



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Stuart Tate

**Respondent:** Yellowcoat Holdings Limited

**Heard at:** London South, by CVP

**On:** 3 October 2023

**Before:** Employment Judge Rice-Birchall

## Representation

Claimant: Mr Small, Counsel

Respondent: Mr Gillie, Counsel

# REASONS

## Background

1. This matter was listed before me for a preliminary hearing to consider an application about the claimant's medical documents; general case management; and an application for disclosure by the claimant. A decision in respect of the claimant's disclosure application was given orally on the day but, written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

## The claimant's disclosure application

2. The claimant made his application for specific disclosure from the respondent on 8 September 2023.
3. The claimant requested the following categories of documents to be disclosed.

### Request 1

- a. All communication between the respondent and HIVE. This should include all emails and letters between the respondent and HIVE that relate to the claimant. The respondent has disclosed some emails, but the letter of engagement has not been disclosed, so the claimant has no visibility into when HIVE were appointed, and under what terms.

- b. All text messages and WhatsApp messages between the directors of the respondent company (Mr Neil Tate, Mr Gary Tate and Ms Vanessa Tate) and HIVE.
  - c. All text messages and WhatsApp messages between the directors of the respondent company (Mr Neil Tate, Mr Gary Tate and Ms Vanessa Tate) and HIVE during the period of 2020 to 31 December 2021. This request was limited to only those materials which relate to the claimant, his employment and involvement with the respondent company. This request would exclude any other matters that were discussed between the three so that material could be redacted by the respondent or its solicitors.
4. It was asserted in the application that this material is highly relevant to the claimant's case on the basis that the assertions that are advanced by the respondent within these proceedings are very similar, if not the same, to the assertions and allegations that were investigated by HIVE; that HIVE advised that the respondent's assertions and allegations were not made out; and that the claimant must be able to see all of the communication between the directors of the respondent company and HIVE, and between the directors themselves (that relate to the claimant's employment and involvement with the respondent) so that the claimant can understand fully what was being discussed about his employment.
  5. During the hearing, and in the claimant's skeleton argument, the claimant argued that, on 30 March 2021, the claimant was suspended from work on the grounds of misconduct. HIVE was instructed by the respondent to carry out the investigation into the claimant's alleged misconduct and it wrote to the claimant on 12 August 2021 where it stated that it had found insufficient evidence to support the allegations against him. However, in the same letter it stated that: "However, the Directors have raised serious concerns regarding your return to work, and specifically the breakdown in trust and confidence and working relationship they feel has arisen between you and them".
  6. On 17 August 2021, HIVE wrote to the claimant again whereby it dismissed the claimant on the basis of: 4 "Based on the concerns expressed by both you and the Directors, I have no alternative but to dismiss you for some other substantial reason, specifically the breakdown in trust and confidence and working relationship breakdown. This decision has not been taken lightly but I do not see how you can return to work in view of these serious concerns".
  7. It is contended that the discussions between HIVE and the respondent are relevant to the fair disposal of the claim as the claimant was dismissed based on the misconduct allegations against him. The claimant suggests that all of this correspondence would normally as of right be disclosed by the respondent as it evidences its reasons for dismissal.
  8. The claimant argues that the respondent cannot argue that the request is somehow a fishing expedition as it simply seeks the communications between HIVE concerning his employment.

Request 2

- a. How the money to set up the GIBIDI project was raised.
  - b. Where did the initial funding to set up GIBIDI project come from?
  - c. Who paid for the GIBIDI yard?
  - d. Who is paying for the GIBIDI yard today?
  - e. Which of the respondent's employees have been working at the GIBIDI project since it was set up?
9. The claimant asserts that, from the very beginning, the claimant has been complaining about monies and resources being diverted away from the other directors of the respondent, and being used to fund and support the GIBIDI project; that this was the beginning of the whistle-blowing complaint and the beginning of the disagreements between the then three directors (the claimant, Mr Neil Tate and Mr Gary Tate).
10. It is asserted that this material is highly relevant for these proceedings in order to show the intention of the other directors of the respondent, in them trying to orchestrate the removal of the claimant.
11. During the hearing, and in the claimant's skeleton argument, the claimant refers to the fact that, in his claim form, the claimant states that staff and monies were being put into the GIBIDI project at the expense of the respondent which resulted in the claimant complaining about this conduct; his ET1 also states that this issue: "was a drive to remove him from the business" and so it is a material factor in respect of the claimant's dismissal, namely that he was dismissed in part or in whole, because of his family's decision to set up this new business. The claimant states that whilst it is correct to note that the claimant's application makes reference to a whistleblowing complaint, the claimant accepts that there is no whistleblowing claim in these proceedings, but the claimant says he is not basing this request on a whistleblowing claim but in respect of his unfair dismissal claim. The claimant says this disclosure is necessary to a fair disposal of proceedings as it goes to the root cause of the claimant's dismissal. He says that the disclosure sought is not too far ranging or excessive and is not a request for information.

Request 3

- a. All meeting notes where the annual dividends have been discussed from the period of April 2021 to the end of June 2023.
- b. All internal emails where the issue of dividends have been discussed from the period of April 2021 to the end of June 2023.
- c. All emails between the respondent and its accountants where the issue of dividends have been discussed from the period of April 2021 to the end of June 2023.

12. The claimant asserts that he is a one-third shareholder of the respondent company; that he still owns his shares and that, despite this, over the last two years, the respondent has refused to pay out any dividend to him; that although this is not a cause of action within this ET case, it has always been the claimant's case that there was an orchestrated effort to dismiss him and that the other directors intentionally had him removed from the business because they wanted to capture his share of the business; and that the recent example of this intention from the other directors of the respondent taking effect is the deliberate non-payment of the dividends. The claimant asserts that it is evident that the respondent company is profitable and generating very good revenues but, no dividends are being paid out. It is the claimant's case that those funds are being diverted elsewhere and that this was the subject matter of the claimant's whistle-blowing complaint at the very start, which led to the other directors orchestrating his removal from the business. As such, asserts the claimant, this body of evidence is highly relevant to these proceedings.
13. The claimant's requests for disclosure were made in writing on 10 July 2023 (other than the requests for text and WhatsApp messages). On 17 July 2023, the Respondent's solicitors replied, refusing these requests, and, as such, this application was filed.
14. During the hearing, and in the claimant's skeleton argument, the claimant argued that, as can be seen from the claim form, the issues of the claimant's shares in the respondent and his dividends caused or contributed to a breakdown in relations between himself and the respondent and that, as is alleged in the claim form, after the claimant refused to sell his shares all further discussions collapsed with the respondent and then he was subsequently suspended in March 2021, which eventually led to his dismissal.

### **The respondent's submissions**

15. The respondent argues that the claimant's application is the latest in a history of unreasonable conduct by the claimant which has included a refusal to inform the respondent whether he had paid a deposit order ordered by the Tribunal; that he had instituted a reasonable adjustments claim half of which was misconceived and refused to provide any further necessary information to understand it and then, forced the respondent to make an application for it to be struck out rather than withdraw it (a strike out order was then subsequently made); and has repeatedly failed to comply with the case management orders.
16. The respondent argues that the claimant's specific disclosure application is "the latest disruptive step in this unreasonable approach". It says that the application:
  - a. has all the classic hallmarks of a fishing expedition, seeking all documents within very broad classes of documents months after disclosure has taken place;
  - b. a third of the application is legally misconceived because it seeks information rather than the disclosure of documents;

- c. nowhere does the application address the core test for granting specific disclosure (whether it is necessary for the fair disposal of proceedings);
- d. the application makes requests for documents going to issues that plainly have no relevance whatsoever to the matters set out in the List of Issues;
- e. the application makes reference to a whistleblowing complaint that forms no part of the C's claim.

Request 1 and 3

17. The respondent submits that all the documents now sought by the claimant are irrelevant to the case specified in the pleadings and unnecessary for the fair disposal of the case, for the reasons below.

Request 1

18. The respondent argues that this is exactly the sort of broad class of documents that falls outside an order for disclosure. The class is not precisely defined. The claimant is seeking the disclosure of all documentation in existence between the respondent and HIVE HR to see if there might be a relevant document. That is the definition of a fishing expedition. The respondent argues that such an application is particularly egregious in circumstances where the respondent has already disclosed all documents relating to HIVE HR that are relevant to the claim as part of standard disclosure.

19. The respondent submits that the rationale put forward, namely that "HIVE advised that the respondents assertions and allegations were not made out. In the circumstances, the claimant must be able to see all of the communication between the directors of the respondent company and HIVE, and between the directors themselves (that relate to the claimant's employer and involvement with the company) so that the claimant can understand fully what was being discussed about his employment", is misconceived for several reasons:

- a. First, it is undisputed that HIVE determined there was insufficient evidence to establish the disciplinary allegations. The Response to the claim says as much and the letter from HIVE recording that decision has already been disclosed. There is no need, therefore, for any further documents to be disclosed in respect of that issue.
- b. Second, it is not necessary for the fair disposal of the case for the claimant to "understand fully what was being discussed about his employment". The claim does not traverse his employment history and relationship but specific issues that have been pleaded and set down in the List of Issues.
- c. Third, this rationale simply reveals the claimant's motivation, which is to conduct a trawl of all communication between these individuals to see if there is anything helpful to him.

- d. Fourth, the breadth of the three classes of documents in request 1 is striking. No particular or relevant communications are specified within them. This must be precisely because the claimant has no idea whether there is any relevant material therein and simply wants to sift through to see if there is a relevant document. That is exactly the scenario in which an order for disclosure should not be made: **Dhanda**.
- e. Fifth, the order sought is entirely disproportionate and, in circumstances where the claimant has not identified a specific class of documents relevant to issues in dispute, a disproportionate interference with the right to privacy under Art.8 ECHR.

### Request 2

- 20. The respondent asserts that an application for disclosure is necessarily an application for the disclosure of documents but that the entirety of 'Request 2' is misconceived because it is a request for information, not a request for documents, and it is therefore not amenable to an order for specific disclosure.
- 21. It further asserts that nowhere in his application does the claimant assert that it is necessary to order the disclosure for the fair disposal of these proceedings; that necessity is the touchstone of any specific disclosure order; and that it is entirely unnecessary for such an order here as:
  - a. First, a proportionate search has been carried out and the parties have completed standard disclosure. It is not suggested that standard disclosure is deficient such that the matter cannot be fairly determined.
  - b. Second, the delay in the claimant seeking an application for specific disclosure should drive the Tribunal to conclude that further disclosure from the respondent is unnecessary for the fair disposal of proceedings.
  - c. Third, the claimant has been unable in his application to specify anything other than broad classes of documents; the claimant also seeks documents going to matters that arose after his dismissal and the institution of his pleaded case; and that this is a fishing expedition that demonstrates that disclosure of documents – many of which he cannot even specify with precision – are unnecessary for the fair disposal of proceedings.
  - d. Fourth, (and without prejudice to the respondent's position that a request for information is not amenable to an order for specific disclosure in any event) the information requested in Request 2 is unnecessary for the fair disposal of proceedings.

### Request 3

- 22. The respondent submits that the documents sought in request 3 are self-avowedly irrelevant to the pleaded case on the following bases:

- a. The majority of the time period ('April 2021 to the end of June 2023') post-dates the claimant's dismissal (August 2021). Documents post-dating the dismissal cannot be relevant to the facts and evidence as they were during the claimant's employment.
- b. The issue to do with dividends is not relevant to any matter in the List of Issues. Even the face of the application concedes this at para 20: "... this is not a cause of action within this ET case". The question of whether dividends have been dealt with lawfully is something the Tribunal has no jurisdiction to determine in any event.
- c. Once again, the class of documents sought is really very broad and amounts to a fishing expedition: the claimant wants to trawl through correspondence to see if he can find anything helpful. That is not how litigation should be conducted.
- d. The claimant states that "it is the Claimant's case that those funds are being diverted elsewhere. This was the subject matter of the claimant's whistle-blowing complaint at the very start, which led to the other directors orchestrating his removal from the business". There is no whistleblowing complaint within this claim. Any matter to do with that is therefore irrelevant to the claim.

## **Law**

23. The relevant rule is rule 31 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, which states: "The Tribunal may order any person in Great Britain to disclose documents or information to a party (by providing copies or otherwise) or to allow a party to inspect such material as might be ordered by a county court or, in Scotland, by a Sheriff."
24. The respondent says the following legal principles are relevant to the Tribunal's exercise of discretion to order the disclosure of specific documents.

## **Necessity**

25. The key question is whether the order for disclosure is necessary for fairly disposing of the proceedings. See **Canadian Imperial Bank of Commerce v Beck** [2009] IRLR 740 (CA) at paragraph 22: "In our judgment, the law on disclosure of documents is very clear, and of universal application. The test is whether or not an order for discovery is 'necessary for fairly disposing of the proceedings'. Relevance is a factor, but is not, of itself, sufficient to warrant the making of an order. The document must be of such relevance that disclosure is necessary for the fair disposal of the proceedings. Equally, confidentiality is not, of itself, sufficient to warrant the refusal of an order and does not render documents immune from disclosure. 'Fishing expeditions' are impermissible."
26. The lateness of an application may undermine its claim that the documents are in fact necessary for the forthcoming proceedings: **Harris v The Society of Lloyd's** [2008] EWHC 1433 (Comm) at para 9: "Before dealing with the substance of the matter I ought to record the remarkable delay in presenting

the application for disclosure which would, in any event, have mitigated strongly against the exercise of any discretion to grant the relief sought”.

### Relevance

27. The relevance of documents is analysed by reference to the pleadings, and the factual issues in dispute on the pleadings: **Harrods Ltd v Times Newspaper Ltd** [2006] EWCA Civ 294; [2006] All E.R. (D) 302 (Feb) at para 12: “In my view the judge was plainly correct to approach the application for further disclosure on the basis that it was essential, first, to identify the factual issues that would arise for decision at the trial. Disclosure must be limited to documents relevant to those issues. And, in seeking to identify the factual issues which would arise for decision at the trial, the judge was plainly correct to analyse the pleadings...”. 9. If a class of documents is specified: the class should be carefully defined so it is limited to what is relevant and proportionate so that the disclosing party is in no doubt as to the scope of their obligation: **City of Gotha v Sotheby’s** [1998] 1 W.L.R. 114 at 123H (CA). 10. The Tribunal must be wary of an application for disclosure that is in reality a fishing expedition. A fishing expedition includes requiring “disclosure of all documentation in existence to see if there might be a relevant document”: **Dhanda v TSB Bank plc** UKEAT/0294/17 (13 December 2017, unreported) para 35).

### **Conclusions and Reasons**

#### General points

28. For the reasons set out above, the respondent’s application fails and the order requested is refused other than in one respect, namely that the respondent was ordered to provide to the claimant any terms of engagement which exist between the respondent and HIVE, or, in the alternative, to confirm that no such document exists.

#### Request 1

29. The request does not meet the test of necessity. It is not disputed that HIVE determined there was insufficient evidence to establish the disciplinary allegations. The Response to the claim says so. The respondent states that the letter from HIVE recording that decision has already been disclosed. There is no necessity, therefore, for any further documents to be disclosed in respect of that issue, nor is it necessary for the claimant to “understand fully what was being discussed about his employment”.

30. The request is too wide. Request 1c) is simply a slightly more specific version of b), which is slightly more specific than a). The claimant has not carefully defined the documents requested to be limited to what is relevant and proportionate.

31. The request meets the definition of a fishing expedition of the type warned against in **Dhanda** and is therefore disproportionate. It appears that the claimant wants to trawl through at least two full years of communications (under c)) or more in relation to the a) and b) to see if there is anything helpful to him. The three requests are extremely broad, and is a request for all documents to see if there is a relevant one in their midst.



32. The Tribunal explained that it would be prepared to order specific disclosure of the terms of engagement between the respondent and HIVE or confirmation that such a document does not exist as it considers that to be proportionate and relevant, and was specifically referred to by the claimant as a document that is necessary to proceedings in order to examine the scope of that relationship.

### Request 2

33. This is a request for information, not for disclosure of documents or a class of documents and is therefore legally misconceived as the application is one for disclosure. The claimant states that it is an application for disclosure but no class of documents as been defined such that the respondent is left clear as to what documents are being requested.

34. The claimant states that this information is necessary for the fair disposal of these proceedings order to show the intention of the other directors of the respondent, in them trying to orchestrate the removal of the claimant and therefore the root cause of his dismissal.

35. The Tribunal does not consider the information to be necessary. In particular, the claimant seeks documents about matters which have arisen since the termination of his employment which cannot be relevant to a decision to dismiss him.

36. Finally, in any event the application is too broad and again smacks of a fishing expedition. The claimant has been unable in his application to specify anything other than broad classes of documents/information.

### Request 3

37. Again the Tribunal did not consider these documents to be necessary to one of the issues in the claim. Again, broad categories of documents were requested.

38. The claimant may be seeking to establish the reasons for dismissal other than those put forward by the respondent, but the documentation is not necessary for the fair disposal of the proceedings. The majority of the time period ('April 2021 to the end of June 2023') post-dates the claimant's dismissal (August 2021). Documents post-dating the dismissal cannot be relevant to the facts and evidence as they were during the claimant's employment. The issue to do with dividends is not relevant to any matter in the List of Issues. Even the face of the application concedes this at para 20: "... this is not a cause of action within this ET case". The question of whether dividends have been dealt with lawfully is something the Tribunal has no jurisdiction to determine in any event. The claimant states that "it is the Claimant's case that those funds are being diverted elsewhere. This was the subject matter of the claimant's whistle-blowing complaint at the very start, which led to the other directors orchestrating his removal from the business". There is no whistleblowing complaint within this claim. Any matter to do with that is therefore irrelevant to the claim.

39. The application smacks of a fishing expedition in which the claimant is hoping to come across something which assists his case.

Employment Judge **Rice-Birchall**

Date: **12 January 2024**

JUDGMENT & REASONS SENT TO THE PARTIES ON

Date: **23 January 2024**

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FOR THE TRIBUNAL OFFICE