THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms C Stewart	**v**	**Foreign, Commonwealth and Development Office**

Heard at: London Central **On**: 19 April and 18 May 2023

Before: **Employment Judge Glennie**

Representation:
Claimant: Mr G Millar KC
Mr D Hutcheon, Counsel

Respondent: Mr B Cooper KC
Mr M Green, Counsel
Ms J Twomey, Counsel

REASONS

1. These reasons relate to the Orders made on 18 May 2023 and sent to the parties on the date shown on the relevant document. The substantive hearing took place on 19 April 2023, when I heard submissions and reserved judgment with a view to delivering oral reasons for such orders as I made on that date. My purpose in approaching the matter in this way was to enable the parties to know the reasons for my decision without having to wait for written reasons to be provided, it being the case that if I were to make any orders under rule 94 of the Rules of Procedure, those reasons would have to be sent to the relevant Minister for potential editing before they could be released to the parties. These written reasons are produced in response to the Claimant's request.

2. There was an agreed bundle of documents, and page numbers in these reasons refer to that bundle unless otherwise indicated.

3. The claim makes complaints of detriments for making protected disclosures; automatic unfair dismissal relying on the making of protected

disclosures; and "ordinary" unfair dismissal. The Respondent disputes those complaints.

4. In short and (I hope) neutral summary, the background is that the Claimant, who was employed by the Respondent, revealed to a journalist some information concerning the evacuation of personnel from Afghanistan. It is common ground that, by reason of this, the Claimant's security clearance was withdrawn. Subsequently, she was dismissed from her employment. The Claimant's case is that her passing of information to the journalist amounted to the making of protected disclosures within Part IVA of the Employment Rights Act 1996; that her suspension and the withdrawal of her security clearance were detriments; and that the reason or principal reason for her dismissal was the making of the disclosures.

5. The Respondent's application was made in a letter dated 10 March 2023, at pages 103-107. As originally put, the orders sought were as follows:

   5.1 That the final hearing be heard, in person, before a designated national security employment judge, in a secure hearing room, and partially in private under rules 94(2)(a), 94(1)(a) and 94(10) of the ET rules.

   5.2 That certain documents (as described below) be redacted for the Open hearing bundle and as part of disclosure, but that unredacted versions will be available to both the Tribunal and the parties at the final hearing. The unredacted documents will also be available for the Claimant and her representatives to inspect at a mutually convenient time(s) and location before the final hearing.

   5.3 That the Claimant and her representatives must maintain the confidentiality of these documents by not using them for any collateral purpose, nor passing any content on to anyone else, nor discussing any content with anyone other than each other and the Respondent's representatives (for the avoidance of doubt, any documents the parties disclosed to each other should in any event only be used for the purposes of these proceedings and not for any collateral purpose, analogous to the principles of the Civil Procedure Rules 1998, 31.22).

   5.4 That any evidence about or discussion of the redacted part of the documents take place in private.

   5.5 That further documents in the case such as judgments and reasons are reviewed by the appropriate Minister under rule 6(1) of the ET rules, [i.e. rule 6(1) of The Employment Tribunals (National Security) Rules of Procedure] if and as required, prior to publication.

   5.6 That these orders are kept under review to ensure they remain both sufficient and proportionate for the protection of national security interests.

6. Of these it is common ground that proposed order (1) (apart from the reference to a hearing partially in private, which is covered by order (4)), and proposed orders (5) and (6) refer to matters that would flow automatically from the making of an order under rule 94, and so would not form express provisions of such an order.

7. The live aspects of the application concern 4 documents, which are referred to in the application at pages 104-105. They are the following:

   7.1 The Vetting Decision Framework ("VDF"). This is a guide to vetting officers as to what factors to take into account when making a vetting decision and what weight to give to various factors.

   7.2 Extracts from the Personal Security Policy ("PSP"). This sets out procedures to be followed after a vetting decision has been made.

   7.3 A submission from the Respondent's Head of Personnel Security Ms Shepherd, which sets out the reasoning behind recommendations to withdraw the Claimant's security clearance. This refers to the VDF, the factors taken into account, and the weight given to them.

   7.4 A submission from the Respondent's Deputy Director of Human Rights and Rule of Law Department Mr Dick, which in a similar way to Ms Shepherd's submission, recommends the dismissal of the Claimant's appeal against the withdrawal of clearance.

8. What has happened so far in relation to these documents is that the Respondent has provided redacted copies of the PSP and the two submissions to the Claimant's representatives but have not provided a copy of the VDF. They have provided facilities for the Claimant's representatives to view the VDF (unredacted) and the unredacted two submissions, in accordance with proposed order (2), but have not done the same with regard to the PSP, stating that the redacted parts (as well as being sensitive on national security grounds) are not relevant to the issues in the claim.

9. I have begun my consideration of the application with the issues as to proposed order (2). Mr Cooper's primary submissions relied on rule 94 of the Rules of Procedure, which includes the following provisions:

   (1) Where in relation to particular Crown employment proceedings a Minister considers that it would be expedient in the interests of national security the Minister may direct a Tribunal to –

   (a) Conduct all or part of the proceedings in private;
   (b) Exclude a person from all or part of the proceedings;
   (c) Take steps to conceal the identity of a witness in the proceedings.

   (2) Where a Tribunal considers it expedient in the interests of national security, it may order –

(a) In relation to particular proceedings (including Crown employment proceedings), anything which can be required to be done under paragraph (1);
(b) A person not to disclose any document (or the contents of any document), where provided for the purposes of the proceedings, to any other person (save for any specified person).

10. The argument on behalf of the Respondent is that proposed order (2) amounts to an order under rule 94(2)(b) that the Respondent shall not disclose (in the form of giving inspection by providing a copy) to the Claimant and her lawyers (and so to "other persons") parts of the relevant documents.

11. I accept that the term "disclosure" is often used in a comprehensive way so as to mean disclosure and / or inspection of documents, such that the fact that the rule does not refer specially to inspection would not in itself be a bar to this particular interpretation. I also find that, as a matter of practical interpretation, the "contents" of a document may mean some, but not all, of the contents. If the Tribunal could order non-disclosure of all of the contents of a document, then it must (in my judgement) be able to order non-disclosure of some of the contents.

12. Mr Millar submits that rule 94(2)(b) does not bear this interpretation, and that what it provides for is an order, directed to a person to whom a document has been provided, not to disclose the document or its contents to anyone else, save for such other person as may be specified.

13. I agree with that submission. I find that it would be straining the language of the rule beyond what it can reasonably bear to say that it enables me to order the Respondent, on the Respondent's own application, to restrict inspection (as part of the disclosure process) by the Claimant of a document which has been "provided" to the Claimant, by way of disclosure given by the Respondent. I agree with Mr Millar that, if Parliament had intended to say in this rule that a person could be authorised not to disclose (including giving inspection of) an otherwise disclosable document or its contents, it would have done so in plain terms, and not in the roundabout fashion that the Respondent suggests.

14. The Respondent's second line of argument relies on rule 29 of the Rules of Procedure, read with rule 94(10). These provide as follows:

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

*94. **National security proceedings.***

(10) The Tribunal must ensure that in exercising its functions, information is not disclosed contrary to the interests of national security.

15. It is common ground that the power to make case management orders includes the power to make orders for disclosure and inspection: see section 7(3)(e)(i) of the Employment Tribunals Act 1996.

16. CPR 31.19 enables the civil courts to restrict disclosure of documents in the following terms:

    (1) A person may apply, without notice, for an order permitting him to withhold disclosure of a document on the ground that disclosure would damage the public interest.

17. In a different context from the present one (i.e. commercial confidentiality in public sector procurement) Ramsey J in **Croft House Care Limited and others v Durham County Council** **[2010] UKHC 909** made orders restricting inspection of documents by the Claimant's directors and personnel in terms somewhat similar to those sought by the Respondent in the present case. Given the specific terms of rule 94(10), and the general case management powers in rule 29, and taking the CPR provisions and he interpretation of these as a guide, I have concluded that the Employment Tribunal is able to make orders of this form, where the interests of national security are engaged.

18. Having reached that conclusion, I have asked myself whether I should make an order of the sort contended for by the Respondent in the present circumstances.

19. In the first instance Mr Millar asserts, correctly, that the Respondent has not produced any witness evidence in support of the application. It is the case that a general need for evidence is referred to in the authorities. For example, in paragraph 48(i) of her judgment in **Fallows v News Group Newspapers Limited** **[2016] ICR 801** (a case about reporting and not involving national security, but which identifies a generally applicable principle about open justice) Simler J said that:

    "…the burden of establishing any derogation from the fundamental principle of open justice or full reporting lies on the person seeking that derogation. It must be established by clear and cogent evidence that harm will be done…….."

20. I find this a relevant and helpful statement of principle. Does it mean that the order sought by the Respondent cannot be made in the absence of witness evidence about the risks concerned? I find that it does not. In the context of the predecessor of rule 94, namely rule 54 of the 2004 rules, Underhill J said the following in paragraph 19(3) of his judgment in **AB v Secretary of State for Defence** **UKEAT/101/09**:

"……..”The interests of national security" constitute a factor of a rather particular nature. Where those interests are genuinely engaged the stakes are high: they will involve real risks to the national interest generally and, typically, real risks (of a more or less direct nature) to the lives of members of the armed forces or the security services or of others. An established risk of such outcomes must of its nature weigh heavily in the opposite balance against the principle of open justice, important though that is. Of course sometimes it will not be self-evident that that any such asserted risk is indeed present or is serious. In such a case, however, the tribunal needs to be aware that the risks in question will often be of a kind which it is not well placed to assess – even if, which will itself often be disproportionate or unrealistic, appropriate direct evidence relating to the risk could be adduced before it."

21. In saying that sometimes it will not be self-evident that the risk to national security is present or serious, Underhill J evidently envisaged situations in which that would be self-evident; and this is strengthened by the suggestion that it might be disproportionate or unrealistic to adduce direct evidence on the point. I find that the risk is self-evident in the present case. The evidence of it is to be found in the contents of the documents themselves.

22. I have already outlined what the VDF contains. I find it self-evident that, to the extent that it gives guidance to officers as to how to reach vetting decisions, it could equally provide guidance to those wishing to obtain security clearance as to how they might try to manipulate the process.

23. Mr Millar submitted that the contents of the VDF would not or should not come as a surprise to anyone as they reflect common sense. In my judgement, finding that the document makes sense when one reads it (it might be a surprise if it did not) is not the same as being able to speculate about what it might contain, based on the application of common sense, but without having read it. In the absence of the hard information, anyone's guess as to what it might contain would remain a guess, which I find is very different from knowing what it contains, and how those contents are expressed. Some parts of the guidance might be regarded as obvious, such as that concern could be raised by past infringements of security regulations. Others I find not so obvious; for example, at (k), "has sought to exploit legal loopholes or variations in different countries by undertaking activities illegal in the UK…."

24. Similarly, I find that, in the main, the two submissions self-evidently contain information the publication of which could put national security at risk. They show how particular relevant criteria were applied in the Claimant's case, which factors were given weight, and which were not. Again, I find that this information could give guidance to anyone seeking to manipulate the vetting process.

25. On this point, I considered whether I should take a different view of paragraphs 8 and 9 of Ms Shepherd's submission, on the grounds that they recount facts which will be in evidence in any event. The Respondent's

position on this was that the appearance of these facts in the submission shows that they were considered relevant to the vetting recommendations, and so should be regarded in the same light as the remainder of the document. I considered that, as suggested in **AB**, this may be a point on which I am not best placed to judge, and that I should give weight to the Respondent's submission.

26. In **AB** Underhill J stated that there was little to be gained by debating the use of the words "necessary" and "expedient" in this context. Assuming that the former is the stricter test, I find that it is necessary in the interests of national security to make the order the Respondent seeks restricting inspection of these 3 documents.

27. In saying this, I am not in any way finding or suggesting that, if the Claimant and her legal advisers were to possess copies of the unredacted documents, one of them might decide to disclose one or more of the documents either to the world at large or to particular individuals. It is the case, however, that for every person who has copies of the documents, the risk of their becoming more widely available because of some inadvertence or error increases. Everyone is capable of making a mistake, of mislaying something, or forgetting to take a particular precaution. The most careful people can unintentionally lose control of a document.

28. I have had to consider this against the background of the important principle of maintaining equality of arms as between parties to litigation. I find that the sensitivity of the contents of the documents is such that it is necessary to take the step of not allowing physical copies to come into the possession of the Claimant and her legal advisers. I accept that this puts them at something of a disadvantage: but, as demonstrated by the proposal that they should have access to the documents, as opposed to having copies of them, this can be mitigated to some degree.

29. I therefore make the order sought by the Respondent in respect of the VDF and the two submissions, but for one aspect. This was not in the original application, but has been put in the Respondent's submissions. It is a provision that the Claimant and her legal representatives should not be permitted to make verbatim notes of the contents of the documents.

30. I am not sure that the Tribunal has power to order that, but assuming that under its general case management powers it does, I would not do so. There are two reasons for this, namely:

    30.1 In my judgement this is not necessary. There is a significant difference between someone saying that they have read something in a document (even when supported by a note of what they say they have read) and having the document. The relevant government entity could deny or remain silent about the former, but could not realistically deny or ignore the document itself.

30.2 There would be difficulty enforcing such an order. At what point would a note become or cease to be verbatim? What degree of variation from the original would enable the note-taker to say that it was not verbatim?

31. I have not therefore included an order restricting the taking of notes of the documents.

32. I have not so far mentioned the redacted parts of the PSP. I have not seen the unredacted document and have not asked to do so. This is because I find that it is covered by the established principle, referred to by HHJ Tayler in paragraph 85 of the judgment in **Frewer v Google UK Limited [2022] EAT 34**, citing the Court of Appeal in **Hancock v Promontoria (Chestnut) Limited [2020] EWCA Civ 907**, as follows:

    "It has been settled law in this jurisdiction for well over century that a litigant giving disclosure of documents is entitled to redact parts of a document that are irrelevant, and in all normal circumstances a certificate to that effect by the party's solicitor will be treated as conclusive."

33. I do not consider the situation in the present case to fall outside of "normal circumstances" and I take the statement by the Respondent's solicitor in correspondence that the redacted parts are irrelevant as conclusive. The Claimant could ask for a witness statement to that effect: I do not require that on my own initiative and it is not something that I am positively encouraging.

34. I now turn to the question of public access to the documents and to the hearing. Again, I remind myself of the importance of the principle of open justice, which should only be derogated from and to the extent necessary.

35. Everything I have said in connection with the need to restrict inspection of the VDF and the two submissions applies to the Respondent's application for redaction of the copies of the documents in the bundle to be made available to the public. The VDF should not be in the public bundle and the copies of the submissions should be redacted.

36. It follows that the parts of the hearing where the VDF or the redacted elements of the two submissions are referred to should take place in private (as permitted by rule 94(1)(a) and (2)(a)). I do not see any insurmountable practical difficulty about that: in any event the importance of not allowing the content of the documents into the public domain is, in my judgement, such that any practical difficulty will have to be overcome.

37. Clause 3 of the Respondent's application was, in the event, dealt with by agreement, and no order in that regard is required.

38. Finally, an element of Mr Millar's submissions about proposed order 2 was to the effect that the only possibilities open to the Tribunal were to leave inspection of the relevant documents unrestricted, or to make an order

under rule 94(1)(b) and (2)(a) excluding the Claimant and her legal representatives from that part of the proceedings in which the relevant documents were considered. That in turn would invoke the special advocate process under rule 4 of the National Security Rules of Procedure.

39. Mr Millar agreed that this represented an "all or nothing" approach, and clearly urged that the correct answer was "nothing", i.e. leaving disclosure and inspection of the relevant documents unrestricted. I should say that, had I been convinced that the Tribunal did not have power to make an order of the sort contended for by the Respondent, and that I therefore had to choose between "all" or "nothing", I would have felt compelled to select "all" and exclude the Claimant and her representatives from the relevant part of the proceedings, because of the need to protect the confidentiality of the documents .

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Employment Judge Glennie

Dated: …29 Aug 23

Judgment sent to the parties on:

29 Aug 23

For the Tribunal Office