Neutral Citation Number: [2023] EAT 125

Case No: EA-2022-001365-OO

EA-2022-001365-OO

EMPLOYMENT APPEAL TRIBUNAL

7 Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11 July 2023

Before:

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE

- -

Between:

MR IONUT COSMIN ONEA	**Appellant/ Claimant**
- and -	
CONTINGENT AND FUTURE TECHNOLOGIES LTD	**Respondent/ Defendant**

- -
- -

MISS MING-YEE SHIU (instructed by **DWF Law LLP**) for the **Appellant/Claimant**
MR JAMES WYNNE (instructed by **Bird & Bird LLP**) for the **Respondent/Defendant**

Hearing date: 11 July 2023

- -

JUDGMENT

- -

SUMMARY

Practice and procedure – stay of Employment Tribunal proceedings pending determination of concurrent claims before the High Court

The claimant was a co-founding employee of the respondent, along with his fellow directors and shareholders, Taiwo Alegbe and Rajpal Wilkhu. He brought a claim in the Employment Tribunal ("ET") for whistleblowing (detriment and automatically unfair dismissal), "ordinary" unfair dismissal and wrongful dismissal. The ET refused his application for a stay of the claim pending resolution of two High Court proceedings, namely: (i) a breach of confidence action brought against him by his former employer, the respondent; and (ii) an unfair prejudice petition he had filed against Mr Alegbe, Mr Wilkhu and the respondent.

The Employment Appeal Tribunal ("EAT") allowed the appeal, identifying that the ET had erred in law. The Employment Judge had failed to ask in which forum the dispute would be most conveniently and appropriately tried (**Bowater plc v Charlwood** [1991] ICR 798 EAT). Rather than weighing up all relevant factors and addressing this question, the ET had wrongly held that it was incumbent on the claimant to meet a threshold criterion of showing "a very real risk of considerable embarrassment to the High Court". In addition, the ET did not take into account a relevant consideration, as it failed to appreciate that there was a considerable degree of overlap between the ET claim and both of the High Court proceedings. The ET also erred in identifying as one of the reasons for declining the stay, that the application should have been made to the High Court, rather than to the ET, to resolve the question.

With the parties' consent, the EAT re-determined the question of whether a stay of the ET claim should be granted, holding that in all the circumstances the High Court was the most convenient and appropriate forum for the issues to be tried in respect of both proceedings.

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS:

1. I will refer to the parties as they were known below. The claimant appeals from the order of Employment Judge Khan sitting at the London Central Employment Tribunal ("the ET") refusing his application for a stay of the Tribunal proceedings ("the ET Claim"). It was sent to the parties on 18 October 2022.

2. The claimant was a co-founding employer of the respondent, along with Taiwo Alegbe and Rajpal Wilkhu. At the time of the material events, the claimant was the respondent's Chief Product Officer, Mr. Alegbe was employed as the Chief Executive Officer, and Mr Wilkhu was the Chief Technology Officer. All three were directors and shareholders in the respondent.

3. The claimant resigned, asserting constructive dismissal on 11 October 2021. The following day, he was purportedly dismissed for gross misconduct.

4. The stay of the ET Claim was sought pending the determination of two High Court proceedings: (i) a High Court claim brought by the respondent against the claimant issued in the Business and Property Court, Business List Claim No. BL-2021-002014 claiming injunctive relief in respect of alleged misuse of confidential information ("the Confidentiality Claim"); and (ii) an unfair prejudice petition filed by the claimant in the High Court Business and Property Court, Insolvency and Companies List, Case No. CR-2022-003204 in which Mr Alegbe is the first respondent, Mr Wilkhu the second respondent, and the respondent to the ET Claim is the third respondent ("the UP Petition Proceedings").

5. By order sealed on 12 May 2023, the appeal was set down for a full hearing by Eady J (President).

6. Before me was a main bundle of documents and a supplementary bundle. The respondents sought permission to rely upon the latter (which was necessary as it was a little over 200 pages). The claimant did not oppose this, and I duly granted permission to do so. The documents it contains are primarily the pleadings in the Confidentiality Claim, which are plainly relevant to the issues that I have to resolve.

7. The respondent also made an application to rely on its solicitors' notes of the hearing before the ET. This application was opposed by the claimant. At the outset of the hearing, I indicated I would consider this document on a provisional basis and give my ruling on its admissibility as part of this judgment.

8. There is a hearing in the UP Petition Proceedings this Friday (that is to say 14 July 2023). Mr Alegbe and Mr Wilkhu apply to strike out the petition. In the alternative, they seek a stay of those proceedings until after the ET Claim and the Confidentiality Claim are heard and decided. In the circumstances, it appeared to me important that I gave an ex tempore judgment on this appeal today as, if I reserved judgment, (a) the High Court would not be aware of the outcome of this appeal and (b) I would risk arriving at my judgment without knowing what had occurred at the hearing on Friday, absent, at least, a further round of submissions in this appeal. Indeed, on the worst-case scenario, both proceedings might be stayed in the erroneous belief that the other was proceeding. I indicated this to counsel at the outset of the hearing.

9. I also explored with counsel at the outset of the hearing what should happen if I were to decide to allow the appeal after hearing their submissions. The claimant's position was that I should proceed to decide the question of whether a stay should be granted. After having had the opportunity to take instructions, Mr Wynne agreed to this course.

SUMMARY OF THE GROUNDS OF APPEAL

10. The claimant relies upon four grounds of appeal. In summary, as set out in the appeal notice, they are as follows.

11. Firstly, that the ET erred in refusing the stay on the basis that there was not a considerable overlap between the respective proceedings, when the overlap was in fact very substantial, such that if the ET Claim were to be heard first, the judgment would contain binding decisions on issues of fact and law that would be likely to embarrass the High Court Judges hearing the UP Petition Proceedings and the Confidentiality Claim ("Ground 1").

12. Secondly, that the ET erred in taking into account the delay to the full hearing of the ET Claim if the application was granted ("Ground 2").

13. Thirdly, the ET erred in taking into account "the liberty of the claimant to seek a direction from the High Court on whether the ET Claim should be stayed at a CMC on 18 October 2022" ("Ground 3").

14. Fourthly, the ET erred in deciding that it was not in the interests of justice overall to grant a stay of the ET Claim, when it was clearly in the interests of justice to do so ("Ground 4").

THE MATERIAL EVENTS AND THE ET'S REASONING

The Claimant's Employment

15. The respondent is a provider of supplier insight software. The claimant was employed initially as Chief Technology Officer and subsequently as a Chief Product Officer from 5 June 2019. I will summarise the events leading up to the termination of his employment briefly and in neutral terms.

16. On 9 August 2021, the claimant was sent an email informing him that he was suspended pending an investigation into alleged performance and conduct issues. He attended an investigation meeting with Mr Wilkhu on 16 August 2021. It was further alleged he had breached the terms of his suspension, and an investigation meeting was held in respect of this allegation on 20 August 2021. The claimant attended a disciplinary hearing in relation to the original misconduct allegations on 15 September 2021. On 20 September 2021, he was issued with a final written warning, which he was informed would remain active on his file for a period of at least four weeks. His appeal against the warning was rejected by Mr Alegbe on 28 September 2021.

17. On or about 20 September 2021, the claimant was informed of a third investigation. This was into his allegedly unauthorised use of the respondent's online systems. The claimant did not attend the investigation meeting in respect of this matter on 30 September 2021. On 4 October 2021, he was invited to a disciplinary hearing on 11 October 2021.

18. On 6 October 2021, the claimant's solicitors had written to the respondent asserting that the respondent was trying to force him out because of an allegation

he had made about Mr Alegbe in respect of a contract with the Ministry of Defence ("the 6 October 2021 Letter"). On 7 October 2021, the respondent notified the claimant that it had reported him to the Information Commissioner's Office for an alleged data breach. On 11 October 2021, the claimant made a whistleblowing report in relation to the Ministry of Defence allegation ("the 11 October 2021 Report").

19. On the same day, that is to say, 11 October 2021, the claimant resigned from his employment and directorship with the respondent, asserting there had been a breakdown of his trust and confidence in the respondent. The respondent did not accept his resignation, and continued with a disciplinary hearing scheduled for that day. The disciplinary panel chaired by Mark Wood decided to dismiss the claimant for gross misconduct. The claimant was so informed on 12 October 2021. As a result of his dismissal, the respondent deemed the claimant a "Bad Leaver" with adverse consequences for his shareholding.

The ET Claim

20. On 28 January 2022, the claimant commenced the ET proceedings. He claimed he had made protected disclosures in respect of the Ministry of Defence allegation concerning Mr Alegbe (including in the 6 October 2021 Letter and the 11 October 2021 Report), and that in consequence he had been subject to specified detriments by the respondent and he had been automatically unfairly dismissed. He also claimed for "ordinary" unfair dismissal and for wrongful dismissal, the latter on the basis that his employment had been terminated without notice. The unfair dismissal claim was advanced on the basis that he had been

constructively dismissed on 11 October 2021 or that he had been summarily dismissed on 12 October 2021.

21. The respondent filed its response on 24 March 2022. All claims were denied. In its grounds of resistance, the respondent referred to the Confidentiality Claim and indicated it would be applying for the ET to stay the proceedings until the completion of that litigation. The respondent subsequently changed its position and opposed the claimant's application for a stay.

22. As set out in the ET's case management order promulgated on 18 October 2023, the 18-paragraph agreed list of issues between the parties included the following:

> "Protected disclosures (ERA 1996 ss. 43B and 43C)
>
> 3. Did the claimant make qualifying disclosures? The claimant relies on the following:
>
> 3.1 On 30 October 2019, informing Rajpul Wilkhu that Tai Alegbe had created a fake email account and used the identity 'Harry Smith' in a meeting with the MoD?
>
> 3.2. On 12 September 2020, in a co-founders meeting, saying to Mr Alegbe and Mr Wilkhu that Mr Alegbe had assumed a false identity when communicating with the MoD, and asking to see a copy of the contract to ensure it had not been signed under a false name?
>
> 3.3 On 6 October 2021, the claimant's solicitors writing to the respondent to state that Mr Alegbe had assumed a false identity when communicating with the MoD to hide the fact that he was in a relationship with a senior procurement official at the MoD?
>
> 3.4 On 9 and 11 October 2021, completing and sending to the respondent a whistleblowing report which stated that Mr Alegbe has assumed a false identity when communicating with the MoD to hide the fact that he was in a relationship with a senior procurement official at the MoD?
>
> 4. Did the claimant thereby disclose information which:

4.1 In his reasonable belief, tended to show that Mr Alegbe had committed, was committing or was likely to commit a criminal offence (s. 43B(1)(a))?

4.2 In his reasonable belief, was in the public interest?

5. Did the claimant therefore make protected disclosures to the respondent under s. 43C ERA 1996?

Detriment (ERA 1996 s. 47B)

6. Did the respondent subject the claimant to the following detriments on the ground he had made the protected disclosures:

6.1 Side-lining and excluding the claimant.

6.2 Fabricating a series of conduct issues about the claimant.

6.3 From 9 August to 11 October 2021, suspending the claimant.

6.4 Subjecting the claimant to a sham disciplinary process.

6.5 On 23 September 2021, during the claimant's appeal against the final written warning, withholding evidence the claimant was not aware of, and which was significant.

6.6 On 4 October 2021, reporting the claimant to the ICO for having what the claimant alleges were legitimate records of business meetings.

6.7 On 11 October 2021, declaring the claimant a 'Bad Leaver' and removing his shareholding.

Dismissal

7. Was the claimant constructively dismissed?

8. Did the claimant resign in response to the following breaches of the implied term of mutual trust and confidence?

8.1 Side-lining and excluding the claimant.

8.2 From 9 August 2021, fabricating a series of conduct issues about the claimant.

8.3 From 9 August to 11 October 2021, subjecting the claimant to a sham disciplinary process.

8.4 On 23 September 2021, during the claimant's appeal against the final written warning, withholding evidence the claimant was not aware of and which was significant.

8.5 On 4 October 2021, reporting the claimant to the ICO for having what the claimant alleges were legitimate records of business meetings.

9. Did the claimant resign in response to the alleged repudiatory conduct, or in response to the prospect of having to face a disciplinary process and the likely sanction that would result?

10. Did the claimant resign without delay so as not to constitute affirmation or acceptance of the breach of contract?

11. Alternatively, was the claimant dismissed by the respondent?

Automatically unfair dismissal (ERA 1996 s. 103B)

12. If the claimant was dismissed, was the sole or principal reason that he made one or more of the protected disclosures alleged?

Unfair dismissal (ERA 1996 s. 98)

13. Alternatively, if the claimant was dismissed, was it for the potentially fair reason of conduct? The respondent alleges that conduct to be:

13.1 Breach of the conditions of the suspension letter dated 9 August 2021.

13.2 Refusal to obey lawful and reasonable instructions from the Chief Executive Officer, amounting to serious insubordination,

13.3 Unauthorised use or abuse of the respondent's email, social media and/or other online systems.

13.4 Unauthorised use and access to the respondent's IT systems.

13.5 Making unauthorised recordings and transcripts at work relating to the confidential business matters of the respondent.

14. Was the dismissal fair or unfair, taking account of the band of reasonable responses? This will involve consideration of the following:

14.1 Did the respondent have reasonable grounds upon which to sustain the belief that the claimant was guilty of misconduct?

14.2 At the stage at which that belief was formed, had the respondent carried out as much investigation into the matter as was reasonable in the circumstances?

14.3 Did the respondent follow a fair procedure when dismissing the claimant?

14.4 Did the decision to dismiss the claimant fall within the band of reasonable responses?

Wrongful dismissal

15. Did the claimant fundamentally breach the contract of employment entitling the respondent to terminate this contract without notice? The respondent relies on the alleged conduct enumerated at paragraph 13 above.

16. If not, to what amount of notice was the claimant entitled?"

23. The list of issues then went on to address remedy, in respect of which I note that one of the issues identified in relation to the unfair dismissal claim was whether it would be just and equitable to reduce the basic award and/or the compensatory award on the grounds of blameworthy or culpable conduct on the part of the claimant.

24. Accordingly, central issues in the ET Claim for the ET to resolve in order to determine the outcome of these claims include: (1) whether the claimant made protected disclosures (as defined); (2) if he did make the alleged protected disclosures, whether the disciplinary proceedings he was subjected to and/or the declaration of him as a "Bad Leaver", with the consequential effect on his shareholding, were on the ground of his making those disclosures; (3) if he did make protected disclosures as alleged, whether this was the sole or principal reason for his dismissal; (4) whether the respondent fabricated a series of conduct issues and subjected the claimant to a sham disciplinary process, thereby acting in breach of the implied term of mutual trust and confidence; (5) did the claimant fundamentally breach his contract of employment by (amongst other things): (a) unauthorised use or abuse of the respondent's email, social media and/or online systems, (b) unauthorised use and access to the respondent's IT systems; and/or (c) making unauthorised recordings or transcripts at work relating to the

confidential business matters of the respondent (so that his wrongful dismissal claim was without foundation); and (6) did the respondent have reasonable grounds upon which to sustain a belief that the claimant was guilty of misconduct including the matters that I have listed in the previous subparagraph at (a) to (c), and did the respondent follow a fair procedure in dismissing the claimant.

The Confidentiality Claim

25. The respondent to the ET Claim issued the Confidentiality Claim on 8 November 2021 seeking: (a) an injunction restraining the claimant from using, divulging or communicating to any person the "confidential information" (as defined in those proceedings), from contacting or communicating with any of the respondent's customers, vendors, clients or investors in respect of this information and from accessing or copying or retrieving information from the respondent's IT systems and software; and (b) an injunction requiring the claimant to deliver up all copies of the confidential information and to delete any such records that he had.

26. The particulars of claim were dated 24 November 2021. Therein, the respondent relies on obligations of confidence contained in the Founder's Service Agreement entered into with the claimant, the Subscription and Shareholders' Agreement, the respondent's IT and Communications System Policy ("the IT Policy") and its Access Control Policy and Access Control Rules and Rights Procedure ("the Access Policy") and implied duties of confidence in contract and in equity.

27. The breaches of confidence that are relied upon are pleaded at paragraphs 13 to 24 of the document and include the following allegations: (1) the claimant made unauthorised recordings and contemporaneous transcripts of internal meetings and investor meetings; (2) contrary to the IT Policy and the Access Policy, the

claimant improperly and without authority accessed the respondent's IT systems, both before and after his suspension, and downloaded documents that were not necessary or relevant to his role as Chief Product Officer or to the disciplinary investigation he faced; (3) that the claimant misused the respondent's confidential information that he had accessed without authority, including using it to make serious allegations of wrongdoing about Mr Alegbe in the 6 October 2021 Letter and in the 11 October 2021 Report, both of which the claimant knew to be false; and (4) the claimant had retained confidential information following the termination of his employment.

28. The respondent to the ET Claim (that is to say, the claimant in the Confidentiality Claim) applied for an interim injunction. In part, the application was resolved by the provision of undertakings, but an injunction was made in relation to other aspects. I am informed that the claimant had subsequently returned certain documents to the respondent.

29. The claimant to the ET Claim submitted a defence and counterclaim dated 19 January 2022 denying all allegations. The defence included the following averments: (1) that the respondent had waived the alleged breaches of its IT Policy, as it used recording software that recorded and transcribed all calls and virtual meetings; (2) in any event, the parts of the IT Policy relied upon did not apply to the meetings that formed part of the claim; (3) the claimant had not shared the recordings and transcripts, and had retained them for use in the disciplinary proceedings against him; (4) the claimant's access to the respondent's IT systems related to his role as the Chief Product Officer and/or to the disciplinary proceedings he faced and/or the systems were accessed in his

capacity as a director of the respondent and, as such, he was not in breach of the IT Policy or the Access Policy; (5) a significant amount of the particular instances that the respondent relied on occurred before his suspension and when he was properly authorised to access the respondent's IT system. Further, there was an occasion where he accidentally started to download certain files on a particular date and, when he realised his error, he stopped before they were fully downloaded. Additionally, on certain specified dates, his access was conducted under the supervision of Mr Wilkhu; (6) the claimant's 11 October 2021 Report was a protected disclosure under Part IVA of the **Employment Rights Act 1996** ("ERA 1996") and was filed in accordance with the respondent's handbook. The claimant filed it in the reasonable belief that the notification of these matters was in the public interest, and he denied he was motivated by a malicious intent; and (7) save for items specified in his appendices to the pleading, the claimant had deleted from his personal computer and devices all information which he had obtained from the respondent during his directorship and employment.

30. In the counterclaim, which it is unnecessary for me to refer to in detail, the claimant alleged that the respondent had breached its obligations of confidence by revealing the existence of the disciplinary proceedings against him to a named third party.

31. The respondent filed a reply and defence to counterclaim dated 2 February 2022. In this document, the respondent took issue with the matters that I have identified above and denied the counterclaim. The claimant subsequently filed a reply to defence and counterclaim dated 15 February 2022.

32. In common, as I understand it, with the ET, I was referred to a draft list of issues prepared by the parties in the Confidentiality Claim. It includes the following. There is a definition of "Disputed Documents" as being "the documents identified in Appendix 1 and Appendix 2 of the Defence and Counterclaim". Then under the heading "The Claim" and "Confidentiality" it says:

> "1. Are the Disputed Documents and/or the information contained in them confidential to the claimant...?"

I need not read the details, but the various policies and agreements are referred to that I have indicated when summarising the particulars of claim. However, I will quote the next part of the document:

> "Access to the Claimant's IT systems and documents
>
> 2. On what dates (if any) between 4 August 2021 and 27 September 2021, and for what purpose(s) did the defendant access any of the following: (a) the claimant's IT systems hosted on Google, (b) its Slack system and/or (c) its 1Password system? What relevance (if any) is there to access to those systems between 4 and 9 August 2021, before the defendant's suspension on 9 August 2021?
>
> 3. What documents (if any) did the defendant download from such systems and on what date and for what purpose? In particular:
>
> (a) Was the defendant entitled or permitted to access such systems on the dates alleged between 9 August 2021 and 27 September 2021 and/or download documents without the claimant's supervision by virtue of the emails of 13 August 2021 and 24 August 2021 sent by the claimant to the defendant (as properly construed in the context of the surrounding circumstances); and/or by virtue of his directorship and/or his role as Chief Product Officer?
>
> (b) Was the defendant in breach of confidentiality in accessing such systems and/or downloading such documents?
>
> Disputed Documents

4. Is the defendant entitled to retain and/or use those Disputed Documents identified in Appendix 1 as 'ET Claim' for the purposes of his Employment Tribunal claim?

5. Is the defendant entitled to retain and/or use those Disputed Documents identified in Appendix 1 as 'Unfair Prejudice' for the purposes of any future unfair prejudice claim that he may bring?

Whistleblowing

6. Is the defendant entitled to retain and/or use those Disputed Documents identified in Appendix 1 as 'Further Whistleblowing Evidence' and those documents identified in Appendix 2 to support his Whistleblowing Report? In particular:

   (a) Do any of the matters disclosed in the Whistleblowing Report amount to a 'protected disclosure' under the Employment Rights Act 1996?

   (b) Did the defendant act maliciously in making his Whistleblowing Report and, if so, what relevance (if any) does that have for the determination of whether the matters disclosed in the Whistleblowing Report amounted to a protected disclosure?

   (c) Is there a public interest in disclosure of the matters set out in the Whistleblowing Report and, if so, disclosure to whom?

Remedies

7. Is the claimant entitled to the permanent injunctions it seeks, including delivery up and deletion of the Disputed Documents...?"

33. I am informed that the trial of the Confidentiality Claim is listed for October 2023.

The UP Petition Proceedings

34. The unfair prejudice petition was filed by the claimant on 21 September 2021, claiming that the affairs of the respondent were being conducted in a manner which was unfairly prejudicial to his interests as a member of the company. The respondent in the present proceedings is named as the third respondent in the

petition, but has not taken an active part in the proceedings (which I am given to understand is the norm in relation to such litigation).

35. In his petition, the claimant complains about the impact on his shareholding of him being treated as departing from his employment with the respondent as a "Bad Leaver" rather than a "Good Leaver". The claimant held 300,000 deferred shares as ordinary shares in the respondent. In his petition, he contends that 120,000 of these are still properly being held by him as ordinary shares on the basis he was a "Good Leaver" under the company's Articles of Association, and that these shares were wrongfully and unconscionably transferred to Mr Wilkhu as deferred shares, in breach of the Articles of Association. He seeks declarations as to his continued ownership of the shares and orders giving effect to this.

36. In section D of the petition, the claimant summarises the basis upon which he says that matters have been conducted in a manner unfairly prejudicial to his interests. He says as follows:

> "24. In summary, since around September 2020, Messrs Alegbe and Wilkhu (as fellow founding shareholders of the company and in their roles as Chief Executive Officer and Chief Technology Officer of the Company) have pursued a course of conduct to remove Mr Onea from the Company and to deprive him of and/or reduce his shares in the Company.
>
> 25. This course of conduct includes the following acts by Messrs Alegbe and Wilkhu (as set out in more detail in sections E and F below):
>
> (a) seeking to reduce Mr Onea's shareholding during a round of investment funding in September 2020 and seeking to exclude him from management of the Company thereafter;
>
> (b) in August 2021, threatening to bring disciplinary proceedings against him unless he agreed to leave the Company in exchange for a cash payment;
>
> (c) when Mr Onea refused to leave the Company on those terms, initiating disciplinary action against Mr Onea involving false

and baseless accusations of misconduct and breach of duty, and suspending him from his position as Chief Product Officer in August 2021;

(d) pursuing false allegations that he breached the terms of his suspension and accessed the Company's IT systems without authorisation, so as to pursue further disciplinary action against him, based on false and fabricated evidence, as was later found to be the case by the Court;

(e) purporting to dismiss him for alleged gross misconduct based on those allegations (although Mr Onea resigned before that on grounds of constructive dismissal); and

(f) characterising Mr Onea as departing as a Bad Leaver on the grounds of the alleged gross misconduct, so as to deprive him of all of his shares in the Company.

26. Further, Mr Alegbe committed breach of his director's duty - including using a false identity in negotiations with the Ministry of Defence ('MoD') over a contract awarded to the company to hide his relationship with an individual who worked both for the MoD and the Company... Mr Onea raised these allegations in a whistleblowing report, but the investigator (a director of a minority investor-shareholder of the Company) dismissed them and the Company did not carry out any other investigation into Mr Alegbe's breaches of duty, in contrast to the disciplinary action against Mr Onea."

The allegations are then set out in further detail in the sections of the document that follow.

37. The petition contains an account of the disciplinary process and the termination of the claimant's employment in which he claims that none of the allegations that were made against him had any factual basis, that they were based on false and fabricated evidence, and that the disciplinary proceedings were substantively and procedurally unfair and were instigated as part of a course of conduct by Mr Alegbe and Mr Wilkhu aimed at removing him from the company. It is denied that he was a "Bad Leaver", in summary "because there were no (or no adequate) grounds for his dismissal at all and/or there were no (or no adequate grounds) for his dismissal for gross misconduct" (see paragraph 63).

38. In paragraphs 84 onwards, the petition refers to the whistleblowing claim, and includes allegations in paragraphs 87 and 88 that in October 2021 Mr Rist dismissed the 11 October 2021 Report on the false basis that it was not supported by evidence and also found that Mr Onea had made the report maliciously, which is denied. It is asserted that the report "involved the disclosure of information which, in Mr Onea's reasonable belief was made in the public interest and tended to show that (pursuant to section 43 of the Employment Rights Act 1996): (a) Mr Alegbe had committed a criminal offence of fraud... in relation to the MoD... contracts."

39. As I have already mentioned, the strike-out application made by the first and second respondent in those proceedings is due to be heard on 14 July 2023 and that, in the alternative, they seek a stay of those proceedings pending determination of the Confidentiality Claim and the ET Claim.

The ET's Refusal of the Stay

40. The application for a stay was considered at the case management hearing on 22 September 2022. At that stage, the final hearing of the ET Claim was listed for six days, commencing on 18 January 2023. In light of this appeal, that hearing date was subsequently vacated, and the ET proceedings have been stayed pending the resolution of this appeal.

41. The reasoning of the Employment Judge (hereafter "the EJ") was contained in one paragraph of the subsequent case management decision that was provided to the parties, as follows:

> "<u>The claimant's application to stay the proceedings</u>

(3) Having considered the parties' submissions, the documents I was referred to, including the respective pleadings, the claimant's witness statement and *Mindimaxnox LLP v Gover & Anor* UKEAT/0225/10 which the claimant relied on, I refused this application for the reasons I gave, as follows:

(a) Overall, I was satisfied that it was not in the interests of justice to grant the application sought.

(b) The principal factor was the degree of overlap between the respective disputes, i.e., the tribunal claim and the claims brought by the respondents (the breach of confidence claim to which the claimant has counter-claimed) and the claimant (the unfair prejudice application) in the High Court. The parties were in agreement that there was some overlap. They disputed the degree of overlap. Having regard to *Mindimaxnox* in which there was considerable overlap in respect of the tribunal and High Court proceedings, the factual material was the same and there were common issues permeating both disputes, I agreed with Mr Wynne that the claimant was required to establish a very real risk of considerable embarrassment to the High Court. I was not satisfied that there was the requisite degree of risk because the claimant failed to show that there was a considerable overlap between the respective disputes.

(c) I also took account of the following secondary factors: (i) the significant (and indeterminate) delay which would obtain were this application granted because the trial for the confidentiality proceedings will not take place before summer 2023 and it is not known when the trial for the unfair prejudice proceedings will take place - there is a CMCC listed in February 2023, and it is most likely that trial will not be listed before late 2023 and very conceivably not until 2024; (ii) the undertaking which the claimant provided in relation to the confidentiality proceedings will not affect his ability to comply with his disclosure obligations in these proceedings; and (iii) the claimant remains at liberty to seek a direction from the High Court on whether these tribunal proceedings should be stayed at the CMCC on 18 October 2022."

The Appeal

42. In sifting the appeal to a full hearing, Eady J observed:

"This appeal raises reasonably arguable questions of law arising from the ET's decision, refusing the application for a stay, as set out in the Notice of Appeal. In particular, a question arises as to whether proper account was taken as to the degree of overlap in the issues to be determined in the ET proceedings (particularly those relating to the claims of constructive unfair

> and wrongful dismissal) and the High Court unfair prejudice petition, and as to whether the ET applied the correct test as to which forum is most appropriate for these issues to be heard (*Bowater PLC v Charlwood* [1991] ICR 798)."

She provided an expedited timetable for the hearing of the appeal.

43. The respondent's answer was lodged on 26 May 2023. Notice of the hearing of today's date was sent to the parties on 16 May 2023. On 9 June 2023, the respondent applied for an adjournment of today's appeal hearing on the basis that the application was pending in the UP Petition Proceedings, which could result in those proceedings being struck out or stayed pending the determination of the ET Claim. The claimant resisted that application as set out in the email sent to the Employment Appeal Tribunal ("EAT") on 19 June 2023.

44. The application to adjourn this hearing was refused, as set out in the order of Eady J sealed on 20 June 2023. Her reasoning was contained in paragraph 6 as follows:

> "Upon my consideration of the application, I am not persuaded that it would be in accordance with the overriding objective to adjourn the hearing listed before the Employment Appeal Tribunal for 11 July 2023. First, as those acting for the appellant observe, even if the unfair prejudice petition were to be struck out, an issue would still arise in relation to the breach of confidence claim (and counterclaim) pursued by the respondent in the High Court: it was the appellant's case that the Employment Tribunal proceedings ought to have been stayed pending determination of the issues in those proceedings... Second, without seeking to form any view as to the merits of the application before the Companies Court, I note the various outcomes allowed for in the application made in the unfair petition proceedings. Although the first and second respondents to those proceedings (not the respondent to the Employment Tribunal claim/this appeal) primarily seek that the petition be struck out, in the alternative it is asked that those proceedings be stayed pending determination of the claim before the Employment Tribunal *and* the respondent's breach of confidence claim before the High Court. In the circumstances, the interests of justice would seem to be better served by determining the issues raised in the appeal in this jurisdiction without any further delay. Thirdly, although I take into account the additional burden (in terms of time and cost) that will be imposed on the parties in requiring that they continue to prepare for

> the hearing before the Employment Appeal Tribunal, I do not consider this is a disproportionate course to adopt given (i) the resources apparently available to the parties, and (ii) the purpose an early determination of this appeal will serve. Fourthly, I am bound to take into account the time that has already passed since the events that have given rise to the underlying disputes between the parties. The appellant's claims in the Employment Tribunal relate back to his employment between 5 June 2019 and 11 October 2021. Dealing with this case justly requires that the proceedings in this jurisdiction are not subject to any further undue delay."

45. I turn to the respondent's application to rely upon the notes of the hearing of 22 September 2002, made by an email to the EAT sent on 27 June 2023. By email of 29 June, the claimant objected to admission of the notes on the basis they were not necessary for the determination of the appeal. The respondent sent a further email on 30 June, stating that it had sought to agree the notes with the claimant and that the notes would assist the EAT in understanding what information was provided to the ET at the time when the decision under appeal was reached. In particular, it was said that the notes supported a point made in the grounds accompanying the respondent's answer, that the claimant had provided little explanation to the EJ as to the asserted degree of overlap between the ET Claim, the Confidentially Claim and the UP Petition Proceedings.

46. Mr Wynne continued to rely upon this reason at the hearing before me. He suggested, in addition, that the notes were relevant as showing that both parties accorded primary importance to the degree of overlap between the proceedings in the submissions they made to the EJ.

47. I refuse the application to admit the notes. I do not consider that their admission is necessary for the fair determination of this appeal.

48. Taking Mr Wynne's second point first, it is quite apparent from the respective submissions made to me this morning that both parties continue to place the

degree of overlap at the centre of their submissions. There has been no material change of position on the part of either party in that regard, and no purpose is served by admitting the notes.

49. I am also unpersuaded by Mr Wynne's first reason. It is not suggested that a new point is being raised on appeal that was not raised below. It is simply said that the issue of overlap is now argued more expansively and/or in greater detail than it was before the EJ. This is unremarkable. An issue will often be addressed in more detail before the EAT, where the particular issue is now the focus, or a focus, of the hearing and where different or additional counsel may become involved (Miss Shui did not appear below.) Counsel is not confined to arguing the point in exactly the same way as it was argued below. In my view, it would be most undesirable if notes of the hearing below were routinely admitted on EAT appeals in order to enable the parties to pick over the finer details of the way that the matter had been argued below. I see no reason to admit the notes for that purpose in this instance.

THE LEGAL FRAMEWORK

50. A decision whether or not to stay proceedings before it, is a matter of case management discretion for the Employment Tribunal as provided by Rule 29 Schedule 1 **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**. As the exercise of a case management discretion, it is not for the EAT to interfere with a Tribunal's grant or refusal of a stay simply because it disagrees with the decision. Such decisions are only challengeable where the decision-maker below exercised the discretion under a mistake of law or disregard of principle, or under a misapprehension as to the facts, or took into

account irrelevant matters or failed to take into account relevant matters, or where the conclusion was "outside the generous ambit within which a reasonable disagreement is possible", for example see: **Noorani v Merseyside Tec Ltd** [1999] IRLR 184 at paragraph 32.

51. In **Carter v Credit Change Ltd** [1979] ICR 908, the Court of Appeal upheld the decision to stay the Employment Tribunal proceedings pending the conclusion of High Court proceedings. In doing so, Stephenson LJ (who gave the leading judgment) rejected the approach of the EAT who had allowed the appeal, indicating that the starting point was that the Employment Tribunal proceedings should go ahead regardless of the existence of High Court proceedings as the parties were entitled to have those matters dealt with speedily. At pages 918H to 919D, Stephenson LJ said:

> "...I would not wish to underrate the importance of a quick and expeditious settlement of straightforward claims for unfair dismissal; but I would deplore any attempt to take from the chairmen of industrial tribunals the discretion which the rule gives them to decide what is best to do in each individual case in all the circumstances when faced with an application to postpone. Naturally, it is the employee who usually wishes to press on with his claim for unfair dismissal, and I appreciate and give full weight to the employee's point that it would be disastrous if our decision could be interpreted as a precedent for encouraging employers to use the device of a stopping writ, as it were - a writ issued simply in order to stop and delay claims for unfair dismissal. But, in my judgment, it is for the industrial tribunal chairman in every case to consider the nature and the object of the High Court or other proceedings for which he is asked to postpone the hearing of an application to the tribunal, and any abuse of postponement proceedings is something which, in my judgment, industrial tribunal chairmen can be trusted to deal with robustly and clear-sightedly.
>
> I accept Mr Cresswell's submission that the appeal tribunal erred in law in the principle which they sought to lay down. I would lay down no principle except the principle (if it can be called a principle) that the industrial tribunal chairmen should attempt to do justice as best he or she can in each individual case."

52. In **Bowater PLC v Charlwood** [1991] ICR 798, the EAT - Wood J (President) presiding - allowed an appeal from a decision of an Employment Tribunal refusing an adjournment of the claimant's unfair dismissal claim pending High Court proceedings for wrongful dismissal. The EAT exercised the discretion afresh, observing at page 804 C that:

> "…the correct basis for the question to ask ourselves is: 'In which court is this action most conveniently and appropriately to be tried, bearing in mind all the surrounding circumstances including the complexity of the issue, the amount involved, the technicality of the evidence, and the appropriateness of the procedures?'"

53. Further guidance was provided by the EAT in **Mindimaxnox LLP v Gover** UKEAT/0225/10/DA. HHJ McMullen QC held that the Employment Tribunal had erred in declining to grant a stay. The judge noted that in doing so the Tribunal had used almost identical language to that employed by the EAT in **Carter**, which the Court of Appeal had subsequently disapproved. His judgment included the following observations as he reviewed the grounds of appeal raised by counsel:

> "28. ...It is clear that Employment Tribunals today deal with highly complex issues relating characteristically to equal pay, discrimination in its nine strands and to major bonus issues, for example amongst traders in the City. I do not accept the simple proposition that because there are complex factual matters the Employment Tribunal's jurisdiction is usurped. That is not the central question.
>
> 29. Given there are complex factual matters in the tribunal proceedings, is it more appropriate for those matters to be determined by the High Court? It is a question of balance... It is also the case that where the issues of fact are supported by voluminous documents, that too will point to the matter being better determined in the High Court...
>
> 30. I accept in principle Mr Kibling's support for the expertise of the Employment Tribunals, I indeed endorse it. The fact is that the authorities which have been shown to me indicate where there is a very substantial factual dispute, the proceedings are more appropriately to be brought in the High Court. The judge does not seem to have been alert to that distinction. He seems to have taken

the view that there was some criticism of the Employment Tribunal as not having the expertise. If he did that was misplaced. There is no such criticism; it is simply a question of where it is more appropriate to decide complex factual matters.

31. There are rules of evidence which are important to resolve in disputes such as this. It has been submitted to me that a Judge of the High Court, sitting alone, with preparation time being provided by the court and reading time and making a decision on his or her own, is an expeditious way to deal with these matters. There may be some force in that.

(2) Embarrassing the High Court

32. This is the language used in **First Castle** at page 78 [a reference to *First Castle Electronics Ltd v West* [1989] ICR 72.] It is that findings by the Employment Tribunal could be embarrassing for a Judge in the High Court. A similar view is taken by Sir Ralph Kilner Brown in the Employment Appeal Tribunal in **Automatic Switching Ltd v Brunet** [1986] ICR 542 at 545; he talked about putting the High Court judge in a straightjacket. A similar approach was taken by HHJ Ansell in **GFI Holdings Ltd v Mr D Camm** UKEAT/0321/08, who said this:

> 'It is generally desirable to dispose of High Court actions first where there are issues in both sets of proceedings which are substantially the same.'

The point is that the Employment Judge, again, seems to have been of the view that there would emerge either *res judicata* or issue of fact estoppels. All of the authorities where this arises indicate preference for the High Court rather than the Employment Tribunal: see, for example, **Jacobs v Norsalta Ltd** [1977] ICR 189 at 192, where it was thought to be preferable for the tribunal to have the High Court judgment than for the High Court to have the tribunal's judgment.

.....

35. ...It is relevant to consider the complexity of legal issues...

.....

(4) Considerable Overlap

37. In my judgment, Mr Griffiths is correct when he relies upon the finding by the Judge that there is considerable overlap. That is the premise upon which the Judge ought to have decided that this matter should be left to the High Court... The factual material is the same in both jurisdictions. It seems to me that where there is considerable overlap it is appropriate to cede to the High Court, and the Judge was

> wrong not to regard this as a compelling reason for rejecting the application for a stay.
>
> .....
>
> 42. ...Where there was a significant overlap between an application to an Employment Tribunal and an action in the High Court, with common issues permeating each dispute and an effectively agreed timetable, it was appropriate to stay the former."

54. The decision of Eady J in **Lycatel Services Ltd v Schneider** [2023] EAT 81 is a recent example of the application of these principles. The EAT allowed an appeal from the Employment Tribunal's refusal of the employer's application for a stay. The claimant in that case had brought a claim in the tribunal for unauthorised deductions from wages in respect of what was said to be a very substantial bonus entitlement. The employer disputed the claim, and commenced High Court proceedings for negative declaratory relief in that regard. The EAT held that the Employment Tribunal had erred in not applying the test identified in **Bowater v Charlwood**, and that it had failed to ask and determine in which forum this dispute would most conveniently and appropriately be tried.

55. Eady J referred to the case law that I have set out. In paragraph 51, she described the error of law made in that case in the following terms:

> "As was common ground below, the question the ET had to answer was as set out in **Bowater**; that is, taking into account all the relevant circumstances - including the complexity of the issues, the amount involved, the technicality of the evidence, and the appropriateness of the procedures - in which forum would this claim be most conveniently and appropriately tried? The ET did not set out this test in its judgment, or refer to the relevant case law; the Employment Judge stating: '*I am familiar with the case-law, and do not burden this judgment with it*'... I do not assume that a failure to cite the leading authorities, or even to set out the relevant test, must mean that the ET erred in its approach to this case; I do, however, consider it is generally helpful for a judge to remind themselves of the legal principles they are required to apply. Certainly, the explanation provided for the decision taken in the present case - '*I see no factor making this Tribunal an inadequate forum to determine this claim*'... - would suggest that the ET unfortunately lost sight of the question it had to answer. As the EAT in

> **Mindimaxnox** was careful to emphasise, in deciding whether to stay an ET Claim in favour of concurrent proceedings in the High Court, the issue is not whether the ET might not have the requisite ability to determine complex issues of fact (or law), it is simply a question of where it is more appropriate for the issues raised in the case in question to be determined... There is a distinction between whether an ET *can* adjudicate upon a particular claim and whether, in preference to an alternative forum, it would be *more appropriate* for it to do so."

56. Eady J went on to discuss certain factors that may be relevant to the exercise of the discretion whether or not to grant a stay, including the costs risks of High Court proceedings, which will generally be absent in the Employment Tribunal; and that there may be certain types of cases, such as equal pay, where the tribunal would be seen as having a particular expertise (see paragraphs 54 and 55). She also observed that she could not see any distinction of principle between a situation where the claims in question raised overlapping issues and one where they raised identical issues (paragraph 56). There is no presumption that the Employment Tribunal ought to hear the claim first (also paragraph 56).

57. With the parties' consent, Eady J went on to re-exercise the discretion. She balanced the various relevant factors and determined that a stay should be granted (paragraphs 64 – 73). Amongst the factors that she identified as relevant in that case were: that the formal nature of the proceedings in the High Court should mean that the issues raised by the claim were more precisely identified in those proceedings; preparation time may more readily be available to a High Court Judge; there were evidential issues of some technicality; delay; and the respondent employer had offered that its High Court claim should be subject to the same rules as to costs that would apply in the Employment Tribunal. In paragraph 73, Eady J identified this last factor as tipping the balance in that particular case in favour of the grant of a stay.

58. Accordingly, the approach that the Employment Tribunal should take when considering an application for a stay based on the existence of concurrent proceedings is quite clear: the decision-maker should assess which forum is the more convenient and appropriate to decide the issues in the case. In undertaking that evaluation, the decision-maker will carry out a balancing exercise weighing up all relevant factors, including the considerations I have discussed over the preceding paragraphs.

59. I also need to consider the nature of issue estoppel in light of a point raised in this appeal. The principle was explained by Lord Sumption in his leading judgment in **Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd** [2013] UKSC 46, [2014] AC 160. In short, issue estoppel arises where a particular issue forming a necessary ingredient in a cause of action has been litigated and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen the issue. At paragraph 22, Lord Sumption said:

> "...(3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised."

60. Although this did not appear to be the position from the written material submitted to the EAT, during the course of oral submissions, Mr Wynne accepted for the purposes of this appeal that subject to the special circumstances exception identified by Lord Sumption, the principle of issue estoppel would apply to the third respondent (that is to say the respondent company) in the UP Petition Proceedings in relation to determinations made in the ET Claim, and that no

distinction arises from the fact that the company does not play an active part in that litigation; and that equally the converse would be true if the UP Petition Proceedings are determined first.

THE PARTIES' SUBMISSIONS

The Claimant

61. As regards Ground 1, the claimant submits that the degree of overlapping issues is manifestly apparent from a comparison of the pleadings in the ET Claim, the UP Petition Proceedings and the Confidentiality Claim, and that the EJ failed to take into account this considerable degree of overlap in arriving at his decision. Ms Shui also submits that the application for a stay now made by the first and second respondents in the UP Petition Proceedings underscores the degree of overlap with the ET Claim.

62. As regards Ground 2, the claimant contends that the ET erred in taking into account the impact of delay on the hearing of the ET Claim. Ms Shui clarified this morning that she did not contend that this factor was wholly irrelevant, but she took issue with what she said was the "undue weight" that the EJ had placed on it, treating it, she said, as a primary consideration. She also suggested that the EJ fell into the same error as the Court of Appeal had identified in **Carter v Credit Change Ltd**.

63. In respect of Ground 3, the claimant contends that the EJ erred in taking into account "the liberty of the claimant to seek a direction from the High Court on whether the ET Claim should be stayed at a CMCC on 18 October 2022". Ms Shui says that this phraseology indicates that the EJ misunderstood the powers of

the High Court, as the High Court could not in fact order a stay of the ET Claim; at most, it could direct the parties to seek or to not object to a stay of the ET Claim. Furthermore, it is submitted that the stay application was before the ET and the ET was required to make a proper determination of the appropriate forum, rather than defer the matter to the High Court.

64. On Ground 4, the claimant asserts that the ET erred in deciding that it was not in the interests of justice overall to grant a stay. In particular, Ms Shui says that the EJ appears to have overlooked or paid insufficient regard to the applicable test, namely where the action could most conveniently and appropriately be tried bearing in mind all the relevant circumstances. Insofar as Ground 4 asserts that it was perverse for the ET to refuse to grant a stay, Ms Shui put less emphasis on that aspect in her oral submissions. However, she did submit that the question could only be decided in favour of the grant of a stay given the considerable degree of overlap that existed between the proceedings, the complexity of the issues and the scale and nature of the dispute, the value of the matters in issue, the more detailed pleading of the issues in the respective High Court proceedings, the likely extent of the documentation, and the fact that a proprietary remedy was sought in respect of the shares in the UP Petition Proceedings. She also pointed out this was not a situation where the claimant resisted a stay on the basis of the differing costs regime applicable in the High Court.

65. Ms Shui also relies upon the factors that I have just summarised in submitting that, if I allowed the appeal, I should conclude in my re-determination of the question, that it was appropriate to grant a stay of the ET Claim.

The Respondent

66. The respondent emphasises the wide discretion that the ET had over whether to grant a stay or not and the limited basis upon which the EAT may interfere with the exercise of that discretion.

67. As regards the alleged degree of overlap and the alleged embarrassment of the High Court if the ET Claim proceeds to a determination before the Confidentiality Claim and the UP Petition Proceedings are resolved, Mr Wynne said in his skeleton argument that the overlap was of "mere background facts" and that the alleged embarrassment can only arise in relation to an issue that is necessarily common to both causes of action such as would give rise to an issue estoppel. Absent an issue estoppel arising, the High Court would be free to make contrary findings on the evidence that it heard, to the findings made in the ET Claim. However, from exchanges that occurred during the course of his oral submissions, it appears that Mr Wynne does accept that, at least in some respects, there are issues that are common to the proceedings that require determination in both the High Court and the ET Claims. Nonetheless, he did emphasise that the Confidentiality Claim was focused prospectively on whether injunctive relief should be granted in respect of the claimant's future actions, and he submits that whether the claimant made protected disclosures, although referred to in the UP Petition Proceedings, was not an issue that required resolution in that litigation.

68. Mr Wynne also emphasises that in the UP Petition Proceedings, it is the first and second respondents, who are separately represented to the company, who are the active parties. He says that in these circumstances, the effect of a stay would be unjust as it would force the respondent to have factual issues that are central to

the ET Claim determined by the High Court in a claim which is, in substance, one between the claimant and third parties.

69. As regards Ground 2, the respondent submits that the EJ was entitled to take into account the relative timescale of each of the proceedings, and that this was clearly a relevant factor.

70. In response to Ground 3, the respondent emphasises that the High Court is able to order the parties to apply for a stay of the ET Claim, and submits that the High Court is better placed than the ET to decide whether the ET proceedings should be stayed, since it is the interests of the High Court that the ET is seeking to protect if a stay is granted. Mr Wynne also says that the claimant identified no good reason below as to why it did not make an application to that effect in the High Court proceedings.

71. The respondent submits that Ground 4 is in essence a perversity ground, and that the high threshold for establishing perversity has not been met. Mr Wynne accepts that if the conclusion was reached that there was considerable overlap between the ET Claim and the High Court claims, this would be a strong factor in favour of a stay, but he submitted that it was not determinative of the issue, referring in particular to the approach of Eady J in **Lycatel** when she re-determined the question of a stay.

72. As regards the question of whether I should grant a stay if I allowed the appeal, Mr Wynne maintains that the degree of overlap was not considerable, and that the ET was in the best position to determine matters first, given the range of issues raised by the ET Claim. He also relies on the potential unfairness that

could be occasioned to the respondent that I have already outlined, and to consequential delay in the resolution of the ET Claim.

WHETHER THE ET ERRED IN LAW: DISCUSSION AND CONCLUSIONS

Did the ET Ask the Correct Question?

73. In my judgement, the ET failed to ask the correct question when refusing the application for a stay. Although the EJ made brief reference to having considered **Mindimaxnox v Gover**, he did not identify the applicable test in his short reasons. As Eady J observed in **Lycatel**, a failure to set out the correct test is not fatal in itself, albeit it is generally helpful for a judge to remind themselves of the legal principles they are required to apply. The crucial question is whether the test has been *applied* in the decision that is arrived at.

74. In the present instance, I cannot see any indication in the EJ's reasoning that the correct test was applied. There is no specific reference to it, and it is not alluded to in the way in which the EJ expresses his conclusions. This is compounded by the fact that there are specific signs that a wrong approach was adopted. The EJ said the claimant was "required to establish a very real risk of considerable embarrassment to the High Court". None of the authorities that have been cited to me expressed the matter in those terms; and whilst the degree to which the High Court would or would not be embarrassed is a highly relevant matter to consider, the authorities identify the correct approach as one involving a weighing up of all relevant considerations, rather than the applicant for the stay having to meet a threshold criterion of the kind apparently identified by the EJ before the application for a stay could succeed.

75. The failure to ask the correct question plainly amounts to a material error of law invalidating the EJ's exercise of his discretion.

76. I have to consider which of the claimant's grounds of appeal raises this point. As I have already indicated, when permitting the case to proceed at the sift stage, Eady J considered that the appeal raised a live issue as to whether the ET had applied the correct test, and Mr Wynne has not suggested that it was not open to the claimant to rely on this point.

77. I conclude that both Ground 1 and Ground 4 are capable of encompassing this error. Ground 1 complains that the EJ erred in his approach to the degree of overlap between the respective proceedings. If, as I have found, the EJ failed to apply the correct test when considering the overlap, then that proposition is made out. Ground 4 asserts that the EJ erred in concluding that it was not in the interests of justice overall to grant a stay. As he arrived at that position without having asked the correct question, I accept that this conclusion was fatally flawed too. Accordingly, I would allow the appeal on this basis, upholding both Grounds 1 and 4. However, I will also consider the other contentions raised by the claimant.

The Degree of Overlap

78. I am quite satisfied that there is a considerable degree of overlap between the proceedings in this instance and that, in failing to appreciate this, the EJ failed to take into account a relevant consideration and thus he erred in law.

79. I accept the respondent's point that the focus of this inquiry should be on the degree of overlap between the *issues* upon which the court or tribunal will have

to rule on in order to determine the respective claims, as opposed to simply a similarity in the factual background that is relied upon.

80. As will be apparent from my earlier summary, issues necessary to the determination of liability in the Confidentiality Claim include: whether the claimant made unauthorised recordings and transcripts of meetings; whether he improperly accessed the respondent's IT systems; and whether he improperly downloaded documents from those systems. As I have already explained, these are some of the central alleged breaches of confidence on the part of the claimant, as is also confirmed by paragraphs 2 and 3 of the list of issues from which I have read. As I have also indicated, the claimant denies each of those allegations in his defence and raises a number of supporting reasons for that denial. When I put this point to Mr Wynne, he did not really dispute that there was a commonality of issues in this regard.

81. Mr Wynne did suggest, on the basis of the list of issues that I have referred to, that the question of whether the claimant had misused confidential information in relation to his Ministry of Defence allegations or whether this amounted to a protected disclosure was only of relevance in a future-facing sense and, in that regard, he referred to the initial words of paragraph 6 of the list of issues. However, I do not consider that this point significantly assists Mr Wynne. There has been no amendment in respect of this aspect of the pleadings, and the particulars of claim clearly rely on the claimant's actions in respect of the 11 October 2021 Report, which are said to involve unauthorised use of improperly accessed material. Furthermore, in subparagraphs (a), (b) and (c) of paragraph 6 of the list of issues, clear reference is made to this report (referred to as "the

Whistleblowing Report") and to whether it amounted to a protected disclosure or not.

82. Accordingly, paragraph 6 of the list of issues, in fact, *reinforces* the proposition that the High Court in the Confidentiality Claim will be required to determine issues that are common also to the ET Claim, in terms of whether the claimant made protected disclosures as defined by the ERA.

83. As regards the ET Claim, it is apparent from the list of issues that I set out earlier that if the ET Claim is determined first, then the ET will have to decide, amongst other matters, whether the claimant engaged in unauthorised use of the respondent's online and IT systems, and whether he made unauthorised recordings and transcripts at work relating to confidential business matters of the respondent. The ET will have to decide those matters because they are relied on by the respondent by way of defence to the wrongful dismissal claim. They are said to be the fundamental breaches of contract (or some of them) committed by the claimant. It is not simply a question of the ET deciding if the respondent had reasonable grounds to believe that the claimant had engaged in such conduct, as arises in the resolution of liability in respect of the unfair dismissal claim. However, even in addressing the unfair dismissal claim, the ET would need to determine whether the respondent's belief was a genuinely held one or a dishonest sham to get rid of the claimant. As will be appreciated from my earlier summary, in both proceedings the claimant accuses the respondent of fabricating evidence against him and of conducting a sham process.

84. I also note that in determining remedy in the ET proceedings, if the claim for unfair dismissal succeeds, the ET will have to make findings as to the extent to

which, if at all, the claimant engaged the blameworthy conduct. Again, the conduct the respondent relies on is, in significant part, the alleged breaches of confidence that it relies on in the High Court proceedings.

85. Accordingly, determining first whether or not the claimant was in breach of the duties of confidence that he owed to the respondent in the ET Claim would effectively decide much of the Confidentiality Claim before the High Court had heard that case. Additionally, if the ET Claim is heard first, the ET will determine and thus resolve the protective disclosure issues that I have already just highlighted.

86. I am quite satisfied that all these matters are not simply ones of background. They are issues that are necessary to the determination of both sets of proceedings. In the circumstances, resolution of the ET Claim before the breach of Confidence Claim would be likely to embarrass the High Court.

87. Accordingly, I accept that the EJ erred in his assessment that there was not a considerable degree of overlap between these two proceedings. Unfortunately, there is nothing in his brief reasoning to indicate that he analysed the issues that the court will have to decide in order to resolve the respective causes of action, although, as I have indicated, the pleadings were available to him.

88. I make the same observation in the relation to the ET Claim and the UP Petition Proceedings. In terms of the disputed issues that the High Court will have to resolve in the UP Petition Proceedings, I am again quite satisfied that there is considerable overlap with the issues that will require determination in the ET Claim and that the EJ fell into error in determining that this was not the case.

89. Firstly, both claims will need to resolve whether the disciplinary allegations that I have summarised in respect of the breach of confidence allegations had a factual basis or were the products of false and fabricated material such that the claimant was subject to a sham disciplinary process designed to force him out. If the ET Claim is heard first, these matters will already have been determined one way or the other when the petition comes to be heard by the High Court.

90. Secondly, both claims will need to resolve whether the claimant was lawfully dismissed for gross misconduct. The respondent's defence has yet to be pleaded in the UP Petition Proceedings, but it seems very likely that the same alleged gross misconduct will be relied upon that is the basis of the respondent's case in the ET Claim and, indeed, the contrary has not been suggested to me. Again, therefore, if the ET Claim is heard and decided first, these issues that directly impact on the outcome of the UP Petition Proceedings in the High Court will already have been determined.

91. Thirdly, both claims will need to resolve whether the respondent acted in repudiatory breach of contract in relation to the disciplinary proceedings. The claimant says that in consequence of this he was constructively dismissed. If he was constructively dismissed, then it would follow that he should not have been designated as a "Bad Leaver", which is a central question for the court to resolve in the UP Petition Proceedings. Indeed, even if he were subject to an outright dismissal by the respondent, the claimant challenges the basis for that as a groundless sham in the UP Petition Proceedings, and relies on that too as a basis for asserting that he should have been treated as a "Good Leaver" rather than a

"Bad Leaver". Again, if the ET Claim is decided first, those matters will have been resolved before the High Court gets to decide them.

92. Fourthly, both claims will need to resolve whether the claimant made a general whistleblowing complaint or a malicious and deliberately false allegation against Mr Alegbe. I have referred to the material parts of the pleadings because Mr Wynne suggests that this is not an issue that would require resolution in the UP Petition Proceedings. However, it appears to me, from the allegations pleaded in the petition, that it would be. In particular, there is an issue as to whether the 11 October 2021 Report was made in good faith or was a malicious report on the part of the claimant. If the Employment Tribunal claim has already, for example, decided that this was a protected disclosure, then that issue has already been resolved in favour of the claimant before the High Court determines matters.

93. Accordingly, if the ET determines matters first, then much of the issues in the UP Petition proceedings will have been decided already. In the circumstances it is plain that there is considerable overlap and that the High Court would be embarrassed.

Delay

94. The authorities show that delay in the resolution of the ET Claim is a relevant factor to take into account. As regards weight, that was a matter for the ET. The fact that the claimant disagrees with the amount of weight accorded to this factor does not provide a ground of appeal. In any event there is nothing to suggest that the EJ treated this as a primary consideration. Indeed, he expressly referred to it as a secondary factor.

95. Accordingly, I am unpersuaded by the claimant's Ground 2.

96. It is also quite clear that the ET did not make the same error as the EAT did in **Carter v Credit Change Ltd**. I have already summarised the approach identified by the EAT in that case which was overturned by the Court of Appeal. It is simply not the same as the EJ's reasoning in this case.

Leaving it to the High Court to Decide whether there should be a Stay

97. I will assume in the respondent's favour that the EJ intended to refer to the High Court's power to direct the parties to apply for and/or not to oppose a stay in the ET proceedings, but used slightly loose language. I do not consider it likely that he thought that the High Court was able to make an order staying the ET Claim, which plainly it cannot do. Nonetheless, I consider that the EJ's reasoning was flawed. None of the authorities that have been cited to me, and which I have set out in this judgment, suggest that if an application is made to the ET for a stay on the basis of concurrent proceedings, the tribunal should decline to grant the application on the basis that it is really for the High Court to determine the question as it is the High Court that is potentially embarrassed if issues are decided first by the tribunal.

98. Whilst I do not suggest that such an approach could never be appropriate, there would, in my judgement, need to be a particular reason for an Employment Tribunal to adopt it; otherwise, the approach that is set out in the case law that I have cited earlier should apply. No such specific factor was identified by the EJ in this instance. If an application for a stay is made to the ET, then the ET should carry out the balancing exercise and determine which is the more convenient and appropriate forum, rather than leaving this for the High Court to decide at

a subsequent application. Furthermore, the contrary approach is likely to occasion delay and increase costs unnecessarily, even more so in a case such as this where, on the face of it, there would need to have been two separate applications made, one in each of the High Court proceedings.

Perversity

99. Insofar as Ground 4 is also put forward as a perversity contention, I do not consider that that aspect is made out. As will be apparent from the next part of my judgment, I consider that in this case the factors strongly point in favour of a stay. However, I do not go so far as to say that no reasonable EJ, having correctly directed themselves as to the test and having taken all relevant matters into account, could refuse a stay. Eady J's decision in **Lycatel** suggests that the existence of a considerable overlap will not *necessarily* lead to the grant of a stay, and that a careful balancing exercise is required. As I have already indicated, in that case the balance was only just tipped in favour of a stay as a result of the costs consideration that she highlighted. All relevant factors must be weighed up, and I accept that this is an instance where more than one legitimate conclusion could be reached.

100. Accordingly, I will allow the appeal on Grounds 1, 3 and 4 on the bases that I have indicated, and I will dismiss Ground 2.

RE-DETERMINATION OF WHETHER A STAY SHOULD BE GRANTED

101. I have weighed up all the relevant factors. In this instance, I am satisfied that the High Court is the most convenient and appropriate forum for the issues to be tried in respect of both the Confidentiality Claim and the UP Petition Proceedings,

bearing in mind all the relevant circumstances. I will therefore direct that the ET Claim is stayed until the resolution of those proceedings. My reasoning is as follows.

102. I have already identified that there is considerable overlap between the ET Claim and the Confidentiality Claim, and between the ET Claim and the UP Petition Proceedings. I am quite satisfied, for the reasons I have already indicated, that if the ET Claim were to be determined first, issue estoppels would then arise in respect of issues that are very significant to the resolution of both these High Court claims. Accordingly, the High Court would be embarrassed in both instances if the ET Claim were to proceed first. As was noted in the passages in **Mindimaxnox** that I have already referred to, the norm is for the High Court proceedings to proceed first and the ET Claim to be stayed where such embarrassment arises.

103. I am quite satisfied, in any event, that there are good and specific reasons to take that approach here. As my early summary indicates, the issues raised in the various proceedings are multiple and complex. It is likely that the documentation will be extensive. There is a very considerable dispute of fact, and it is likely that a substantial amount of evidence will need to be heard. The pleadings in each of the High Court matters contain a much greater level of detail than the ET pleadings in respect of the common issues. Allied to these factors, a High Court Judge is likely to have significantly greater reading time in advance of the substantive hearing.

104. I also bear in mind the high value of the claims involved. I was told that the value of the disputed shares in the UP Petition Proceedings is in the region of

£1.8 million. I also note that, in those proceedings, the claimant claims a proprietary remedy over the ownership of the shares, which is not a matter that the ET could resolve, but, absent a stay, the ET would determine issues that were key to deciding that entitlement.

105. I have borne in mind the points raised by Mr Wynne. So far as overlap is concerned, I have already explained why I do not accept his submissions. He fairly accepted that if I found that there was a considerable degree of overlap (as I have), this would be a strong indicator in favour of the grant of a stay. I have already explained why I reject his proposition that the ET, rather than the High Court, would be in a better position to determine the issues that are common to the proceedings.

106. As regards delay, the Confidentiality Claim is, on the face of it, close to trial, and closer indeed than the final hearing of the ET Claim. The timescale is more uncertain in relation to the UP Petition Proceedings. But there will be delay one way or the other in any event, and I consider that a judgment in the UP Petition Proceedings - if the petition is not struck out - will likely narrow the issues considerably in the ET Claim.

107. As regards Mr Wynne's unfairness point, he accepted that Mr Alegbe and Mr Wilkhu were actively involved in providing the respondent's instructions in the ET Claim. Accordingly, the separation between them and the company is not as great as has been suggested, although, of course, I accept that their respective interests will not necessarily fully coincide.

108. I mention, for completeness, that the differing costs regime is a neutral factor in this instance as, unusually, it is the claimant who seeks to stay the ET

proceedings. For the avoidance of doubt, I have not taken into account the suggestion that there is some inconsistency in relation to the first and second respondents being the instigators of a stay application in the UP Petition Proceedings, since the application itself does not set out the detailed grounds upon which it is based and I am not aware of them.

109. However, for the reasons that I have indicated, and having conducted the requisite balancing exercise, I am quite satisfied that the factors point very clearly in favour of the grant of a stay.

CONCLUSION

110. I therefore allow the appeal in respect of Grounds 1, 3 and 4, and I will direct that the ET proceedings are stayed pending the resolution of the High Court claim brought in the Business and Property Court, Business List, Claim No. BL-2021-002014 and pending the claim brought in the High Court Business and Property Court, Insolvency and Companies List, Case No. CR-2022-0003204.
