Neutral Citation Number: [2024] EAT 79

Case No: EA-2023-001165-JOJ
EA-2023-001196-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 24 May 2024

Before :

SARAH CROWTHER KC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

VIRGIN ATLANTIC AIRWAYS LTD **Appellant**

- and -

(1) LEE LOVERSEED

(2) JONATHAN FENTON

(3) NIAMH O'CONNOR **Respondents**

- -
- -

PAUL EPSTEIN KC & CAROLYN D' SOUZA (instructed by **Gowlings WLG LLP**) for the **Appellant**
OLIVER SEGAL KC (instructed by **Ashfords LLP)** for the **Second and Third Respondents**

Hearing date: 2 May 2024

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JUDGMENT

SUMMARY

Redundancy – Disclosure – Indirect Discrimination

1. 12 former flight crew of the Respondent airline bring claims for unfair dismissal and, for some claimants, indirect discrimination on grounds including sex and age following a redundancy programme which arose at the start of the COVID-19 pandemic in 2020.

2. By a case management decision on 29 August 2024, Employment Judge Eeley held that the Respondent should disclose clean unredacted copies of internal management documents from the period April to July 2020 on grounds that the material was relevant to the issues pleaded in the case and disclosure was necessary and proportionate.

3. The Respondent's appeal against that decision in respect of all cases was dismissed.

4. The question of relevance of a document for the purposes of CPR 31.6 is not a matter of case management discretion. However, the Judge had directed herself correctly and reached the correct conclusion because the redacted material was likely to affect the parties' cases on the disputed issues on the pleadings, namely what criteria for selection the Respondent had used, whether they were fair and, the extent to which they could be justified as being a proportionate means of achieving a legitimate aim in the indirect sex and age discrimination cases.

SARAH CROWTHER KC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction:

1. Mr Loverseed, Mr Fenton, and Ms O'Connor are three of twelve claimants who are all former or current flight crew with Virgin Atlantic Airlines ("the airline"). They all bring claims before the employment tribunal with respect to the redundancy exercise which followed the dramatic reduction in passenger flights caused by COVID-19.

2. This case raises an issue about whether Employment Judge Eeley was right to hold that financial information contained within management documents produced by the airline between April and July 2020 for the purposes of decision-making which led to a redundancy exercise in which the claimant pilots were dismissed is relevant to the claimants' claims in the sense of CPR 31.6.

3. I am grateful for the benefit I have had of skilful written and oral argument from Mr Epstein KC and Ms D'Souza on behalf of the airline and Mr Segal KC on behalf of the claimant pilots, Mr Fenton, and Ms O'Connor. I shall refer to the airline as Respondent and the pilots as the Claimants to avoid confusion with the proceedings before the employment tribunal.

4. Shortly before the hearing in this matter, an application was made to the Employment Appeal Tribunal by a third party who described himself as a PR agent to one of the parties. It was not clear from his correspondence or the application by which of the parties he was instructed. His application was for disclosure from the EAT file of documents pertaining to the claims and this appeal. It turned out that he was acting on behalf of Mr Fenton and Ms O'Connor. I heard submissions from Mr Epstein and Mr Segal and they each consented on behalf of their respective clients to an order being made that the EAT would disclose the statements of case in the Fenton, O'Connor,

and Multiple claims (as explained below). It was not apparent to me why my order was necessary, because the applicant could be given sight of the copies of those documents which Mr Fenton and Ms O'Connor would have in their possession, and it was not suggested that any third party was affected by the use to which the documents were going to be put. However, in light of the consent of the parties, I was content to direct that the EAT should make copies available to him. I have therefore not given any consideration to the question of whether such an order was necessary, and my judgment should not be taken to mean that such applications are appropriate. It is to be hoped that in most cases, parties can reach arrangements about documents which are already in their possession without the need for formal order.

5. During the hearing, a letter reached me and the parties from Manleys solicitors, acting on behalf of Mr Laverty, one of the claimant pilots who is not involved in this appeal. The letter sets out the issues which Mr Laverty has raised in his claim no 2308192/20 before the employment tribunal which is being heard together with the other pilot claims. I invited submissions on the letter, but both Mr Epstein and Mr Segal declined. For myself, I cannot see that the letter takes matters any further and I have not taken it into account in determining the issues on this appeal.

6. Mr Loverseed is also one of the claimant pilots who was a respondent to this appeal. He wrote to the Employment Appeal Tribunal about 6 weeks before this hearing indicating that he no longer wished to take part in the appeal. However, Mr Segal and Mr Epstein are agreed that the correspondence was ambiguous as to whether Mr Loverseed was consenting to the Respondent's appeal being allowed. In those circumstances they both urged me to determine the appeal in Mr Loverseed's case.

7. For reasons which I set out below, the appeal in Mr Loverseed's case is dismissed. The appeal in the cases of Mr Fenton and Ms O'Connor should also be dismissed.

Chronology of the Claims

8. There are 12 claimants in total: Mr Fenton, Ms O'Connor, Mr Rees, Mr Mutty, Mr Butler, and Mr Bell (who are all represented by Mr Segal and those who instruct him and together are the "Multiple" claimants), Mr Loverseed, Mr Hargreaves, and Mr

Laverty, who are each separately represented and then Ms Hoar, Mr Olsen, and Mr Springall, who each appear in person. At an earlier stage, Ms Hoar was also represented by solicitors.

9. The first tranche of claims was presented in the period from 11 December 2020 to 23 February 2021. The Claimant, Mr Bell presented a further ET1/Claim Form on 23 September 2021 ("Bell2"). Mr Fenton presented a further ET1/Claim Form on 15 October 2021 ("Fenton2") and a third ET1/Claim Form on 9 February 2022 ("Fenton3"). Mr Laverty presented a second claim on 11 July 2022 ("Laverty2").

10. The pleaded cases in respect of redundancy did not suggest that the redundancy exercise was in any way a 'front' or 'sham' in the sense that there was an ulterior reason for dismissal. Most of the claimants accepted that there was a redundancy situation within the meaning of section 139 Employment Rights Act 1996.

11. Mr Loverseed's pleaded case (at paras 3.1 and 25-26 of his particulars of claim) was slightly different to the others in that he stated that (i) there was a continuing requirement on the part of VAA for pilots qualified to fly the A330/350 aircraft, (ii) he was bumped in favour of B747 pilots who were not qualified to fly the A330/350 aircraft; and hence (iii) he was not dismissed for redundancy. The Respondent's contention is that, whether he was bumped as he alleges or not, the reason for his dismissal was nevertheless redundancy.

12. The Claimants each raised the question of fairness of dismissal within the meaning of section 98(4) Employment Rights Act 1996. One aspect of the pleaded case was that the selection criteria which were utilised by the Respondent were not 'transparent' in the sense of being clearly defined and/or communicated to the pilots. It is also alleged that there was a lack of clarity about the extent to which any criteria had been agreed with the union, BALPA. The Respondent was also alleged to have departed from an earlier agreement between the airline and BALPA, to apply 'LIFO' ('Last in, First Out') as selection criteria. Mr Segal explained in argument that the documents showed that the airline appeared to have partially reinstated LIFO in respect of a smaller group of the most senior pilots. The impact of this is said to have been that a cohort of 'middle bracket' pilots, who happened to be the most expensive to the

Respondent's business, were selected for redundancy. This in turn has given rise to a claim that the selection criteria were indirectly discriminatory on grounds of age and/or sex in respect of the 'middle bracket'. The relevant issues are set out in sections 9 and 10 of the List of Issues, which I have considered in detail, but I hope I can be forgiven for not setting out in full.

13. The case has been largely case managed by Employment Judge Eeley throughout. The first preliminary hearing for directions was heard on 9 May 2022. Prior to that date the Respondent and various of the Claimants had produced draft lists of issues. The Tribunal recorded in its written decision, para 1,

> **"The majority of the hearing was taken up with working through the parties' lists of issues to arrive at an updated, composite list of issues for the determination by the tribunal at the full merits hearing."**

14. The Respondent produced an updated composite list dated 20 June 2022 that reflected those discussions. Mr Laverty made applications to amend his pleadings that were heard at a preliminary hearing on 1 November 2022. By a decision sent on 22 November 2022, some were allowed, and some were refused. By a decision sent on 5 December 2022, Mr Fenton was given permission to amend his third claim form.

15. There was a preliminary hearing held on 15 February 2023, and a decision was sent on 16 February 2023. It recorded at para 4 that,

> **"The composite list of issues in the multiple as a whole has now been finalised."**

16. The Tribunal's approach to the finalisation of the List of Issues was recorded at para 1 of the Case Summary as,

> **"If the issue in question could not be distilled from the Grounds of Complaint it was not added to the list of issues."**

17. At the preliminary hearing on 15 February 2023, there was discussion about disclosure. The Respondents had disclosed about 50 pages of documents (what were then known as documents 148, 150, 152, 172 and 173), in redacted form. Document 172 is a slide deck concerning the Respondent's collective labour agreement. The other documents are different versions of an internal management document entitled

'Velocity 21', dated between April and July 2020, which contain pilot pay scales, block hour costs and other financial information regarding the costs of pilots to the business and raising some comparisons as to what saving might be achieved if certain changes to terms and conditions were made or in the event of reduction of numbers.

18. The Respondent had covered up some parts of the documents which related to (i) pilot costs and potential savings and (ii) pilot payroll details. The Claimants contended that the information about pilot costs and savings was relevant to their claims. It is not suggested that the pilot payroll details, which would tend to identify specific individuals, ought to have been disclosed.

19. The Tribunal had directed that the Claimants should submit any requests for specific disclosure by 1 March 2023, specifying which of the issues in the case the requested document was relevant to. Any formal application for disclosure was to be made by 19 May 2023.

20. Mr Loverseed sought (in a letter dated 1 March 2023) the unredacted documents, stating it "is plainly relevant to the Respondent's reasons for adopting its chosen selection criteria and whether a key reason for adopting them was to maximise salary savings." Mr Fenton and Ms O'Connor sought the unredacted documents in a separate letter of the same date. The reasoning in the attached table at item 10 has become rather confused, but it seems to me that what is intended to be said there is that the redacted material is relevant because it is likely to harm the Respondent's contention that it had not used maximum permanent salary savings and changes to contractual terms and conditions as criteria for selection for redundancy. In other words, that the Respondent's positive case as to the selection criteria would be undermined by the financial information.

21. Mr Loverseed's solicitors made an application for specific disclosure on 19 May 2023, which stated,

> **"In each of these documents, information relating to VAA's pilot cost base and the savings anticipated to result from the redundancies has been redacted.**

> **In our letter of 1 March 2023, we pointed out that the information which has been redacted will throw crucial light on the Respondent's reasons for adopting its chosen selection criteria and in particular whether a key reason for adopting them was to maximise salary savings.**
>
> **VAA has refused to provide unredacted copies of these documents. In each case two reasons have been given for its unwillingness to do so. The first is a generic assertion that the information that has been redacted is not relevant to a specific defined issue in the Agreed List of Issues or necessary to achieve a fair disposal of the proceedings. The second is a contention that the redacted information is "highly commercially sensitive".**
>
> **We now seek an order for disclosure of unredacted copies of those documents. The redacted information will throw important light on whether, contrary to the defence it is advancing in these proceedings, VAA chose to depart from the seniority selection criteria which had previously been agreed with BALPA in order to maximise salary savings. VAA's formulaic response to our request has not engaged with or answered our contention that the redacted information is necessary to achieve a fair disposal of the proceedings for this reason…."**

22. The application by Mr Fenton and Ms O'Connor of 19 May 2023 stated that disclosure would, 'support the claimants' case that the respondent's selection criteria were adopted inter alia to ensure maximum permanent savings in salary, contract and terms changes and that item 2.1 on the list of issues was relevant'.

23. A preliminary hearing was held on 23 June 2023 at which the applications were considered. The Tribunal noted (in para 4 of its decision sent on 28 June 2023) that "the list of issues has only recently been finalised," and at paragraph 2 indicated that the Claimants should, 'review, refine and update' their specific disclosure requests which would be considered on 29 August and 29 September 2023.

The hearing before Employment Judge Eeley

24. At the hearing, which took place in private, by CVP, before the Judge sitting alone, Mr Fenton, Ms O'Connor (together with Mr Rees and Mr Mutty) were represented by Mr Segal KC. Mr Loverseed was represented by Mr Cheetham KC, Mr Bell was represented by his solicitor Ms Grant, and Mr Laverty by his solicitor, Ms Yates. Mr Butler was represented by Mr Green, Mr Hargreaves by Ms Clarke, and Ms Hoar by Ms Holden all of Counsel. The Respondent was represented by Ms D'Souza of Counsel. There was a formidable amount of case management to get through, and the

resulting Record of the Hearing which was sent to the parties on 31 August runs to some 15 pages. It is not clear to me whether skeleton arguments were provided to the Judge, but several authorities were cited to her, and these were placed before me - except for *Frewer v Google UK Limited* [2022] EAT 34.

25. Judge Eeley made the following findings about the documents at paragraph 2 of her Case Summary, which are not challenged,

> **"When looked at in redacted form, the pages apparently set out the pilot cost base and what savings can be delivered in 2021. It apparently shows the comparative costs savings of various different proposals. Item 150 is the Velocity 2021 Consultation Update dated 14 May 2020…Again the unredacted versions would show the financial costs and savings of competing models under consideration. Item 152 is the Velocity 2021 Consultation Update dated 15 May 2020. Item 172 is pages entitled "Collective Labour Agreement effect on bottom line." Item 173 is pages in the Velocity 2021 – Flight Crew Update dated 2 July 2020. The flavour of all these documents is that they provide an analysis of the various options available to the respondent during the consultation and redundancy period under consideration in these proceedings, including an analysis of the financial impact of the various options."**

26. She notes in her judgment that the application was made by Mr Cheetham on behalf of Mr Loverseed, but that it overlapped with the applications made on behalf of Mr Fenton and Ms O'Connor and therefore it was appropriate to hear submissions from Mr Segal to ensure consistency and avoid unnecessary repetition.

27. The Judge indicated that the Respondent had referred her to various cases and directed herself in accordance with the Respondent's submissions on the law. In light of her summary of the law she identified that the following four questions which she considered she needed to answer:

> **"6.**
>
> **a. Is the information relevant to the issues in the case (having regard to the pleadings and the list of issues)? I should be alive to the possibility of a 'fishing expedition' by the claimants whereby they seek to get disclosure of a matter which is not yet an issue in the case, but which may become an issue in the case as a result of the disclosure.**
>
> **b. Any redaction should have the relevant attestation by the legal representatives attached to it explaining the reason for the redaction.**

c. If the material redacted has the applicable attestation but is relevant, is disclosure of the redacted portion necessary for the fair disposal of the proceedings?
d. Is disclosure of the matter proportionate?"

28. At paragraph 16 of her judgment, after considering the parties' respective arguments and setting out the facts of the case, she made the following findings,

> **"On reviewing the totality of the information, I concluded that the redacted portions of the documents were relevant to the following matters: -**
>
> **a. Whether there was a redundancy situation and whether redundancy was the reason for dismissal in the claimant's case.**
> **b. The fairness of the selection criteria from an unfair dismissal perspective. This incorporates the following issues:**
> **i. The transparency of the selection criteria.**
> **ii. The reasons why the selection criteria were selected or amended. Was maximising costs savings the reason? Did it cause the respondent to depart from an agreed position with BALPA?**
> **iii. The extent to which the respondent departed from its agreements with BALPA or acted in conjunction with BALPA through the process of negotiation (raised in the Grounds of Resistance).**
> c. **The assessment of proportionality in the respondent's defence if the PCP is found to be indirectly discriminatory."**

The Law

Disclosure

29. The employment tribunals have adopted the civil court rules in respect of disclosure and inspection of documents. Although there is a habit of using the term 'disclosure' to mean production of documents, in fact, 'disclosure' merely concerns the obligation on a party to identify the existence of documents in his possession or control. Inspection relates to provision of either access to the documents or these days most likely copies of them.

30. Rule 31.6 of the Civil Procedure Rules requires a party to disclose the documents on which he relies, or which adversely affect his own or another party's case and those which support any other party's case. The parties, in submissions before me, referred

to this test as the 'relevance' test. I accept that this shorthand does not fully accurately encapsulate the full test and has potential to read more widely than the actual words of CPR 31.6. Nevertheless, I have adopted the term 'relevance' as a convenient expression and where I refer to it in this judgment, I have the actual words of the rule in mind. I remind myself that CPR 31.6 is designed to exclude from disclosure documents which provide lines of enquiry leading to other information which might affect a party's case (see *Harrods Ltd v Times Newspapers Ltd* [2006] EWCA Civ 294; [2006] All ER (D) 302).

31. In the context of the civil courts, the 'case' means the statements of case in a civil claim. In the employment tribunal, these are the grounds of claim and those of resistance, together with any further and better particulars. These set out the case each party must meet and inform the Court of the parameters of the dispute between the parties and therefore forms the basis of case management. The often-cited statement of Langstaff P in *Chandhok v Tirkey* [2015] IRLR 195 at paragraph 18 acts as an essential reminder not to lose sight of the pleaded statements of case,

> **"An employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings."**

32. In the employment tribunals, where it is more common than in the civil courts for parties to appear without the benefit of legal representation and where the legal issues arising from a factual situation can be multiple and often lend themselves to be put in several different ways, the practice has become well-established of using the statements of case to form a list of issues to guide conduct of the case. The purpose is to distil what can in practice be lengthy, narrative pleadings into a comprehensive checklist of the legal issues which fall to be determined because of them. They are not to be used for 'backdoor' amendments or additions to the pleaded claims and therefore it is generally unhelpful for the list of issues to depart from the pleaded cases or to expand over the lifetime of a case. As Eady P said in *Hassan v BBC* [2023] EAT 57, (citing *Bailey v GlaxoSmithKline* [2019] EWCA Civ 1924)

> **"The list of issues will generally be used to form the basis of the management of the case, of the need for disclosure and of the preparation of factual and expert evidence for trial…Allowing parties at trial to**

> **expand the issues and the evidence needed in reliance on pleading points is to undermine such good case management."**

33. In a case which has been managed by the tribunal with a list of issues, this therefore, will be a useful starting point (and often the end point) for questions of relevance in respect of whether a document is disclosable or not. However, ultimately, it is the scope of the pleaded cases upon which questions of relevance depend.

34. There is no definition of the phrases 'support' or 'adversely affect' in CPR 31.6 and therefore this has been left as an element of judicial evaluation in the application of the test to the facts of the case. The test of relevance in respect of disclosure is designed to be a factual question, which requires consideration to be given to how each party's case is advanced and an assessment to be made of whether a document (or part of it) is likely to be of probative value to any of those issues. Often, especially in employment cases, where several overlapping claims can arise out of the same facts, documents are relevant to more than one issue.

Confidentiality

35. Questions of 'privacy', 'commercial sensitivity', 'confidentiality' or 'third party rights' do not come into play when considering the issue of relevance: see *Science Research Council v Nasse* [1980] AC 1028. Where a party suggests that the whole or part of a document is relevant, but it nevertheless might be covered up or redacted on grounds of privacy, that raises a different issue and I will say no more about it because as Mr Epstein KC acknowledged in his submissions, although the point featured in the application before EJ Eeley, it is no longer pursued in this case before me.

Redacting or covering up parts of otherwise disclosable documents

36. Often, the question of relevance of a document will be considered by the disclosing party in respect of the document as a whole. This is a proportionate approach in respect of time and costs and should in my judgement be the one which is to be encouraged. Redaction of documents is a time-consuming process and ought not to be

the norm. Further, as is illustrated by this case, there are risks inherent in such an approach because it is not uncommon for it to give rise to challenge or specific disclosure issues. However, as was common ground before me, it has long been open to a party to consider that only part of a document is relevant to the issues in dispute in the litigation and in those circumstances, only the relevant parts fall to be disclosed.

37. In *GE Capital Corporate Finance Group v Bankers Trust Co* [1995] 1 WLR 172, Hoffmann LJ explained the procedure which falls to be applied where a party considers that part of a document is not relevant. At page 174B he said,

> **"It has long been the practice that a party is entitled to seal up or cover up part of a document which he claims to be irrelevant. Bray's Digest of the Law of Discovery, 2nd Ed (1910), pp 55-56 puts the matter succinctly: 'Generally speaking, any part of a document may be withheld from production; the party's oath for this purpose is as valid in the one case as in the other. The practice is either to schedule to the affidavit of documents those parts only which are relevant, or to schedule the whole document and to seal up those parts which are sworn to be irrelevant…'**
>
> **The oath of the party giving discovery is conclusive, 'unless the court can be satisfied – not on a conflict of affidavits, but either from the documents produced or from anything in the affidavit made by the defendant, or by any admission by him in the pleadings, or necessarily from the circumstances of the case - that the affidavit does not truly state that which it ought to state:' per Cotton LJ in Jones v Andrews (1888) 58 LT 601, 604."**

38. Leggatt LJ, giving judgment in the *GE Capital* case said at pp 176-177H:

> **"The plaintiffs are obliged to disclose the relevant parts of the documents, but not the irrelevant…For over a century litigants have been permitted to cover up or blank out irrelevant parts of documents. The court will not ordinarily disregard the oath of the party that the parts concealed do not relate to the matters in question."**

39. I do not discern from what the learned judges were saying in that case that there is any difference in principle as to the test which applies to determine whether the whole or merely part of a document is relevant and falls to be disclosed in accordance with the terms of CPR 31.6. Those authorities establish that where only part of a document is said to be relevant to the issues in a case - and the disclosing party wishes to take the time and trouble to redact or cover up the irrelevant parts - this is permissible but needs to be supported by the usual disclosure statement which demonstrates that the

disclosing party understands and has complied with his disclosure obligations. That disclosure statement will be subject to challenge only in the limited circumstances set out by the court. This line of cases was examined in *Frewer v Google*, by HHJ Tayler, at paragraphs 22-25, although it was not referred to in argument before me. My reading of that judgment in respect of partial disclosure on grounds of relevance is entirely in line with what was said in *GE Capital*. In particular, at paragraph 25, HHJ Tayler refers to the need for 'attestation' by the party who discloses only part of a document on grounds that the remainder is irrelevant. I do not understand him to be suggesting that this adds any procedural step over and above those which apply to disclosure in general.

40. Notwithstanding this, it was suggested in argument by Mr Segal KC on behalf of the Claimants, if not before EJ Eeley, but before me at least, that a different test in law applied in circumstances where a party accepted that part of a document was relevant but wished to contend that other parts of it were irrelevant and therefore cover them up. He also argued that an additional procedural safeguard over and above the normal disclosure statement was needed in circumstances of redaction: namely that the solicitor ought to separately and specifically attest that the redactions were limited to irrelevant material and set out reasons why the material was said to be irrelevant.

41. Both suggestions were derived from the decision of the Court of Appeal in *Hancock v Promontoria (Chestnut) Ltd* [2020] 4 WLR 100. In that case, which concerned an application to set aside a statutory demand by a debtor in personal insolvency proceedings, the court was required to construe the terms of the Deed of Assignment pursuant to which the petitioner alleged that the debt which was subject of the petition had been assigned to the debtor. The debtor contended that because the copy of the Deed of Assignment which had been put into evidence was heavily redacted, and the explanations for such redactions were in his submission inadequate, the Statutory Demand ought to be set aside on the basis that there was a genuinely triable issue in relation to the unpaid debt.

42. The Court of Appeal rejected the contention that the petitioner needed to provide an unredacted copy of the Deed of Assignment. It did, however, hold that irrelevance alone was not a proper ground for redaction of part of a document which the court is

asked to construe. In such situations, there needs to be some additional feature, such as privacy or confidentiality, which permits the redaction. At paragraph 75, Henderson LJ held that it is only where 'on any reasonable view' the redacted part of the document is irrelevant and where the reasons for taking that view are fully and clearly articulated by a solicitor acting for the party would redaction of a contract which needed to be construed by the court be tolerated. Furthermore, it was held that any such redactions would need to be justified in a separate affidavit by the solicitor with conduct explaining the reason why redaction had nevertheless taken place.

43. Mr Segal submitted that a similar approach applied in relation to disclosure of documents generally in the employment tribunal. I am unable to accept this submission. First, it is clear from the decision in *Hancock* itself that it is distinguishable on its facts. Unlike this case, the question in *Hancock* was one of construction of a contractual document by the court to establish its proper meaning and effect. The Court of Appeal proceeded on the basis that such an exercise is one for the court, not the parties to undertake, and secondly that it would read the document as a whole to do so. Therefore, unlike in respect of the more general disclosure exercise in litigation, it is primarily for the court, not the parties to assess whether parts of a document are relevant. This, to my mind, is why Henderson LJ set a higher bar and found that redactions of contracts are only permissible where 'on any reasonable view' those parts of the contract to be covered up were irrelevant to construction of the document as a whole. It is also why he concluded that the reasons for redaction needed to be clearly articulated so that the court was aware of what was being withheld from it and why.

44. Secondly, the Court of Appeal in *Hancock* expressly rejected a submission that the approach under CPR 31.6 to partial disclosure of documents was analogous to redactions of a contract to be construed by the Court. At paragraph 89, Henderson LJ said,

> **"There is in my judgment a clear distinction between the rules which apply when a party is giving disclosure of documents, in the ordinary course of litigation, and the process of construction of a document which a court has to embark upon when considering the meaning or legal effect of a document."**

45. In my judgement, *Hancock* is binding authority for the proposition that redaction to contracts which fall to be construed by the court engages separate considerations from those which apply in the disclosure of documents more generally under CPR 31.6 or 31.14. It follows that, to the extent that EJ Eeley in her judgment followed the *Hancock* approach, (for example in the question she posed herself at paragraph 6(b) of her judgment about the need for specific attestation to redactions from disclosure). If, which is not clear from her judgment, by that she meant that a separate statement of redactions was needed, she was wrong to do so. The only questions she needed to answer in my judgement were whether the parts of the documents which had been covered up were likely to support or adversely affect the case of any of the parties' pleaded cases and so whether the disclosure was necessary and proportionate for the fair disposal of the issues. The only 'attestation' to relevance is that which is generally required by the rules in respect of disclosure regarding relevance. The decision in *GE Capital* is to the effect that relevance of documents is dealt with in the same procedural fashion under CPR 31 whether the question of relevance relates to a whole or part of a document. There is no basis for the introduction of additional procedural steps either in the rules or as a matter of general principle. In my judgement requiring such a step would serve little or no purpose and is likely to add complexity and costs.

Standard of review on appeal on case management decisions regarding relevance

46. I was reminded by Mr Segal KC that where the EAT is invited to consider a case management decision made by the ET it should be slow to interfere. He drew my attention to the decision of Mummery LJ in the well-known passage from *Gayle v Sandwell and West Birmingham Hospitals NHS Trust* [2011] IRLR 810, at [21]:

> **"… If the ETs are firm and fair in their management of cases pre-hearing and in the conduct of the hearing the EAT and this court should, wherever legally possible, back up their case management decisions and rulings."**

47. In similar vein, he referred me to the dicta of Asquith LJ in *Bellenden (formerly Satterthwaite) v Satterthwaite* [1948] 1 All ER 343 at 345, that, for an appeal to succeed in relation to the exercise of discretion, the discretion must,

> **"Exceed the generous ambit within which reasonable disagreement is possible."**

As well as that of Lawrence Collins LJ in *Walbrook Trustee (Jersey) v Fattal* [2008] EWCA Civ 427, at [33]

> **"… These were case management decisions. I do not need to cite authority for the obvious proposition that an appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."**

48. I agree with this submission to the extent that the issues in this appeal turn on proportionality of disclosure of a wide category of documents or the question of necessity. In fact, as the case was argued before me, it is primarily the question of relevance on the pleadings which falls to be considered. It seems to me that, the task in respect of assessing relevance to the pleadings is not exercise of any judicial discretion, but rather is an evaluative judgement as to whether, properly seen, the information redacted from the documents was likely to be relevant to any of the issues arising on the pleaded cases of the parties. Whilst I would accept that it would be possible for there to be some limited range of opinion on that question in borderline situations, it is not a decision which in general is due the same deference by the appellate court as would a case management exercise of a discretion.

Ground 1 of the Appeal – the challenge to paragraph 16(a) of the Judgment

49. As I have said, the primary focus of Mr Epstein's attack on the Judge's findings was in relation to her determination that there were three ways in which the redacted material was relevant to the issues in the case (at paragraph 16 of her judgment set out above). He presented these as three separate grounds of appeal. During oral argument, he developed this by submitting that if any of these three findings were in error, then that would vitiate her determination in respect of disclosure. In my judgement, that is not the correct approach. The Judge, for the reasons I have set out above, was not exercising a discretion, but simply answering the question laid down by CPR 31.6,

namely whether the documents were relevant to the issues in the case. Unless Mr Epstein can knock out all three bases upon which the Judge held the documents to be relevant, then, (subject to questions of necessity and proportionality), his appeal cannot succeed.

50. Taking first then, the finding in paragraph 16(a) that Mr Loverseed's case raised an issue under s139 ERA 1996 either of whether there was a redundancy situation or whether that redundancy situation was causative of the termination of his employment. In this respect, I accept Mr Epstein's submission that Mr Loverseed's case, pleaded as it was on the limited basis of being 'bumped' for pilots who were trained to fly other types of aircraft, could not possibly contain any issue in which the financial information in the documents was relevant. His issue was entirely specific to his individual case and the wider financial information is not relevant.

Grounds 2 and 3 of the Appeal – the challenge to paragraphs 16(b) and 16(c) of the Judgment

51. There is considerable overlap between the considerations which arise in respect of Mr Epstein's challenge to the Judge's findings at paragraphs 16(b) and (c) (fairness of selection criteria and indirect discrimination respectively) and it is sensible to take them together.

52. Mr Epstein tackled the finding of the Judge that the financial information was relevant from the perspective of unfair dismissal in relation to the selection criteria by arguing that the List of Issues at paragraph 2.1 only raised the issue of fairness of the selection criteria in general terms and did not specifically allege that one of the selection criteria had in fact been maximisation of permanent costs savings and changes to terms and conditions. He submitted that amendment would be needed at some point to make these allegations and therefore this was a classic 'fishing expedition' whereby a claimant seeks to obtain disclosure of information which would then allow him to plead a case, whereas the law was clear that disclosure ought to follow, not lead the pleadings.

53. In support of this submission, he relied on the decision of the Employment Appeal Tribunal in *Remploy Limited v Abbott and others* UKEAT/0405/14/DM, a decision of HHJ Serota QC handed down on 24 April 2015. In that case, some 1,600 claimants had individual claims for unfair dismissal following on from their redundancies after the government decided to remove sponsorship for the Respondent company which was a non-departmental government body with the purpose of providing employment for the disabled. Their claims were pleaded on the basis that they ought to have been considered for redeployment to other factories. A hearing date was set for November 2014. In September 2014, the claimants sought to amend their cases to add new allegations, including that the redeployment ought not only to have considered other factories but other parts of the Respondent's organisation, as well as raising fresh issues as to unfairness of selection.

54. It was held by the EAT that the amendment ought not to have been allowed. At paragraph 82, HHJ Serota QC found that there had been a material omission in the exercise of the discretion to amend on the part of the tribunal, in that it had failed to take into account the significant impact that late amendment would have on the ability of the parties to prepare properly for the trial. The question of seeking alternative employment was a factual question which a tribunal would struggle to determine fairly without evidence being led by the parties and the prejudice to the respondent in having to seek to do that in the remaining time available outweighed that to the claimants of refusing the amendment.

55. In *Remploy*, reliance had been placed by the claimants (and the tribunal) on the previous decision in *Langston v Cranfield University* [1998] IRLR 172 as authority for the proposition that in a case of unfair dismissal in a redundancy situation an employment tribunal is bound to investigate all aspect of unfairness even if the parties have not specifically asked them to do so. HHJ Serota QC held, at paragraph 76 of his judgment, that the principle in Langston is not of blanket application. He said this,

> **"Whether an employment tribunal is bound to take a point not raised by the parties will depend on the circumstances."**

56. Later in his decision, he added (paragraph 82),

> **"In straightforward cases it may properly be left to the Employment Tribunal to determine for example all the Burchell points or various heads of compensation for unfair dismissal, but in a complex case such as the present case where the parties are legally represented and have pleaded their case with some particularity, any addition to the Particulars will require amendment, which will have to be applied for and considered in the usual way on conventional grounds. I ask forensically how the Employment Tribunal might have been expected to consider the question of alternative employment if the parties had not raised it. The point could only properly be determined, if the Employment Tribunal were bound to determine the point, if it had been drawn to the attention of the parties, who would then have had to consider what evidence, if any, might be required and to make appropriate submissions."**

57. Mr Epstein pointed out that HHJ Serota QC had noted that in Remploy the claimants had the benefit of legal representation and the claims had been carefully case managed with lists of issues and detailed pleadings. He observed that the present case bears many of the hallmarks of a group action in which most claimants are represented by experienced and highly skilled lawyers and where there has been considerable time and effort invested in managing the case including identifying the issues.

58. In respect of Ground 3, Mr Epstein made the same argument as he had done in relation to the fairness of selection criteria for unfair dismissal. He submitted that this point had not been taken below until the hearing itself. He noted that on the justification issue on which the Respondent would bear the burden at trial, it had not raised any argument as to cost as the basis for any justification defence, whether as a legitimate aim or as part of any proportionality assessment.

59. Mr Segal's central submission was that the Respondent took an improperly narrow view of relevance to the pleadings/list of issues. He submitted that Mr Epstein's arguments pre-supposed that the financial information was not already relevant to the issues as set out in the list derived from the pleadings. He said that it was unnecessary for any of the claimants to plead further detail of all the ways in which challenge might be taken at trial to the Respondent's defences of its criteria as fair. The Respondent's pleaded defence of justification of the indirect discrimination claims would be for the Respondent to show that its conduct constituted a proportionate

means of achieving a legitimate aim and that any evidence which tended to show that the stated reasons put forward by the Respondent for the act complained of were not its actual reasons (or not all of its actual reasons), would adversely affect the Respondent's defence of justification.

60. Therefore, he argued, the Respondent was taking too narrow a view of relevance considering the pleaded issues. It was not sufficient simply, as the Respondent had done, to consider what material supported any pleaded case either party was asserting, it was also necessary to take into account any material that was likely to adversely affect either party's case. In the instance of the present documents, that arose because they tended to suggest, for instance, that one of the real but 'silent' considerations on the part of the Respondent was to achieve the maximum possible long term costs savings in part by getting pilots permanently to change their contractual terms and conditions. That material would be relevant within the meaning of CPR 31.6 to both the fairness of the selection criteria and the Respondent's claim that any prima facie indirectly discriminatory conduct could be justified.

61. *Remploy* and the line of cases about the extent of the principle laid down in *Langston*, were, accordingly, in the submission of Mr Segal, something of a red herring. The parties had clearly joined issue on the current pleadings as to what the selection criteria used by the Respondent were, as to whether they were fair and whether they were indirectly discriminatory. He raised by way of analogy a situation where an employee is dismissed, and the employer advances conduct as the potentially fair reason. It would not be open to that employer to redact emails which tended to show management discussions about consequential costs savings of a possible dismissal of the claimant simply on the grounds that the claimant had not said in terms that this was the real reason for his dismissal. It was sufficient that the material would likely adversely affect the employer's case that misconduct was the reason for dismissal and that fulfilled the test in CPR 31.6.

Discussion

62. I prefer the submissions of Mr Segal on this issue. I agree that the Respondent's approach takes too narrow a view of relevance in light of the pleadings on both sides.

It fails properly to account for the potential for the information to adversely affect its own case and in my judgement the Judge was right to find the unredacted documents relevant for the reasons she gave.

63. In support of this conclusion, I consider that the Judge was clearly alive to the competing contentions of the parties regarding the scope of the pleaded issues. At paragraph 11 of her case summary, she set out the argument that the disclosure request amounted to an 'unjustified and impermissible extension' of the claimants' cases beyond the pleaded issues and contrasted it to an attempt to add a new allegation by one of the other claimants that his dismissal did not arise as a result of any reduction in need for workers by the respondent's business, but was a 'sham', which the Judge had rejected.

64. In my judgement when the Judge set out that the claimants were arguing that,

> **'The way the redundancy exercise was implemented was opportunistic and disguised to achieve annual savings by removing the most 'expensive' pilots',**

she had direct regard to Mr Fenton's pleaded case and the airline's grounds of resistance, particularly the averment by the Respondent that it,

> **'Came to an agreement on the collective redundancy processes to be applied, together with alterations to the respondent's working arrangements and necessary changes to terms and condition for the pilots' (paragraph 3) and, 'that the selection process was the product of and governed by agreements with BALPA (paragraphs 8.7.2 and 8.9 of the Grounds of Resistance.)'**

I pause here to observe that the Respondent's pleading is rather coy on the question of what the actual selection criteria were, especially considering the Claimants' direct complaint in their grounds that there has been a lack of transparency about those criteria. Whilst, understandably, the reasoning is a little compressed in the Judge's reasons, it being a case management hearing, on a fair reading of her judgment I find that is the basis on which she Judge concluded that the material is relevant to the Claimant's attack on the Respondent's case about the nature and fairness of its selection criteria.

65. She also obviously had in mind Mr Segal's submission, similar to the one he made to me, which is recorded by the Judge (paragraph 13), that,

> **'The disclosure regarding collective consultation has been limited. The redacted financials show if there is a link between the financial information and the particular redundancy process which was followed in this case. Counsel submitted that all the claimants raised questions as to whether the selection criteria were influenced by/designed to achieve certain costs savings. This cannot be determined without access to the redacted information.'**

66. It is clear to me that her finding at paragraphs 16(b) and (c) are derived from acceptance of this submission. In my judgement these were findings that took account of the statutory test of 'relevance' in the specific sense of whether the material was likely to adversely affect the Respondent's case. I agree with those findings. The financial information is relevant to question the amount of transparency on the part of the Respondent regarding the criteria used to select for redundancy. The material is also relevant to exploration of what the actual criteria were used, and whether in fact the criteria selected were influenced by a desire to achieve longer term change to terms and conditions to maximise long-term savings in pilot costs.

67. The relevance in my judgement is also apparent from the part of the documents which have already been disclosed. For example, it is apparent that financial considerations were considered by the Respondent at the time highly material to the discussions with BALPA as well as the options which were available to the Respondent if agreement with BALPA could not be secured. Therefore, in turn, the impact on the 'bottom line' was clearly seen as relevant by the Respondent to whether to do a deal with BALPA about selection criteria, and if so, on what terms. Similarly, the 24 April 2020 iteration of the Velocity 2021 document contains (internal pagination 11) a detailed cost comparison between the two scenarios – agreement with BALPA or no agreement. From the development in the documents over time it can further be seen that negotiations with BALPA were having an impact on the Respondent's design for its selection criteria and the shape of the overall scheme. What cannot be seen easily or at all without the figures is how those negotiations were affecting the structure.

68. In the course of his submissions, Mr Segal asked rhetorically if, (as I have found), the Respondent was using the whole of these documents in order to weigh up its options regarding negotiation and choice of selection criteria with BALPA at the time the documents were produced, then it obviously considered all of the information in the documents as relevant to that exercise: so on what possible basis can it be suggested now that only some of that information was relevant to the question of which selection criteria were in fact adopted and the related questions of whether they were fair or discriminatory or not? I am not sure that there is an answer to that question. In fact, it seems to me that the most relevant information in the documents is potentially the redacted information because it is likely to show the cost comparison for the different terms and conditions which the pilots had and how the costs would vary depending on what type of deal was done with BALPA. Whatever those figures are, it will affect the parties' respective cases about the extent to which the financial bottom line was used to design the process. Without the figures, it is difficult to see what use can be sensibly made of the material.

69. The redacted material is therefore likely to be material to questions before the tribunal at trial. It will have a bearing on any determination about the parties' cases on what the selection criteria used were, whether they were fair criteria or whether they were influenced by factors other than those presented to either BALPA or the claimants. It will be similarly material which is likely to have an impact on what the tribunal finds were the aims of the Respondent's business and whether they were the ones now advanced as legitimate. It will also be material to assessment of proportionality of the redundancy scheme as designed to meet those aims.

70. As I have said earlier, although necessity and proportionality of disclosure were mentioned briefly in the Appellant's skeleton argument, they did not feature heavily in Mr Epstein's oral submissions and do not appear to have been a significant focus of submissions before Judge Eeley either. In any event, the material is in my judgement necessary for the same reasons I have given above in respect of relevance.

71. I reject the suggestion that uncovering the redactions is disproportionate. The relevant material can be revealed easily. It is modest in amount – about 50 pages – and the Respondents can simply provide clean copies. No further searches need take place. It

was not suggested to me that any new witnesses will be needed because of the new material (the Respondent already has is in mind to call some 19 witnesses over the 15 weeks of the listed case). It was not suggested that the witness statement deadline of July would be adversely affected by the addition of the modest amount of material in the figures. The Respondent is aware of the arguments which are likely to be led on the material and can deal with them in the statements if it so chooses. The revealing of the figures in the existing documents does not have any significant impact on the management of the case to trial which is due to take place in January 2025. I reject the vague suggestion which was made that revealing the covered-up material will lead to a train of enquiry disclosure applications or somehow derail the witness evidence. There is nothing before me which supports this submission.

72. In the event, I have not derived any real assistance from the *Remploy* case. It is not apparent from my reading of the judgment below that the specific point which Mr Epstein now argues in reliance on *Remploy* was in fact taken before Judge Eeley. The argument before her (as set out at para 11 of her judgment) appears to have focussed on seeking to draw an analogy with amendment to include a case that the redundancy was a 'sham' or 'front'. She, quite rightly in my judgement, rejected that submission then, and as I find, on a proper reading, also did in her subsequent decision of 24 March 2024, (in which she permitted some amendments by one of the other claimants (Mr Olsen) but not a sham case) to be added. I reject the submission of Mr Epstein that this later judgment casts any shadow over the Judge's earlier reasons – indeed, in my judgement she has applied the same distinction in both situations between s98(4) fairness of selection and indirect discrimination on the one hand as being raised already – and addition of a new case in respect of s139 ERA 1996 on the other.

73. Even if I am wrong that reliance on the *Remploy* decision is not a 'new point' on this appeal, that case was in material respects very different from this one, not least that, in *Remploy*, the court was faced with an application to amend and therefore had to apply the *Selkent* principles, which include balancing prejudice between the parties. The lateness of the application was obviously an extremely important feature. It was also a case where the claimants had (at least initially) accepted the need to amend to advance a completely different factual case in circumstances where the effect of the proposed amendment would be to cut across the entire preceding group management

of the claims because it raised issues local to each factory for the first time in a case of some 1,600 claimants, giving rise to substantial further evidential investigations and where the prejudice to the defendant was obvious and significant. Here, as I have said, the only real issue is relevance. I have found that the documents are relevant and also necessary. In any event, for the reasons that I have given, the proportionality exercise falls overwhelmingly on the side of full disclosure.

Disposal

74. The appeal in respect of the order made on the application by Mr Fenton and Ms O'Connor is dismissed. As a stay has been imposed on the direction of Judge Eeley, I will direct that clean copies (save for the redactions which concern pilot payroll information) shall be provided within 7 days. After circulating my reasons in draft, I invited further submissions by email to me by the parties and those representing Mr Loverseed as to the proper disposal of his appeal. In light of those submissions the appeal in Mr Loverseed's case shall also be dismissed.