Neutral Citation Number: [2024] EAT 52

Case No: EA-2023-000604-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16 April 2024

Before:

HIS HONOUR JUDGE SHANKS
(sitting alone)

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Between:

MS E AIRD AND OTHERS (represented by Keller Postman UK Ltd)
Appellants

- and –

(1) ASDA STORES LTD

(2) MRS S BRIERLEY AND OTHERS (represented by Leigh Day)
Respondents

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RACHEL CRASNOW KC and **TOM BROWN** (instructed by Keller Postman UK Ltd) for the **Appellants**

BEN COOPER KC and **NADIA MOTRAGHI KC** (instructed by Gibson Dunn & Crutcher UK LLP) for the **First Respondent**

VICTORIA BROWN (instructed by Leigh Day) for the **Second Respondent**

Hearing date: 27 February 2024

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JUDGMENT

- -

SUMMARY
PRACTICE AND PROCEDURE
EQUAL PAY

Leigh Day act for a group of claimants (the Brierley Multiple) in multi-claimant equal pay litigation against Asda. Keller Postman and Leigh Day act for claimants within another group (the Calder Multiple) whose claims are in effect stayed pending the resolution of the Brierley Multiple claims.

Because the solicitors were unable to agree, Keller Postman applied to the EJ case managing the litigation for orders (a) that they should be permitted to attend all private PHs in the Brierley Multiple and (b) that they should be provided with all correspondence and documents passing between the parties in the Brierley Multiple.

The EJ granted order (a) but refused (b). Keller Postman appealed against that refusal on the basis that the EJ had wrongly taken into account the fact that there was some inequality between the two groups of Calder Multiple claimants which resulted from their own choice of representative, that he had failed to take into account relevant factors and that he had reached a perverse decision.

The EJ was entitled to recognise that there may be inequality between groups of claimants in multi-party litigation flowing from their choice of representative and that the right to be placed on an equal footing was not absolute and may have to give way to other aspects of the overriding objective. He had not failed to take into account relevant factors which he, as the judge with responsibility for case-managing the case, would have had well in mind and been in the best position to assess. The suggestion that his decision was perverse was unsustainable: the decision was a case management decision which was well within his discretion.

HIS HONOUR JUDGE SHANKS:

1. This is an appeal against a case management order made by EJ Horne sitting in Manchester sent out on 26 April 2023 in relation to large scale multi-claimant equal pay litigation against the supermarket Asda. The order was amended slightly by the judge in a further CMO sent out on 12 December 2023 following the provision of a signed confidentiality undertaking by Keller Postman.

The litigation

2. The first equal pay claims against Asda were presented in August 2008. On 3 September 2014 the President of the Employment Tribunals directed that all such claims should be combined and transferred to the North West Region. On 13 December 2016 EJ Tom Ryan, who was then responsible for case-managing the litigation, ordered that claims presented after 3 June 2016 which gave rise to the same or similar issues were to be referred to as the "Calder Multiple" and automatically stayed on presentation. The claims presented up to 3 June 2016 were referred to as the "Brierley Multiple". All the *Brierley* claimants are represented by Leigh Day; there are about 7,000 of them.

3. Litigation of the substantive issues has proceeded under the *Brierley* Multiple with Leigh Day acting for the claimants and Gibson Dunn for Asda. There have been many hearings including an appeal to the Supreme Court in 2021. No "lead cases" have been formally identified for the purposes of rule 36 of the Employment Tribunal Rules but representative sample claimants and comparators were identified in 2017. Stage 2 of the equal value process (determination of facts) was completed in January 2022. Since then experts have been preparing their reports with a view to an open stage 3 hearing which is to start on 9 September 2024, after which there are likely to be further hearings in relation to the "material factor" defence and limitation.

There are closed PHs currently arranged for 1 May and 5 July 2024 in anticipation of the September stage 3 hearing. EJ Horne took over the case management of the claims on the retirement of EJ Tom Ryan in 2020 and he is conducting all first-instance hearings in the case.

4. Keller Postman started to present equal pay claims on behalf of Asda employees in November 2022. Before doing so they expressly proposed to Gibson Dunn that their clients' claims should be stayed until the outcome of the *Brierley* Multiple and in their pleaded details of claim on behalf of Ms Aird and others they refer to the *Brierley* Multiple and reserve the right to rely on the pleaded claims of the *Brierley* claimants. Keller Postman now represent about 7,000 out of a total of about 45,000 *Calder* Multiple claimants. The remainder are represented by Leigh Day, except for a small number who are represented by other firms or acting in person. There is nothing distinctive about the type of claimants represented by Keller Postman.

5. On 23 January 2023 Keller Postman wrote to Gibson Dunn and Leigh Day seeking information about the status of the *Brierley* Multiple and seeking their consent to Keller Postman attending all private hearings and being provided with all documents exchanged between them concerning the litigation. As the three firms of solicitors could not reach agreement Keller Postman applied to EJ Horne on 18 April 2023 for orders to be made in those terms at a PH which had already been arranged for 21 April 2023.

6. In his CMO sent out on 26 April 2023 EJ Horne ordered (in effect) that Keller Postman were permitted to attend all private as well as public PHs in the *Brierley* Multiple and were to be provided with the bundles for all PHs at the same time as the tribunal but he refused their application to be provided with all documents and correspondence passing between the parties in the *Brierley* Multiple. EJ Horne supplied reasons for his decision on 13 July 2023. Keller Postman's appeal against the part of the decision that went against them was listed for a full

hearing by Judge Stout on the "sift" on 8 November 2023.

The legal context

7. The appeal arises in the context of large scale multi-claimant litigation. Mr Cooper KC for Asda drew my attention to the case of **Lungowe v Vedanta Resources PLC** [2020] EWHC 749 (TCC) where Fraser J discussed the principles applied by the courts in this type of litigation, albeit in the context of High Court proceedings. He said at para 38:

> **Parties to litigation are generally entitled to be represented by the solicitors of their choice, and to have their case argued by their own representatives. However, in group litigation, that entitlement is qualified. In order properly to achieve efficient conduct and case management of the group litigation, that basic right takes second place to the advancement of the rights of the cohort …**

He went on to say that this was achieved in the High Court by the role of the lead solicitor and the instruction of one set of counsel by that solicitor in the context of a group litigation order ("GLO"). The lead solicitor is the sole contact point for the court and the other parties to the litigation. The degree of consultation and liaison between the lead solicitors and the other firms instructed should be a matter of agreement between them and should only rarely involve the court. There should never be any need for separate counsel to be instructed to represent different groups of claimants.

8. Obviously this case is not proceeding in the High Court and is not subject to a GLO but I accept that similar principles apply. Although there has been no formal rule 36 order, Leigh Day are the solicitors representing the claimants whose claims are being litigated as representative sample claimants and the claims of those represented by Keller Postman (which by definition give rise to the same or similar issues) are stayed pending the outcome of those

claims. In the light of the Court of Appeal's decision in **Ashmore v British Coal Corporation** [1990] 2 QB 338 it is most unlikely that any party, including Asda, would be permitted to re-litigate issues resolved in the context of the sample claims being litigated in the *Brierley* Multiple. Leigh Day are therefore in practice in the position of "lead solicitors" with responsibility for running the claims and instructing counsel. The degree of consultation and liaison between them and other firms involved ought to be a matter of co-operation and agreement between the solicitors and the issue should not be a matter of concern for Asda and should only rarely involve the tribunal.

9. There is no dispute between the parties that, once faced with the issues arising from Keller Postman's application (which in effect arise from a failure of co-operation or agreement between the different firms of solicitors) the tribunal was required to reach a decision which balanced "justice and fairness to all, having regard to all relevant circumstances" (see the Appellants' skeleton argument at para 15). In other words, the judge was to give effect to the "overriding objective" in the context of large scale multi-claimant litigation.

10. Such a decision is a paradigm example of a case management decision and I was properly reminded of the limited scope for review of such a decision by the EAT. The first instance judge who is closest to the practicalities of the litigation has a wide ambit of discretion when exercising case management powers. This applies all the more so to a judge who has been specifically entrusted with the case management of complex large scale multi-party litigation as in this case. The exercise of case management powers is often a matter of finding "the least worst solution". The EAT can therefore only interfere with a judge's case management decision if he has misdirected himself in law, failed to take account of relevant factors or taken irrelevant factors into account, or reached a decision which is perverse. In considering reasons for a case management decision the EAT should bear in mind that such reasons should be proportionate and may be very short (see ET rule 62(4)) and should not be "hyper-critical or

over-analytical" of the ET's reasons.

The appeal

11. In spite of the obvious hurdles presented by those limitations Ms Crasnow KC for the Keller Postman claimants maintained on the appeal (a) that the EJ had wrongly taken into account that some of the inequality being claimed by the Keller Postman claimants was caused by their own choice of representative (ground of appeal (5)); (b) that the EJ had failed to take relevant matters into account (ground of appeal (1)); and (c) that he had reached a perverse conclusion (ground of appeal (2)). She did not pursue grounds of appeal (3), (3A) and (4) which sought to raise issues of principle in relation to open justice and Article 6 of the ECHR.

Ground (5)

12. There was no dispute that Keller Postman's clients have a legitimate interest in ascertaining whether the issues in their cases are being tested in the *Brierley* litigation so that they can decide if there is anything they need to do to protect their positions sooner rather than later (see the submissions of Mr Cooper before EJ Horne at the hearing on 21 April 2023 at pp122/3 of the transcript at p120 of the Supplementary Bundle). But EJ Horne implicitly rejected the notion that the overriding objective required that the Keller Postman claimants should necessarily be placed on an equal footing with the *Calder* claimants represented by Leigh Day, who, by virtue of the fact that Leigh Day also act for the *Brierley* claimants, are potentially privy to more information about the *Brierley* litigation than those represented by Keller Postman.

13. EJ Horne's reasons for this conclusion are at para 34. First, he observed that the requirement that parties should be on an equal footing is not absolute and that it may have to be balanced against other aspects of the overriding objective, like saving expense and dealing with cases

proportionately. Second, he noted that the "parties" which Keller Postman sought to equalise were two groups of *Calder* claimants, while his (EJ Horne's) primary concern was to put the parties to the *Brierley* litigation on an equal footing. And, third, he observed that some of the inequality complained of was caused by choices made by the different groups of claimants as to representation.

14. Ms Crasnow says that the third point involved an error of law. She says in effect that her clients cannot be said to have made a real "choice" since they were unlikely to have understood the nature of Keller Postman's involvement in the proceedings.

15. It seems to me that EJ Horne was fully entitled to conclude that he was not required to put the two groups of *Calder* claimants in exactly the same position and that he was entitled to take account of the fact that if there was inequality flowing from different representation that was something that resulted from choices the different claimants had made. I accept Mr Cooper's proposition that it is inherent in this kind of litigation that absolute equality between all claimants is not possible: that is implicit in the principles enunciated by Fraser J in **Lungowe**. In any event, all kinds of differences inevitably flow from a litigant's choice of representative in multi-party litigation. It cannot be right that the EJ was required to investigate the nature of the choice made by individual claimants or groups of claimants and what information they had when they chose particular representatives or what motivated them to choose those representatives. He was entitled to assume that Keller Postman had advised any potential clients of the status of the litigation and how the stay would operate and what information they were likely to receive and to assume that Keller Postman would not have advised their clients that they were certainly going to be put in exactly the same position as those *Calder* claimants who were represented by Leigh Day. I reject ground of appeal (5).

Ground (1)

16. Having concluded that there was no requirement for the two groups of claimants to be put on an equal footing in relation to information, EJ Horne was correct to proceed to carry out a balancing exercise in paras 35-41 of his reasons. Ms Crasnow argued under ground of appeal (1)(a) that in carrying out that exercise he wrongly omitted to consider the *extent* of the information that the Keller Postman claimants required (they were saying they should get *all* communications between the parties and not just the bundles for hearings) and wrongly concentrated only on the question of *when* they should be provided with the bundles for hearings (ie he was considering whether the bundles should be provided to Keller Postman at the same time as they were provided to the tribunal or at some earlier stage, presumably when they had been agreed between the Gibson Dunn and Leigh Day).

17. Although I accept that EJ Horne appears to concentrate at times in paras 35-39 on the question of the timing of the provision of bundles for hearings, that must be seen in the context of the reasons as a whole. He had stated in para 23 that his starting point was that Keller Postman's clients had "a legitimate interest in knowing what happens at preliminary hearings of the *Brierley* multiple". He effectively stated at para 35 that his impression (my word) was that the dispute was largely over timing because Keller Postman "will get *all the information they need* in the end" (my emphasis). In para 36 he describes Keller Postman's position in a way that makes it clear that he understood that they wished to be copied in to "… *all* relevant documents when they are sent between the parties" (my emphasis). In para 39 he reaches an overall view that the risks relied on by Keller Postman would be sufficiently safeguarded against if they were able to observe private PHs and read the bundles for those hearings. In para 40 when considering the question of prejudice to the *Brierley* parties it is plain that EJ Horne had well in mind that Keller Postman were saying they wanted to see all communications between the parties.

18. It does not seem to me that EJ Horne committed the error which Ms Crasnow relies on. He had well in mind that Keller Postman were maintaining that they needed to see all the communications and he was in my view entitled to decide, with his extensive knowledge of the case, that this would be disproportionate and that their interests would be adequately protected by the order he made. He would have had in mind the general principles I have alluded to above and the fact that it was not for Keller Postman to police the way Leigh Day were conducting the litigation or to gainsay their litigation decisions. He assessed some specific examples of information Keller Postman said they might need using his own extensive knowledge of the case. Ground (1)(a) fails.

19. It is also said that EJ Horne failed to take account of the matters listed in grounds (1)(b)-(h). Ground (1)(b) appears to suggest that EJ Horne ought to have taken into account that it would be open to Gibson Dunn and Leigh Day deliberately to exclude Keller Postman from getting certain information by agreeing not to put it before the ET. I do not recall that point being pursued in argument before me but, in any event, it seems to me that, unless there was some basis for the suggestion, it would be quite wrong to take into account a suggestion that two firms of solicitors might conspire to keep information which may be relevant to their clients' cases away from a tribunal in order to prevent another firm of solicitors getting it.

20. In so far as grounds (1)(c) and (d) ever had any validity I accept that they have indeed been superseded by the CMO sent out on 12 December 2023 and the confidentiality undertaking given by Keller Postman.

21. Ground 1(e) does not appear to add anything to the main point of principle I have considered in para 15 above: EJ Horne had well in mind that there may be some inequality between those represented by Keller Postman and those represented by Leigh Day.

22. On ground (1)(f), EJ Horne had well in mind any issues relating to the timing of disclosure: he was well aware that Keller Postman would only receive the bundles for closed PHs at the same time as the tribunal and considered this to be good enough.

23. As to grounds (1)(g) and (h), EJ Horne took into account prejudice and proportionality in relation to the provision of all communications between Gibson Dunn and Leigh Day and was entitled to reach the conclusion he did in para 40 of his reasons. As Mr Cooper reminded me, with his detailed knowledge of the case, this was an assessment that the judge was uniquely qualified to make and one that was readily understandable.

24. For all those reasons I reject ground of appeal (1).

Ground (2)

25. It inevitably follows I think from what I say above that the suggestion that the EJ made a perverse decision is simply unsustainable. This was a case management decision which fell well within the discretion that he, as the judge assigned to the case, was best placed to exercise. I have no hesitation in rejecting ground of appeal (2).

Disposal

26. The appeal as a whole is therefore dismissed.