EMPLOYMENT TRIBUNALS

Claimant	**Respondents**
Mr R Passi	**(1) Nissan Motor (GB) Limited** **(2) Nissan Motor Co Limited** **(3) Mr H Nada** **(4) Mr A Smart**

PRELIMINARY HEARING

Heard by CVP **On: 14 April 2022 (chambers 2 May 2022)**

Before Employment Judge Manley

Appearances
For the Claimant: Mr L Davies, solicitor
For the Respondents: Mr T Croxford QC, counsel

PRELIMINARY HEARING RESERVED JUDGMENT AND ORDERS

1 The claimant's application for specific disclosure is allowed in part as set out in the orders below.

2 The respondents' application for specific disclosure is allowed as set out in the orders below.

3 The matter proceeds to the merits hearing already listed in June 2022.

REASONS

Introduction

1 This preliminary hearing was listed to deal with three case management issues, the merits trial having already been set for 20 days in June 2022. In summary, there was an application by the claimant for specific disclosure and two applications by the respondents, one for a single item of specific disclosure and another to be allowed to amend the response.

2 The claimant's application was the most complex and took most of the time both in discussion on 14 April and in the further submissions. The initial application, made by letter from the claimant's previous solicitors on 20 February 2022, contained a list of 32 requests for many pages of documents. The documents in question were those that had been sent to the respondents by the claimant pursuant to a High Court order. The claimant's case is that many, if not most, of the documents returned by him to the respondents should be disclosed as they are needed for the tribunal merits hearing.

3 The respondents' solicitors replied to the claimant's representatives in detail by letter of 4 April 2022, stating that the requests for disclosure should not be met. In the respondents' view, the requests amounted to a "fishing expedition" because of the broad range of documents requested. The respondents' case is that all documents that should be disclosed for the tribunal proceedings had been disclosed.

4 During the course of preparation for the preliminary hearing on 14 April, at that hearing and before further submissions were made, the application was considerably reduced and is set out below.

5 The respondent's application to amend the response was allowed at the 14 April hearing. I have now determined the respondents' single specific disclosure application having received written submissions and made the order below.

6 Unfortunately, the short delay between the 14 April hearing, the further submissions and my decision has led to further applications for orders and unless orders. There appear to have been (short) delays in documents being sent and the sending of further submissions. I am making no further orders at this point, beyond those below, as I am concentrating on the matters we discussed on 14 April. Without wishing to encourage any further applications, it is, of course, open to the parties to make applications. I remind the representatives that the merits hearing is approaching and further delays are unlikely to aid preparation. The overriding objective should be borne in mind.

<u>The claimant's outstanding specific disclosure application as at 25 April 2022</u>

7 In discussion on 14 April, the respondents agreed to send copies of the documents in dispute to the claimant's solicitor on the conditions as set out in the case management summary. This was to assist the claimant's solicitor, who is relatively new to the case and did not make the original specific disclosure request, in deciding how many of the documents and pages the claimant would maintain in this application for disclosure. The respondents also agreed to send copies of those documents to me to assist me in determining the application. Dates for further submissions were also agreed and I indicated I would do my best to determine the application in the week beginning 3 May.

8 After I read the further submissions and looked through the copies of documents supplied to me, I saw there are a few documents that I have

been unable to ascertain whether they are still sought or not. That is to say, they have appeared in the application at some time but appear not to have been mentioned in the claimant's skeleton argument or further submissions. I admit that I might have overlooked one or two documents, there being so many written applications and submissions to consider. If that is the case, I urge the parties to attempt to resolve matters between themselves but they have leave to come back to me if an important document is missing.

9 What I understand remains to be decided by me in relation to the claimant's application for an order for specific disclosure, after some voluntary disclosure by the respondents and some withdrawal of parts of the application by the claimant is as follows:

Request 6 (101, 109,116)
Request 8; (135)
Request 10; (172, 226 (29 pages long),228,242,254,262,285)
Request 12 (252) – the respondents cannot identify this document;
Request 13 (176);
Request 15 (225, 401);
Request 17 (177, 190, 211, 212, 224, 231, 233);
Request 18 (210 - the respondents cannot identify, 216, 245, 246, 258, 261);
Request 19 (217);
Request 21 (244);
Request 22 (222, 223, 237, 251);
Request 23 (234, 259);
Request 26 (278)
Request 27 (293).

10 As can be seen, some requests apply to one or two documents but others to many more. This has made the task for the lawyers and myself rather complex and may have led us into occasional error. In an attempt to simplify matters as far as possible, I will set out a summary of the legal tests and then explain where I have decided to make orders for disclosure and where I have not.

The legal principles

11 In spite of suggestions to the contrary, I am of the view that there is no significant difference between the representatives as to the legal tests for specific disclosure orders. Rule 31 of the Employment Tribunal Rules of Procedure 2013 gives the tribunal the power to order disclosure of documents as might be ordered by a county court. It is agreed that the test for making an order is whether the documents support or adversely affect a party's pleaded case as reflected in CPR Rule 31. The duty to disclose relevant documents, that is any that relate to the pleaded case which, in a case such as this, will be reflected in the agreed list of issues, is a continuing duty.

12 The decision on whether to make an order for specific disclosure is one where the judge has a relatively wide discretion, with the burden resting

on the party making the application to show that the documents should be disclosed. I must consider whether an order for disclosure "*is necessary for fairly disposing of proceedings*" (Canadian Imperial Bank of Commerce v Beck [2009] IRLR 740). I was referred to Santander UK plc and others v Bharaj UKEAT/0075/20 which gives some guidance where these is a dispute about the relevance of documents. After quoting from Flood v Times Newspapers Ltd [2009] EMLR 18 at paragraph 23 "*the question to be asked is whether they are likely to help one side or the other……taken to mean that the document or documents "may well" assist*", Mr Justice Linden agreed that the test was not the potentially broader and less precise concept of relevance. It was also pointed out that an order must be in accordance with the overriding objective and that applications must be supported by evidence. I am reminded to consider the pleaded issues in the case when deciding the application.

13 With respect to an application for an order for specific disclosure in whistleblowing claims, such as this, I was referred to the very recent case of Dodd V UK Direct Solutions Business Ltd [2022] EAT 44. This case emphasises the point that the party seeking an order must have reasoned arguments by reference to the pleadings and issues as to whether the documents are disclosable.

14 There is another particular dispute in this matter about whether any of the documents attract the protection of legal privilege and whether therefore no order should be made on those grounds. It might be important to mention here that the claimant was a senior in-house lawyer for the first and/or second respondent. As many of the documents consist of those he wrote or received, the question of legal advice privilege merits consideration. Although the claimant's representative stated that the "law of legal privilege does not apply in Japan" (which is where the parties were when many of the communications occurred), I have no knowledge of Japanese law and reject any suggestion that I should apply such a rule, if there is one, to these tribunal proceedings.

15 This is not a case where it seems the respondents are relying on litigation privilege but, for some of the documents, they assert legal advice privilege prevents their disclosure. In Three Rivers (no 5) [2003] EWCA Civ 474 the Court of Appeal considered whether legal advice privilege attached to documentation or internal memoranda of an organisation's employees where there is an investigation. The court decided that information contained in information gathered is not privileged until legal advice is sought on the basis of that information.

Conclusion on the claimant's application

16 First, from reading the submissions, it seems the application is not pursued for a number of documents and/or the respondents have indicated they will disclose them.

17 Secondly, it seems to me that the application and the respondents' resistance to it, falls into two broad categories.

18 The disclosure of many of the documents is resisted on the grounds that the respondents say the documents have no relevance to the claimant's pleaded case. It is said that they do not advance his case. This is a difficult argument to assess, given that the pleadings are extensive and the list of issues is very detailed and runs to 13 pages. This is a public interest disclosure detriment and dismissal, unfair dismissal and victimisation case. The agreed list of issues refers to 7 alleged public interest disclosures with 40 detriments. The legal tests for public interest disclosure claims are relatively complex, involving a number of steps, including assessing the reasonable belief of the person making the disclosures. Of course, for the unfair dismissal claim, which is linked to the public interest disclosure claim, the tribunal will also be assessing whether the actions of the first and/or second respondents were reasonable. For the victimisation claim, the tribunal will be assessing whether there was a causal link between the protected act and the treatment complained of. All this makes it particularly difficult to assess, at this early stage, whether a document is likely (or not) to advance the claimant's case.

19 I am particularly concerned that making no order for disclosure could lead to the situation where an important piece of evidence is not before the tribunal at the merits hearing when it is applying those legal tests. The risk that documentary evidence is excluded now which may well assist the claimant, or, indeed, the respondents, is high. I have been told that the respondents have disclosed over 6000 pages of documents to the claimant (from a review of over 26,000) and the tribunal could have 15 lever arch files of documents. I admit that I am rather at a loss to understand why the disclosure of these relatively few (around 100) documents now requested is resisted so strongly. Tribunals are very used to seeing large files of documents where only a small proportion are ever considered. I am not yet convinced that the parties have always had the overriding objective in mind when pursuing and resisting these applications.

20 Save for those where legal advice privilege attaches, which I come to next, as long as I have been satisfied that the document may well advance the claimant's case, as I understand it at the moment and there is no issue of legal advice privilege, I have ordered disclosure.

21 I have taken into account the fact that many of the documents now requested are documents which the claimant had access to whilst he was employed and he is often either the author or mentioned in the documents. There was a highly complex investigation into alleged wrongdoing by senior executives of the corporate respondents and I believe it will assist a fair hearing for the documents to be disclosed. I have also taken into account that the respondents will have the opportunity to argue that some of the disclosed documents should be included in a Rule 50 order which is to be considered at the commencement of the merits hearing. Of course, just because a document is disclosed does not mean it necessarily has to appear in the bundle of documents for the hearing.

22 A list of the documents to be disclosed is as follows:

Request 6 – documents 101, 109, 116
Part Request 10 – documents 172, 228, 242, 254,262, 285
Request 17 – documents 177, 190, 211, 212, 224, 231, 233
Request 18 – documents 216, 245, 246, 258, 261,
Request 19 – document 217
Request 22 – documents 222, 237, 251
Request 23 – documents 234, 259
Request 26 – document 278

23 The other category of documents which are disputed are those for which it is argued legal advice privilege attaches. This is limited to a relatively small number of the documents now requested. I have read those documents relatively carefully and do believe that some of them should not be disclosed. It is clear to me that they do contain legal advice.

24 For instance, Request 13 (document 176) is a legal briefing note, marked privileged and confidential. On balance, I also take the view that Request 15 (document 225) attracts legal privilege (and note here that the document 401 that I have seen seems only to be an envelope). Request 21 – document 244 is clearly marked as a privileged document.

25 Request 17 is now argued by the respondents to contain legal advice. I appreciate it contains communication between employees, some of whom are lawyers but, upon reading those communications, I do not accept that it contains legal advice. It is not marked as such and this was not an argument which I can see the respondents made earlier. As can be seen, I have ordered disclosure of the documents at Request 17.

26 I had particular difficulties with the long document 226 at Request 10. Again, it seems that some parts may contain legal advice but I have seen few references to this document by the parties. It is now said by the claimant that some pages are not relevant but some are. The respondents say parts of the document are privileged. I have decided to make no order for document 226. If it remains an issue, the parties should now have enough information and guidance from my decision to be able to agree on whether that document (or parts of it) is disclosable.

27 I make no order for Request 27 which is a public document. I see no potential relevance for Request 8 and make no order for it. I cannot make any order for Request 12 as it cannot be identified nor can document 210 in Request 18.

Conclusion on the respondents' application for specific disclosure

28 I can see no good reason for information about the claimant's new employer to be withheld. The claimant's representative argued that it was not relevant for the liability hearing in June but accepted it would be needed for remedy. Provision of this information is in line with good practice and the overriding objective and I order it is provided.

Orders

Made under the Employment Tribunal Rules 2013

1 The respondents are ordered to disclose the documents set out at paragraph 22 above for inclusion in separate Rule 50 bundle (if necessary) by **13 May 2022**

2 The claimant is ordered to disclose the identity of his new employers to the respondents by **13 May 2022**

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

2. The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge Manley

Dated: 3 May 2022

Sent to the parties on:
4 May 2022

For the Tribunal: