of disclosable documents.

84. The Tribunal did not accept the Respondents' submission that costs should not be awarded because the relevant documents did not, ultimately, assist the Claimant's case. The documents from the personal email accounts were crucially relevant and essential to a fair hearing. They ought to have been disclosed, but it was the Claimant who was put to the expense of ensuring that this happened.

85. The Tribunal accepted that costs in the Claimant's Costs Schedule from 11 August 2020 had been incurred in respect of the 14 August 2020 application.

86. It accepted that the Claimant did incur the costs claimed – disclosure applications require minute, forensic analysis and are very time consuming.

87. Not all disclosure was ordered as sought by the Claimant.

88. Solicitors' costs after 11 August 2020 were £12,815.77 . Counsel's costs were £13,100. Total costs were therefore almost £ 26,000.

89. The Tribunal ordered the Respondents to pay the Claimant's costs in the sum of £20,000, *r78(1) ET Rules of Procedure 2013*. It was in accordance with the overriding objective to make an assessment, rather than order a detailed assessment, which would entail additional costs. In any event, it was appropriate to make a discount for the fact that some of the Respondents' arguments were accepted by EJ Stout.

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Employment Judge **Brown**

Date: 2 July 2021

SENT to the PARTIES ON

02/07/2021.....

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FOR THE TRIBUNAL OFFICE