Neutral Citation Number: [2022] EWHC 1074 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

9th May 2022

Before :

MR JUSTICE FORDHAM

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Between :

TRANSPORT SALARIED STAFFS' ASSOCIATION (TSSA)	**Claimant**
- and -	
1. PERSONS UNKNOWN RESPONSIBLE FOR PUBLISHING MATERIAL ON THE WEBSITE "REEL NEWS" **2. MR SHAUN DEY** **3. MS CLAIRE LAYCOCK**	**Defendants**

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Rebecca Tuck QC, Eleena Misra and Madeline Stanley
(instructed by Morrish Solicitors LLP) for the **Claimant**

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Hearing date: 8/9.5.22

Judgment as delivered in open court at the hearing

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced and approved by the Judge, after using voice-recognition software during an ex tempore judgment.

MR JUSTICE FORDHAM:

Introduction

1. This was an urgent out of hours application for an injunction, heard overnight 8/9 May 2022. I am going to give some reasons at this stage, and it may be necessary to amplify them subsequently. I have announced in open Court the nature and limits of the Order which I am making tonight in this case. I will deal with Counsel's assistance, as soon as they are ready, with the precise terms of the injunction order. In substance, what matters for the present purposes is that tonight's injunction prevents further actions on the part of the Third Defendant but does not bite on a video which has already been posted by the First and Second Defendants. The Claimant was seeking an Order which would not only have prevented further actions on the part of the Third Defendant (which I am granting), but which would also have required immediate steps to be taken (within two hours) for a video to be removed by the First and Second Defendants and other consequential actions by other third parties (which I am refusing).

2. I also mention at the outset that I was told in the oral submissions when this hearing began this evening (at 20:30) that there had been contact by The Guardian newspaper who had seen the video in question and had asked the Claimant for a comment about it. I asked Ms Tuck QC whether it was the Claimant's intention that the Order being sought would have consequences for The Guardian newspaper, in light of it having seen the video. She candidly told me that, yes, it was intended that the Order sought would have consequences for The Guardian (and for others). In those circumstances, I asked for The Guardian journalist who had made contact with the Claimant to be alerted to the fact that a hearing was ongoing this evening, in which it was being said that the Order sought would impact on The Guardian. The journalist was kind enough to join the resumed hearing (which had resumed at 22:15). For reasons I entirely understand the journalist has emphasised that there is a Guardian legal team, but that it was not considered appropriate in the circumstances to alert that legal team further (given that we were by then at 22:30). I have taken full account of the practical circumstances faced by The Guardian and, to the extent that I can foresee them, other third parties. The Order that I am making would have a consequence directed at the Third Defendant were she, for example, to seek to give an interview or make a comment to any journalist in relation to the subject-matter. And to that extent that there is a consequence relevant to any third party of that kind. But the Order that I am making would not prevent somebody who has already seen the video from making reference to its contents.

3. What happened in this case goes back about a week. But so far as the Court is concerned an application was filed at about 17:00 today which sought a 90-minute telephone hearing later this evening, to consider whether to make the injunction Orders sought. The context and circumstances relate to the Third Defendant, a former employee of the Claimant. She had made an employment tribunal claim which had been the subject of a settlement agreement in November 2021. Yesterday evening, Saturday 7 May 2022 at around 18:15, a video was uploaded in which she speaks to the camera about a set of circumstances which include reference to the subject-matter of that settlement agreement. That video was to be found on the website to which the First Defendant relates. There was prior communication between the Claimant and the Second Defendant about the intention to publish it on that website. The application documents, which I had and took the opportunity to pre-read before convening the hearing, set out the background. They included a witness statement of a Ms Jones (with exhibits), the

application, a draft claim form and the draft Order which the Court was being asked to make.

HRA s.12

4. The skeleton argument in support of an interim order invoked the American Cyanamid test for interim relief. No reference was made to the Human Rights Act and the claim was said not to raise any issue under that Act. I was concerned that section 12 of the Human Rights Act appeared, on the face of the materials, to have been overlooked. Ms Tuck QC accepted that section 12 of the Act is in play by virtue of this application. I shall deal with section 12(3) later.

5. By virtue of section 12(2) the Court is precluded from granting relief which might affect the exercise of the Convention right to freedom of expression unless it is satisfied (a) that the applicant has taken "all practicable steps" to notify the respondents, or (b) there are "compelling reasons" why the respondents "should not be notified". This is not a case where there are compelling reasons why the Defendants should not be notified. Indeed the Claimant's solicitors have written letters before claim (at around 15:10 this afternoon) to the Second and Third Defendants. Those letters warned that, absent a response by 16:00, the Claimant would be seeking an interim injunction today on an ex parte basis, saying that the letters were informal notice of the same. Ms Tuck QC submitted that in those circumstances, given the absence of any response to those letters, I could and should conclude that "all practicable steps" to notify the Defendants had been taken. I was not persuaded by that submission. The fact is that an application notice was issued and filed with the court. The Claimant has email addresses for the Second and Third Defendants. The application asked for the 90-minute telephone hearing. It also stated, in answer to the question "who should be served with this application?", that "the Defendants" should be served. In those circumstances, in my judgment, it was "practicable" for the application to have been brought to the attention of the Second and Third Defendants when it was made to the Court. I adjourned to allow email and telephone contact to be attempted, in order to maximise the ability of the Second and Third Defendants to attend this telephone hearing, if they wished to do so. Having taken that step, I am satisfied that section 12 to was in those circumstances complied with and no longer constituted any bar to the grant of interim relief.

6. I was able to find and bring to the attention of Ms Tuck QC (immediately prior to the hearing first commencing) two authorities concerned with non-disclosure agreements, interim injunctions and section 12. She was able to assist me by reference to those and (during the adjournment) supplied one of the earlier cases cited in those judgments. The two cases were ABC v Telegraph Media Group Ltd [2018] EWCA Civ 2329 [2019] EMLR 5 and Linklaters LLP v Mannish [2019] EWHC 177 (QB). The earlier case, discussed in those authorities, is Cream Holdings Limited v Banerjee [2004] UKHL 44 [2005] 1 AC 253.

The case for the injunctions

7. The case for an Order directed at all three Defendants – which would involve not only restraining further action by the Third Defendant incompatible with the non-disclosure agreement in this case, but also would involve requiring action to in relation to the video currently on the First Defendants' website – in essence, in my judgment, came to this:

8. It was accepted, for the purposes of today, that the cause of action is as summarised in the Linklaters case at paragraph 26 of the judgment:

> "The law of breach of confidence is summarised and considered in the recent judgment of the Court of Appeal in ABC v Telegraph Media Group Ltd [2018] EWCA Civ 2329 [2019] EMLR 5. In summary, however, the matters that have to be proved to establish a claim for an injunction in breach of confidence are: (1) That the information has the necessary quality of confidence; (2) That the information has been imparted to or acquired by the defendant in circumstances importing an obligation of confidence; and (3) That the defendant threatens or intends to misuse the information. Defences or justifications in a breach of confidence claim include loss of confidentiality due to prior disclosure in the public domain, and a compelling public interest in the disclosure of the information in question, which requires the duty of confidence to be overridden."

9. The Claimant's application contends that this, on the face of it, is a case of an egregious breach by the Third Defendant of the non-disclosure agreement, known as a "COT3", dated 15 November 2021. That agreement was entered into with the assistance, prescribed by Parliament in section 144(4)(a) of the Equality Act 2010, because it was facilitated by ACAS. The agreement dealt expressly with the obligation on the Third Defendant not to disclose "confidential information" a term defined to include information "directly or indirectly" relating to "a grievance" which she had raised, and also referred to her duty to keep "the circumstances of her claim" confidential, and not to make any "adverse" or "derogatory" comment about the Claimant or its officers or employees or workers. Permitted disclosures, described as "protected disclosures", were allowable under the terms of the agreement. This feature of this case engages the strong considerations, for the purposes of interim relief, described in ABC at paragraphs 24 and onwards, and again at paragraphs 41 and onwards.

10. The Claimant's application continues by emphasising a further feature, this time referable to the First and Second Defendants. What is submitted is that they knew, or ought to have known, or ought to have enquired, as to whether the subject-matter of the video would – through its disclosure and if posted – have involved a breach of a non-disclosure agreement. That, as Ms Tuck QC puts it, was an "obvious" question which should have been addressed. In any event she emphasises that they have been made aware of the position from 15:10 this afternoon (8 May 2022) through the letters before claim. This feature of the case engages the point emphasised in paragraph 66 of the judgment in ABC. There, the Court was focusing on the question of whether it was "likely" (HRA s.12(3)) that the Claimant's would establish at trial that the relevant information in that case had been acquired by the Daily Telegraph with knowledge of the non-disclosure agreements and of the general obligation of confidentiality owed by the relevant employees.

11. By reference to those features of the case, Ms Tuck QC submitted that the statutory test in section 12(3) is satisfied for the purposes of an interim injunction notwithstanding its effect on freedom of expression. The test under that provision is whether the Court is satisfied that the Claimant "is likely to establish at trial that publication should not be allowed". So far as "likely" is concerned she reminded me of the discussion in Cream Holdings and the emphasis placed on circumstances where judges are doing no more than issuing interim relief "as a temporary measure", pending a further hearing and

pending "proper consideration" of the application for interim relief. In this case, as I have said, it is envisaged that such a hearing (with fuller consideration) will be taking place at a return date in the very near future.

12. On the basis of those submissions, the Claimant says that the 'balance of justice' favours interim relief of the nature which is sought. First, because the section 12(3) "likely" test is satisfied (at least for a temporary measure). Second, because the public interest and proportionality considerations relevant to interim relief for a short period are also satisfied. Thirdly, because of the "harm" which it is said will be sustained by the Claimant if interim relief is not granted. The relevant passages in ABC, for the purposes of the "harm" aspect of the question of interim relief, are at paragraphs 48 and 51 where the Court referred to the "immediate, irreversible and substantial harm" to the claimant companies that would arise in that case out of adverse customer reaction. The witness statement in support of this application describes the harm that it is said would be sustained by the Claimant. That includes harm which relates to the timing of the disclosure, which the Claimant points out is striking, given that the Claimant's annual conference was taking place from Saturday 7 May 2022 and that an important anniversary event is taking place on Monday 9 May 2022.

Discussion

13. Parliament intended the parameters of section 12 to be applied by a judge in my position dealing with an application for interim relief with implications for freedom of expression.

14. I am satisfied that, so far as the restraint, by Order tonight, of further actions on the part of the Third Defendant is concerned, the Claimant has demonstrated – by reference to the applicable legal standards – that it is necessary and appropriate and proportionate for an Order for interim relief to be granted. I have in mind the weighty considerations which arise out of non-disclosure agreements, as described in the case law. There could be no excuse, looking prospectively, for any third party – alerted to this Court's Order – including The Guardian newspaper, taking any step which would engage any further disclosure by the Third Defendant.

15. But, in my judgment, different considerations apply in the circumstances of the present case to the contention that this Court ought now – urgently and out of hours – to make a wider mandatory injunction order, now, which requires immediate steps to address a video which is on the First Defendant's website having been put there by the Second Defendant, together with the other implications which Ms Tuck QC has accepted are intended to follow from such a mandatory Order for third parties. I will explain the reasons that have led me to that conclusion.

16. In my judgment, a highly material consideration in the context of the urgent out of hours application this evening, for the wider interim order with the reach that was sought, is the prior engagement between the parties in the run-up to the publication on Saturday evening 7 May 2022 (18:15) of the uploaded video. I said at the outset of this judgment that the circumstances leading to the application this evening go back over the course of a week or so.

    i) The position is that, on the evidence, the Claimant became aware of 'rumours' on 3 and 4 May 2022 that there was to be publication originating from the Third

Defendant and in the public domain. There was a contact point at "reelnews.co.uk", namely the Second Defendant, and a contact point namely Ms Jones on the part of the Claimant. On Tuesday of last week (3 May 2022), according to a screenshot from WhatsApp, there was communication between the two of them about the video. At 18:55 on that day (3 May 2022) the point was made by Ms Jones that "if you are making allegations about TSSA, can we please have sight of those and a right of reply?"

ii) On Thursday 5 May 2022 at 08:37 the Second Defendant emailed Ms Jones, referring to the recognised duty to "check the accuracy of claims being made" and the appropriateness of giving an opportunity to the Claimant to respond. That email said that if there were publication it would include "any response", "exactly as sent by the Claimant" and "unedited". That email also made clear that "the decision" whether to publish or not would be made on Saturday 7 May and gave a deadline for any response of 09:00 that morning (7 May). There was then a summary of the allegations in the video. At 20:50 on that day (Thursday 5 May 2022) Ms Jones asked for details and at 22:24 that day the Second Defendant promised to provide a transcript.

iii) The transcript of the video was provided at 10:24 on Friday 6 May 2022 and at 18:20 that day Ms Jones sent a holding response. On Saturday 7 May 2022 at 08:41 Ms Jones sent the Claimant's detailed response to the transcript, which was acknowledged at 08:48 by the Second Defendant. The video was uploaded at 18:15 later that day. At 18:55 the Claimant's solicitor sent an email and at 20:48 Ms Jones also sent an email. The letters before claim, as I have explained, were written at around 15:10 on Sunday 8 May 2022.

17. In my judgment, it is striking from that sequence of prior engagement that, knowing the timing of the proposed publication and having been provided with the summary and then the transcript, there were communications on behalf of the Claimant. Those communications made clear that the subject-matter of the video was regarded as containing allegations which were false. The point was made, in the detailed response, that it would be "irresponsible" for them to be published. That detailed response of 08:48 on Saturday 7 May 2022 contained a detailed rebuttal.

18. Nowhere, in any of the engagement preceding the publication, was the point made to the Second Defendant (to be passed onto the First Defendants) that the disclosure and any publication of the subject-matter would constitute a breach of a non-disclosure agreement. Nor were the First or Second Defendants asked not to publish the video on that basis. Indeed, even when the solicitors had come on the scene, in their Saturday email the basis which they put forward was that the video and accompanying article now on the website was "defamatory", and reference was made to seeking an injunction on the basis of defamation. I interpose that the highly restrictive principles applicable to interim injunctions and defamation and their implications are reflected in the judgment in Linklaters at paragraph 31 and 35. Defamation, in the event, has not been relied on although reference has been made to harm to reputation.

19. All of this was in circumstances where the video itself made reference to the fact that an agreement had been entered into. This feature therefore appears within the transcript that was sent to the Claimant by the First Defendant at 10:24 on Friday 6 May 2022. The full rebuttal response that was provided at 08:41 on Saturday 7 May 2022 also

alluded to that feature of the case. But, as I have explained, it was not put forward as a basis on which it was said that it would be unlawful for the First or Second Defendants to publish the video. On the contrary, the thrust of what was said about the agreement in that rebuttal was that the Claimant was explaining that it "doesn't seek to silence staff through termination agreements"; and (in a paragraph that referred to specific clauses in agreements) "TSSA has never, and would never, prevent staff – past or present – from speaking out against wrongdoing".

20. In my judgment, this sequence of events is highly relevant to the question of whether, in relation to the publication took place on Saturday 7 May 2022 at 18:15, it can be said to be "likely" – and my assessment is that it cannot – that the Claimant would establish at trial that the relevant information had been acquired with the relevant knowledge as to the non-disclosure agreement and of the obligation of confidentiality (as referenced in paragraph 66 of the judgment in ABC). I have considered test in section 12(3) of 'likelihood', in the light of these circumstances. I recognise that, on the one hand, an interim order could simply 'hold the position' for a couple of days until the return date. But, on the other hand, the aspect of interim relief which is sought in relation to the video is more than a 'holding' position. It would involve intrusive and immediate steps, against the First and Second Defendants as third parties, relating to a video which came to be posted by them on the evening of Saturday 7 May 2022, in the circumstances which I have described.

21. All of this arises against the backcloth of what the evidence tells me about "damage". What is said is that the ventilation of the subject-matter of the video will cause "serious damage" to the Claimant's "reputation"; that the timing of the publication of the video is "particularly damaging" because of the annual conference; that there is a risk that the video will "distract or overwhelm" other events and initiatives; and reference is also made to the need to "protect members' interests" and to "retain and attract new members". What is said is that if this Court does not grant the injunction tonight, there will be "irreparable damage" to the Claimant. I am not satisfied, by reference to that evidence, that in all the circumstances for this Court to leave the Third Defendant's video on third party websites, for the short period between now and a return date, would involve damage which justifies the granting of an Order having immediate and significant implications for third parties and their freedom of expression. This, in my judgment, is not a case involving the sort of "immediate, irreversible and substantial" harm to which the Court was referring in ABC. As the Court explained in that case at paragraph 67, each case will turn on its own particular facts.

22. My concerns about the wider Order that is sought, urgently and out of hours this evening, are reinforced by the implications that it would have had for third parties. That is illustrated by Ms Tuck QC's acceptance of the intention that the Order bite on third parties who would have had access to the video that has been uploaded. That position is exemplified by The Guardian newspaper whose journalist has seen the video and viewed it, is aware of its substance and has contacted the Claimant for comment about it. The position is also, in my judgment, reinforced by considering a case like Cream where there had already been a publication of two articles (see paragraph 5 of the judgment) and the focus of the interim injunction sought was to restrain publication of "further" confidential information given by the defendant accountant to the relevant newspapers, including (as I understand it) further information which the accountant had supplied to them, but had not yet been the subject of any press article. I accept of course

that it is open to the Court to make an order which has the consequence of presently available information being removed from websites and social media. An example is the case of AAA v Persons Unknown [2021] EWHC 2529 (QB).

23. In my judgment, having regard to the Human Rights Act section 12(3) test, and to the 'balance of justice', in the context of third parties and freedom of expression, and against the backcloth of the prior engagement which I have described, this is not a case in which the wider Order sought is justified or appropriate as an urgent mandatory order requiring immediate action from the First and Second Defendants and impacting on other third parties. It is, in my judgment, appropriate for me – in considering urgent interim relief tonight – to look at the position 'in the round'. The video was uploaded at 18:15 on Saturday 7 May 2022. The Court was being moved for an injunction nearly 24 hours later; and over 24 hours later by the time the 90-minute telephone hearing took place (including with the Court having undertaken its pre-reading and having identified relevance of section 12 and the case-law). The return date in this case can be very soon. It is envisaged that it will be on Tuesday 10 May 2022. That will give the Court a much better opportunity to consider, in more detail and with fuller and further notice to those affected, the implications of the wider Order, if it is pursued. But I am not prepared, in the circumstances, to make a mandatory order which requires that the video be taken down and other consequential steps referable to it and third parties undertaken. I have in mind considerations of proportionality and public interest. And I have in mind that, in the uploading of the video, a full rebuttal statement – as provided by the Claimant – was included, verbatim, both by way of slides at the end of the video, and that the website where the video was uploaded and accessible drew attention, in the text, to the fact that this response had been provided and identified where in the video it was to be found. It will remain open to the Claimants to seek to persuade the Judge at the return date to make a wider mandatory Order and to spell out its implications for all concerned. I recognise that, in the time between now and then, there will been a period of time in which the video will have remained online. However, there has already been a period of time in which the video has been online.

24. In all the circumstances and for these reasons, I have declined the wider Order that was sought.

Order

25. The order that I make tonight includes the following key provisions:

    (1) The Third Defendant MUST NOT take any step or action in contravention (or further contravention) of clause 12 of the confidential COT3 Agreement dated 15 November 2021 including specifically by directly or indirectly disclosing, disseminating, or publishing anything defined as Confidential Information within the COT3 agreement including the subject matter of the grievance raised by the Third Defendant whilst employed by the Claimant or the claim which was compromised by the COT3 settlement agreement.

    (2) The prohibition in (1) above extends to the giving of any interview or supplying information which falls within the category of Confidential Information as defined in the COT3 Agreement of 15 November 2021 to any third party.

(3) The Claimant shall take prompt steps to restore the application against the Third Defendant, and (if pursued) the application against the First and Second Defendants, before the Court on a return date by no later than Tuesday 10 May 2022 subject to the Court's availability to accommodate the same.

Judgment

26. Finally, I record that Ms Tuck QC accepted that there was no reason in the circumstances – given the way in which this judgment has been expressed – why the release of this judgment into the public domain should be deferred. In the event, no further amplificatory reasons are being sought.

9.5.22