EMPLOYMENT TRIBUNALS

Claimant: Mr D Shaw **v** **Respondent:** The Intellectual Property Office

PRELIMINARY HEARING

Heard at: Reading **On:** 21 January 2019

Before: Employment Judge S Jenkins (sitting alone)

Appearances
For the Claimant: In person
For the Respondent: Mr A Williams of Counsel

JUDGMENT

1. The Claimant's applications for specific disclosure, an unless order, for an order striking out the response, and to amend his application are dismissed.

REASONS

Background

1. The hearing was to deal with the issues outlined in a notice of preliminary hearing, dated 18 December 2018, which were to determine the Claimant's applications: for specific disclosure; for an unless order; and for an order striking out the response. Case management issues were also to be addressed which have been summarised in a separate document. During the course of the hearing, an application on the part of the Claimant amend his Claim Form also arose.

The Applications

2. In relation to the applications identified prior to the hearing, I heard representations from the Claimant and from Mr Williams on behalf of the Respondent, and I considered various emails passing between the parties and/or the Tribunal in relation to the issue of disclosure. I clarified that the unless order would be something which would arise from my conclusions in relation to the application for specific disclosure. I also clarified that the

application to strike out the response related to the Claimant's assertions that the Respondent had failed to comply with Tribunal directions, namely a general direction for disclosure made by Employment Judge S Davies in April 2017 at a time when the case was being managed by the Wales Employment Tribunal, and a specific direction made by Employment Judge Milner-Moore, at a preliminary hearing on 5 June 2018, that the Respondent provide a draft index to the proposed trial bundle to the Claimant on or before 17 July 2018.

The General Disclosure Direction

3. The essence of the Claimant's concerns with regard to general disclosure were that the Respondent had provided a response to a data subject access request ("DSAR") he had made under the Data Protection Act 1998 by providing him with a significant amount of documentary material in March 2017. The Respondent had then provided him with a separate list of documents by way of compliance with the disclosure direction in April 2017.

4. Whilst I did not have an opportunity to consider all the documents on what is already a voluminous Tribunal file, it appeared to me that the Respondent had initially taken the approach that its disclosure would be treated as something separate from, and additional to, the DSAR. By the time that the Respondent submitted a draft trial bundle index in August 2018 however, it seems that the Respondent had conflated the two, as its proposed index included a number of documents which had been disclosed to the Claimant under the DSAR and not in relation to the Respondent's Tribunal disclosure. The Claimant contended that this was unfair in that he was placed with the burden of checking the DSAR documents which he felt was something that the Respondent should have done.

The Specific Disclosure Direction

5. With regard to the Respondent's breach of the specific direction to provide the draft index to the proposed trial bundle by 17 July 2018, it was accepted by the Respondent that the draft index had not been provided in time. To clarify, the direction was provided orally by Judge Milner-Moore at the hearing on 5 June 2018, but the written summary of those directions was not sent to the parties until 30 July 2018, i.e. after the date upon which the Respondent had been ordered to provide the draft index.

6. Mr Williams, who had represented the Respondent at the preliminary hearing in June 2018, noted that any failure in this regard was his responsibility, in that he had not appreciated that Judge Milner-Moore had given a specific direction and had not passed the directions on to the Respondent or his instructing solicitors. The Claimant himself raised the issue with the Respondent and the Tribunal in July 2018, and the Respondent then did provide the required draft index on 22 August 2018.

7. However, none of the further directions issued by Judge Milner-Moore have been complied with, as the Claimant had been concerned about the Respondent's failure to comply with the order to provide the draft index by 17 July 2018. In that regard, the Claimant referred me to the case of Chidzoy v BBC (UKEAT/0097/17/BA) and noted that a factor in the Tribunal's decision to strike out the Claimant's claim in that case had been its decision that it could not trust the Claimant. He contended that he could not himself trust the Respondent in light of its failure.

The Specific Disclosure Application

8. With regard to the application for specific disclosure, the Claimant indicated that he had made several requests for specific disclosure, and it appears that the Respondent has complied with them but, it seems, not to the Claimant's satisfaction. He made reference to his view that other documents were in existence which he felt could be inferred from the documents that had been disclosed. The Respondent contended that it had complied with all specific disclosure requests, other than the one to which I refer in more detail below, but that the other documents requested either did not exist or had no relevance to the proceedings.

9. Ultimately, the Claimant clarified that his request for specific disclosure encompassed one document, and that is a request for a copy of a personal journal maintained and kept by Mr Brian Woods, one of the Respondent's managers. It appears that Mr Woods had typed up some extracts from this journal, which referred to his interactions with the Claimant, and that these had been provided to the Claimant. The Claimant however sought production of the entirety of the journal. This had been resisted by the Respondent on the basis that it was not the Respondent's own document and that Mr Woods had refused to provide it. The Respondent confirmed that Mr Woods had informed them that the journal did not only contain work material but contained personal matters and that he was not prepared to divulge it.

Decision on Strike Out Application

General Disclosure Direction

10. I did not consider that there had been any failure by the Respondent to comply with its general disclosure obligation. The Respondent confirmed, as it had in correspondence, that it was aware of its general obligations with regard to disclosure and had complied with them.

11. To the extent that documentation appeared to have been disclosed to the Claimant, by virtue of both the reply to his DSAR and the response to the disclosure order, the overarching position is that parties should disclose to each other material which is relevant to the case, and then that the relevant material should be included in the hearing bundle. It did not seem to me that the Claimant was contending (save in relation to the journal) that the Respondent had not provided him with all documents. His

contention was focused on the fact that the Respondent was referring to material within the DSAR response which meant that he had had to go through that material to check it. Ultimately, however, it seemed to me that the overriding objective of dealing with the case fairly and justly had been achieved in that the Claimant had received documentation considered by the Respondent to be relevant, even if some of that material was also contained amongst other material which had no such relevance. Whilst it is entirely a matter for the Claimant, if he is concerned that the Respondent acted unreasonably in not providing the relevant material purely via the disclosure exercise, then it would be open to him to make an application to the Tribunal for a preparation time order reflecting the work that he may contend he has been required to do additionally to that which would otherwise have arisen in relation purely to the disclosure response.

Specific Disclosure Direction

12. With regard to the accepted failure by the Respondent to provide the draft bundle index at the required time, I noted the explanation for the delay, and I also noted the regrettable delay in the Tribunal's written summary not being sent to the parties until after the date by which the direction was required to be complied with. However, regardless of how the failure came about, it was clear that there had been a failure to comply with the relevant directions. Regardless of that, the order had been complied with by 22 August 2018, i.e. just over a month after the stipulated deadline, but the case is not listed to be heard until May 2019 and therefore there were still ten months before the hearing. I did not therefore consider that the Claimant suffered any material prejudice arising from the Respondent's failure and I also considered that there was no question of a fair trial not being possible in the circumstances.

13. With regard to the Claimant's reference to the case of Chidzoy v BBC, in that case the Tribunal had conclude that it could not trust the Claimant in relation to the evidence she had provided to the Tribunal, following it having been established that the Claimant had discussed her evidence with a third party during a break in proceedings whilst she was giving evidence. However, that case involved a question of the Tribunal's inability to trust one of the parties, and I did not consider that the Claimant's perception that he could not trust the Respondent as a result of its failure, a failure which did not involve any element of deception, meant that the Tribunal could not trust the Respondent or that a fair trial was not possible.

Decision in relation to Specific Disclosure

14. I noted that this was not a document held by the Respondent and, notwithstanding that Mr Woods was, and remains, an employee of the Respondent, I did not consider that it would be open to me to make an order for the Respondent to produce the journal. I noted however that I had a general power under Rule 31 of the Employment Tribunals Rules of Procedure to require any person to disclose a document in relation to a

tribunal claim. However, I did not consider that it would be appropriate for me to make an order for specific disclosure in the circumstances.

15. I noted that extracts from the journal had been provided, and I also noted that the Claimant did not, indeed could not, make any assertions that he was aware of any additional extracts from the journal that were relevant to his claim. In the circumstances, I did not consider that it would be within the scope of the overriding objective to order disclosure of a document from a third party where there was no compelling indication that any material disclosed would contain anything which would be relevant to the case. I was conscious that the Respondent is fully aware of its disclosure obligations and was satisfied therefore that it would have canvassed whether Mr Woods' journal contained any additional material. Overall therefore I did not consider that it would be appropriate to make the specific order requested and consequently the issue of whether or not to attach an unless order obviously then became irrelevant.

Amendment application

16. Following conclusion of my consideration of the Claimant's applications for specific disclosure and to strike out the response, I proceeded to deal with the other aspect listed in the notice of preliminary hearing, namely "*To finalise the list of claims and issues and to deal with any other outstanding issues relating to case management*". There were two such issues. The first was an application to consider amendments to the list of issues included in the case management summary issued by Employment Judge Milner-Moore following a preliminary hearing on 5 June 2018, and the second was to address a revision of the case management programme set out at paragraphs 4, 5 and 6 of Judge Milner-Moore's orders. I have addressed the latter in a separate Case Management Summary.

17. With regard to the former issue, Judge Milner-Moore had noted, at paragraph 1 of her orders, that the parties were to notify each other and the Tribunal in writing, within 14 days of the date the summary was sent to them, providing full details of anything set out in the case management summary section about the case, and the issues that had been identified, which was inaccurate and/or incomplete in any important way. The Claimant had done that and had produced a document noting his additions to the list of issues. The Respondent had responded to that, noting its agreement to several of the Claimant's amendments, proposing two additional amendments of its own (to which the Claimant did not object) and disagreeing with some of the Claimant's proposed changes. Some of these disagreements were relatively minor, but there were two disagreements, covering the same point in each case, which were of significance. They related to the insertion by the Claimant in section 9.1 and 10.14 of the list of issues of the following wording:

"Thereafter failed to provide the Claimant a performance review for the period spanning April through October 2016 due to the Claimant raising a

grievance pursuant to the Equality Act 2010 and/or due to the Claimant being absent on leave in connection with his disability."

18. The two particular sections ended with references to "SS1" and "SS4", which referred to paragraph numbers in the Claimant's Scott Schedule. The Respondent resisted these amendments on the basis that they had not been pleaded by the Claimant, whether in his original claim form or in his Scott Schedule.

19. The Claimant contended that these issues were only expansions of his original claim form and were not substantive, whereas the Respondent contended that the Claimant, in stating in his original claim that he reserved the right to amend, misunderstood the nature of pleadings which were required to provide details of all the claims to be pursued and that he was only able to make such additions by way of the acceptance of an application to amend. The Claimant further noted that he felt that he should be allowed to make this amendment applying the usual Selkent (Selkent Bus Company Limited v Moore [1996] IRLR 661) principles.

20. I considered the proposed amendments and looked at the Claimant's initial pleading. I noted that the amendments followed on existing wording relating to the Claimant's allegation that, on 13 July 2016, his mid-term review had been withheld because he had been due to attend a meeting to discuss reasonable adjustments. The wording sought to be included however was not present. In my view, the wording, not having been included previously, amounted to a fresh factual basis to the Claimant's claims and therefore was something which needed to be considered by way of an application to amend. I then considered the direction provided by the cases of Cocking v Sandhurst (Stationers) Limited [1974] ICR 650, Selkent and British Coal Corporation v Keeble [1997] IRLR 336, and the Presidential Guidance on Case Management.

21. That required me to consider the balance of injustice between the parties and to have regard to carry out a balancing exercise of all the circumstances of the case, consistent with the requirements of "*relevance, reason, justice and fairness*". Particular circumstances to consider include the nature of the amendment, the applicability of time limits and the timing and manner of the application.

22. As I have already noted, I considered the nature of the amendments to involve the addition of a fresh factual basis to the Claimant's claims. I also noted that it was obviously in the Claimant's own knowledge as to the fact that he had not undergone a performance review for the period April through to October 2016, that it was in his knowledge that he had been absent on leave during much of this period and also that it was in his knowledge that he had raised a grievance. These were all matters which therefore could have been addressed in his original claim form submitted in December 2016. Due to delays in the progress of this case, it has moved slowly through the tribunal system, but with the effect that the Claimant's proposed amendment arose over 18 months after his original

claim. No reason was advanced by the Claimant as to why he had not included the issue in his original Claim Form, or why he had not addressed the matter by way of an amendment application at an earlier stage.

23. In the circumstances, I did not consider that the Claimant had progressed the matter with sufficient speed and also that there was greater prejudice to the Respondent in allowing the claim to proceed than to the Claimant in not. I noted that the Claimant had, in both sections where the addition was sought to be made, included reference to the withholding of his mid-term review in July 2016 and I therefore concluded that he would be able to pursue matters arising from that, amongst a number of other asserted points, and therefore that his claim overall would not suffer any prejudice. I therefore concluded that that it was not appropriate to grant the application.

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Employment Judge S Jenkins

Date: 10 February 2019

Sent to the parties on: 19 February 2019

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For the Tribunal Office