Appeal No. UKEAT/0137/19/BA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 20 May 2019

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MISS A CHRISTIE APPELLANT

PAUL, WEISS, RIFKIND, WHARTON & GARRISSON LLP & OTHERS RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS A CHRISTIE (The Appellant in Person)
For the Respondents	Mr P Epstein QC (of Counsel) Instructed by: Stephenson Harwood LLP 1Finsbury Circus London EC2M 7SH

SUMMARY

PRACTICE AND PROCEDURE – Case management

The Claimant is pursuing claims of sex discrimination, harassment, victimisation and whistle blowing before the Employment Tribunal ("ET"). She applied for a witness order in respect of a former colleague, who initially agreed to attend as the Claimant's witness but subsequently declined, citing issues relating to her pregnancy and referring to a non-disclosure agreement ("NDA") with the First Respondent. The ET declined to make any decision on the application without first receiving representation from the Respondents. The Claimant appealed.

Held: *dismissing the appeal*

There was no requirement that other parties be notified of an application for a witness order under rule 32 of the **ET Rules** (see rule 92) but it was expressly allowed that an ET might depart from that general rule where it considered it was in the interests of justice to do so. In any event, if the ET decided to grant the application, it would be required to communicate its decision to all parties to the proceedings **(Jones v Secretary of State for Business and Skills** UKEAT/0238/16). Here the ET considered it might be assisted by the Respondents when determining issues of relevance and necessity **(Dada v Metal Box Company Ltd [1974] IRLR 251 NIRC)** and thus decided that the Respondents should be notified of the application in advance. There was no general rule that this additional procedural step was required because the witness had agreed an NDA, but it could not be said that the ET's decision amounted to an error of law or was perverse.

HER HONOUR JUDGE EADY QC

Introduction

1. This appeal raises questions as to the approach an Employment Tribunal ("ET") ought to adopt when considering making a witness order against a third party who is subject to confidentiality obligations under a non-disclosure agreement ("NDA").

2. In giving this Judgment, I refer to the parties as the Claimant and Respondents, as below. This is the Full Hearing of the Claimant's appeal against the refusal of the London Central ET to make a witness order pursuant to her application of 20 March 2019. The ET's letter declining to make the order was sent out on 24 April 2019 and the Claimant lodged her appeal against that decision on 29 April. Unfortunately, the appeal was not put forward for the initial paper sift until 15 May 2019, when I allowed that it should proceed to a Full Hearing. At that stage, I had understood that the Full Merits Hearing of the Claimant's claim had already commenced before the ET - it was listed for 13 to 24 May 2019 - and I therefore gave directions for the appeal to be heard on an expedited basis. In fact, on 13 May 2019, the ET had allowed an application by the Claimant for an adjournment of that hearing. The need for expedition no longer arises but the parties have been content to proceed with the hearing of the Claimant's appeal as directed. I have today heard from the Claimant, who acts in person, and from Mr Epstein QC, who is instructed by Stephenson Harwood LLP, for the Respondents.

3. The Claimant's application for a witness order relates to a former colleague, Ms Sonia Larsen. The Claimant contends that Ms Larsen can give evidence and produce documents that would be relevant to the issues raised in her claims before the ET; she says Ms Larsen was

previously willing to attend as a witness, but declined to do so after entering into an NDA with the First Respondent.

4. In declining to make an order as sought by the Claimant, the ET explained as follows:

> **"The Tribunal is not minded to make a witness order in relation to Ms Larsen without input from the Respondent on this application. It is not clear what non-disclosure obligations to the Respondent Ms Larsen maybe under. She is in a vulnerable position, at a time close to the birth of a child. The Tribunal do not see it as consistent with the overriding objective to expose the potential satellite litigation at the present time. Please consider reformulating your application in a manner appropriate for disclosure to the Respondent."**

5. The Claimant challenges the ET's decision to thus make no determination on her application without the Respondents' input. She contends this is an error of law because the ET thereby failed to consider the relevance of the evidence in question and the necessity of making the order; she argues that it instead took into account irrelevant factors - the necessity of seeking the Respondents' input on the application, the terms of Ms Larsen's NDA, the risk of exposing Ms Larsen to potential satellite litigation and her vulnerability as a new mother. The Claimant further objects that, even if any of these matters were potentially relevant, the ET failed to conduct the requisite balancing exercise or to apply the overriding objective. Separately, the Claimant contends that the ET's decision was perverse, alternatively that its reasoning was inadequate.

6. The Respondents resist the appeal, relying on the reasoning provided by the ET but also contending that, in any event, there would be no jurisdiction to make a witness order in respect of Ms Larson as she currently resides out of the jurisdiction.

7. The Claimant objected to this latter point and contended that I should have no regard to any issue relating to Ms Larsen's current residence, not least as the Claimant takes issue with the evidence the Respondents sought to adduce in this respect.

8. Dealing with this as a preliminary issue, although the new material the Respondents seek to adduce might meet the tests laid down in **Ladd v Marshall** [1954] 1WLR 1489, it seemed to me that the Claimant's objection had some merit. The first question I had to address was whether the ET had erred in declining to make a witness order for the reasons it had identified, which did not include the issue of jurisdiction. Given the potential dispute between the parties on this issue - which all agreed it would not be appropriate for me to determine - I decided to first adjudicate upon the appeal on the basis of the reasoning provided by the ET, allowing that the jurisdictional question might then become relevant were I to allow the appeal and needed to consider disposal.

The Background

9. The First Respondent is a global law firm which has its headquarters in New York. The Claimant is a lawyer who was employed by the First Respondent, as a corporate senior associate at its London office, from 20 February 2016 until the termination of her employment on 16 February 2018. I understand that the First Respondent's London office has some four or five partners and a further 24 practising lawyers, of whom some eight to nine are senior associates. The second Respondent is senior partner at the London office.

10. The Claimant is pursuing a number of complaints before the ET largely, but not exclusively, focused on her dismissal. She claims that her dismissal amounted to direct sex discrimination, harassment related to sex, victimisation pursuant to section 27 of the **Equality Act 2010** ("the EQA") and/or because of protected disclosures she had made, thus giving rise to

an automatic unfair dismissal. The Claimant also pursues complaints of direct religious discrimination, relating to holiday entitlement, and of breach of contract. The Respondents resist each of these complaints.

11. By letter of 20 March 2019, the Claimant applied for a witness order to compel Ms Larsen to attend to give oral evidence before the ET and produce documents for the Full Merits Hearing of the Claimant's claims, which had been listed for 13 to 24 May. Ms Larsen is an employee of the First Respondent but is currently on maternity leave; I am told that her employment is due to end on 30 June 2019. The Claimant wished Ms Larsen to attend before the ET and to produce documents in relation to her own grievance and subsequent ET claim, which the Claimant understood to include complaints of sex discrimination, sexual harassment, victimisation and allegations of a hostile working environment for women at the First Respondent.

12. In support of that application, the Claimant further explained that they were the only two female senior associates in the Mergers and Acquisitions Group at the First Respondent's London office and she drew attention to various parallels in their complaints relating to their working environment. The Claimant had complained about an increasingly hostile work environment for women, in particular following the lateral hire of another partner, Mr Membrillera, and she pointed out that she had specifically mentioned Ms Larsen as someone who had been made physically ill by what she had said was the bullying behaviour of this partner. The Claimant also placed reliance on Ms Larsen's grievance submitted to the First Respondent in December 2017 which, she contended, bore a number of similarities to her own grievance submitted in February 2018, not least in the Respondents' failure to investigate the matters there raised.

13. The Claimant relied on Ms Larsen's complaints as supporting her own case, not just of sex discrimination, harassment, and victimisation but also as supporting her whistleblowing complaint, countering the Respondents' objection that she had no reasonable belief in the matters alleged. The Claimant also referenced emails from representatives of the First Respondent, working out of its New York office, relating to Ms Larsen's grievance which, she contended, suggested there was a link between those individuals and the decision taken that her own employment should be terminated; a decision taken one week after the Claimant submitted her grievance. The Claimant further drew attention to the fact that Ms Larson was present when she (the Claimant) was escorted from the premises on her dismissal.

14. In seeking to demonstrate why it was necessary for the ET to make an order to compel Ms Larson's attendance, the Claimant explained that Ms Larsen had initially agreed to assist, confirming that her lawyers had advised this did not give rise to any difficulties. Given that indication, the Claimant had listed Ms Larsen as one of her witnesses at a Preliminary Hearing before the ET on 8 October 2018. On 29 January 2019, however, Ms Larsen had messaged the Claimant in the following terms:

> **"Hey Anna. Sorry, it's been a few difficult weeks with the pregnancy. I am extremely tired and still quite sick and there are still two months to go. I decided to negotiate with pw because I was not up for a fight in this state…"**

The Claimant explained that - suspecting that Ms Larsen might have entered into a non-disclosure or confidentiality agreement with the Respondents - she messaged back on 9 March 2018, as follows:

> **"Hi Sonia, I hope all went if you have already had your baby. I imagine this is the last thing on your mind right now, so I am very sorry to trouble you with this. I am just writing to check whether you would still be willing to be a witness for me at my tribunal hearing? As I previously mentioned, the hearing will take place during a 10-day period from 13 May 2019. I am required to submit witness statements by 1 April 2019. I was hoping this would not be too onerous for you as you could potentially regurgitate what was on your ET1 claim form for your own claim against Paul Weiss and also your**

> **formal grievances to the firm. I know it's been a while since you agreed to be a witness for me back in October and I appreciate your circumstances have changed a bit since then as you were able to negotiate with PW and settle your claim. However my understanding is that even if PW made you sign an NDA/confidentiality clause, that this would not prevent you from giving witness evidence before tribunal. I would be very grateful if you are still willing to be a witness, especially with regard to speaking to the sex discrimination, sexual harassment you suffered, and the hostile work environment women are subjected to at PW. Can you possibly let me know and also let me know whether you are able to send me a witness statement by 1 April?..."**

15. On 20 March 2019, Ms Larsen responded to the Claimant:

> **"Hey Anna, I'm due to give birth in the next few days. This is a little tricky as I'm not capable of doing much. In any event, I am unfortunately no more at liberty to give any statements nor even discuss my case as you can appreciate. I'm sorry."**

16. It was after receiving this message from Ms Larsen that the Claimant made the application to the ET for a witness order.

The Parties' Submissions

The Claimant's Case

17. This Claimant contends that the ET erred in law in failing to consider the relevance of Ms Larson's evidence and the necessity of making a witness order. She says it further erred in having regard to irrelevant factors, alternatively, in failing to carry out the requisite balancing exercise or in failing to have regard to the overriding objective. The ET had been required to consider both the question of relevance and necessity (**Dada v Metal Box Company Limited** [1974] IRLR 251 NIRC, per Sir John Donaldson at paragraphs 12 to 15 and **Remploy Limited v Lowen-Bulger** UKEAT/0027/18, at paragraphs 30 to 32 and 37) but its decision demonstrated no engagement with either of those questions: either the ET had failed to apply the correct test, or it had provided inadequate reasons.

18. The ET had further erred by having regard to irrelevant factors, specifically, (1) the input from the Respondents, (2) the terms of NDA between Ms Larsen and the Respondent, (3)

A the question of satellite litigation, and (4) Ms Larsen's vulnerability. Addressing the first of those factors, the Claimant noted that Rule 92, Schedule One of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules") did not require that an application for a witness order be copied to other parties. Such a requirement, the Claimant contended, would be particularly inappropriate where (as she argued was the case here) there was material to suggest that the witness had been bullied by the Respondents during her pregnancy and where there was a clear disparity in resources. As for allowing the Respondents to have any input in relation to the terms of any NDA, the Claimant argued that would be akin to allowing justice to be perverted, relying by analogy on the criminal case **R v Selvage** [1982] QB 372. More generally, the terms of the NDA could not be determinative of the question whether the witness order should be granted: the NDA could not oust the ET's jurisdiction in this regard and yet that seemed to be what the ET had in mind, when it referred to it being unclear about what non-disclosure obligation to the Respondents Ms Larsen may be under. Similarly, the potential risk of satellite litigation had to be an irrelevant factor, given there could be no sanction against Ms Larsen if she was ordered to attend before the ET to give evidence and produce documents. Although the Respondents have asserted that there might be relevant duties of confidentiality, it was unclear what those were. Certainly, the ET's reasoning seemed to relate solely to the NDA. As for Ms Lawson's potential vulnerability, a hearing in her own case had been listed when Ms Larsen was seven months pregnant. By the time the ET was considering this application, Ms Larsen had given birth two months previously and such vulnerability should not be seen as determinative (see **Parexel International Ltd v Adnett** UKEAT/0381/12). In any event the Claimant had raised this issue when the Full Merits Hearing of her claim was listed but the ET had fixed it for hearing for the convenience of the Respondents.

19. Even if ET was entitled to have regard to any of these matters, the Claimant complains that it then failed to carry out the requisite balancing exercise which, pursuant to the overriding objective, would have included the inequality of arms, the need to deal with the case justly and would also have given proper consideration to the question of necessity.

20. The Claimant further contends that the ET's decision was perverse, given (1) the irrelevance of the Respondents' input pursuant to Rule 92 of the **ET Rules**, and (2) the relevance of the evidence the Claimant was seeking to adduce (as to which, see above). Further, and in the alternative, she submits that the ET's reasoning was inadequate.

The Respondents' Case

21. For the Respondents, Mr Epstein QC emphasised that the real issue for the EAT was whether the ET erred in law in the decision it made. He made clear that the allegations made by the Claimant in the underlying proceedings were strongly disputed and the Respondents denied the further allegations made in relation to the conduct of the ET proceedings and as to any dealings with others, including Ms Larsen.

22. Turning to the decision under challenge, the ET had made no final determination; it had merely stated that it was not minded to make the order at that stage. As for its reasons for declining to do so, whilst Ms Larsen's obligations under the NDA could not impact upon the ET's jurisdiction, the agreement she had entered into could legitimately raise issues of confidentiality to which the ET might properly wish to have regard. In this regard the Respondents sought to draw an analogy with the decision of the Commercial Court in **South Tyneside v Wickes Building Supplies Ltd** [2004] EWHC 2428, where (in a case relating to a rental agreement for commercial premises) it was allowed that confidentiality might be a

relevant consideration in deciding whether or not to make a witness order (see paragraph 23, sub-paragraph (iv) of that Judgment). The Respondents note that the ET was bound to approach evidential issues in a way akin to that of the civil courts, see per Underhill P (as he then was) in **HSBC v Gillespie** [2011] ICR 192 EAT).

23. As to the reference to satellite litigation, there was no reason to think that the ET had the NDA in mind rather than the risk that Ms Larsen might be required to give evidence about her own litigation. Although Rule 92 of the **ET Rules** did not provide that an application for a witness order had to be copied to other parties, it was allowed that this might be required where it was considered to be in the interests of justice. Given that any decision to grant an order would need to be copied into other parties (see **Jones v The Secretary of State for Business, Innovation and Skills** UKEAT/0238/16) it must be open to the ET to require the application to be brought to the attention of other parties before making its decision.

24. Although the ET's decision did not demonstrate any balancing of competing considerations, that was because it had not reached that stage; it had not made a final determination on the application (although the Respondents disputed that Ms Larson's evidence would be relevant to the issues to be determined by the ET in the Claimant's case in any event).

25. As for the adequacy of the ET's reasons, the Respondents noted that Rule 62(4) of the **ET Rules** allow that these were only required to be proportionate to the issues and could be expressed shortly.

The Relevant Legal Principles and the Competing Submissions on the Law

26. The ET's power to make a witness order is provided by Rule 32 of the **ET Rules**, as follows:

> **"The Tribunal may order any person in Great Britain to attend a hearing to give evidence, produced documents or produce information."**

27. Where a party applies for a witness order to be made under Rule 32, she may do so without notifying any other party to the proceedings; that is made clear by Rule 92 of the ET Rules which provides:

> **"Where a party sends a communication to the Tribunal (except an application under Rule 32), it shall send a copy to all other parties and state that it has done so (by use of the cc or otherwise). The Tribunal may order a departure from this Rule where it considers it in the interests of justice to do so."**

28. The Respondents say that departure allowed from the application of Rule 92 – "in the interests of justice" - must apply to the exception in respect of any application under Rule 32 as much as to the normal requirement to copy any communication to other parties. That reading of Rule 92, the Respondents submit, is supported by the fact that, although an application for a witness order is not required to be copied and sent to other parties, once an order is made there is a requirement on the part of the ET (under Rule 60) to communicate that decision to all the parties (see **Jones**).

29. As Kerr J explained in **Jones v The Secretary of State for Business, Innovation and Skills** UKEAT/0238/16, the requirement on the ET to communicate its decision arises because the making of a witness order is a decision within the meaning of Rule 1(3)(a) and thus falls within the ambit of Rule 60, which provides that decisions made without a hearing shall be communicated in writing to the parties. As the Claimant points out, Kerr J left open the possibility that there might be exceptional circumstances where an ET could withhold from a party the fact that a witness order had been granted and refrain from sending a copy of it to that party (for example, where an employee needed to be protected from the risk of reprisals by an employer), see paragraph 55 **Jones**. Ordinarily, however, the principles of open justice and

transparency, and the clear wording of Rule 60, would require a decision concerning the making of a witness order to be communicated to all parties and, as was recognised in **Jones**, a failure to provide that notification would give rise to a procedural irregularity which might undermine the fairness of the hearing. In the present case, the Respondents argue that, given that a decision to make any witness order would thus have to be sent to other parties (which would allow those other parties to make objections at that stage), there could be no principled objection to the ET deciding that it would allow the other parties to make representations *before* it made its decision. That, the Respondents contend, would be in keeping with the fact that Rule 32 is a case management provision.

30. More generally, in interpreting or exercising any power given to it under the **ET Rules**, an ET is obliged to give effect to the overriding objective (see Rule 2); that is, to deal with cases fairly and justly, which will mean, so far as possible: (a) ensuring that the parties are on an equal footing, (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues, (c) avoiding unnecessary formality and seeking flexibility in the proceedings, (d) avoiding delay, so far is compatible with proper consideration of issues, and (e) saving expense.

31. In deciding whether to grant an application for a witness order, the ET is exercising a judicial discretion. As Sir John Donaldson observed in **Dada v Metal Box Company Limited** [1974] IRLR 251 NIRC: *"There is no automatic right to witness orders"*. In **Dada**, Sir John Donaldson opined, however, that there were only two matters of which an ET should be satisfied before granting such an order: (1) that the witness can apparently give evidence which is relevant to the issues in dispute; and (2) that it is necessary to issue a witness order, albeit he then continued (see paragraph 14):

> **"We do not seek in any way to fetter the discretion of Tribunals. What we are saying is that Tribunals should be satisfied that the witness can give relevant evidence and that it is necessary to issue a witness order. If they are satisfied on both those matters, they ought to issue such an Order."**

To the extent that the ET might have regard to matters other than questions of strict relevance and necessity, the Claimant contends that it must be bound by the overriding objective and to act in the interests of justice, and refers to the case of **Outasight VB Ltd v Mr L Brown** UKEAT/0253/14.

32. As to whether the evidence of the proposed witness is sufficiently relevant to the issues to be determined, the ET will generally be best placed to make that assessment (see **Noorani v Merseyside Tech Ltd** [1999] IRLR 184 CA). For the Respondents, it is contended that when having regard to evidential matters the ET is bound to adopt the same approach as in the civil courts, see **HSBC v Gillespie** [2011] ICR 192 EAT (albeit, as the Claimant observes, that case was concerned with issues of admissibility and relevance rather than the question of whether to grant a witness order). The Respondents argue that issues of confidentiality can thus still be relevant to an ET's decision on an application for a witness order: as was made clear in **Dada**, the requirement to be satisfied that the witness evidence in question was relevant and that an order was necessary did not mean that the ET could not have regard to other matters relevant to its discretion.

33. As for the ET's obligation to provide reasons for any decision in this respect, the starting point is provided by Rule 62 of the **ET Rules**, which relevantly provides:

> **"62 Reasons**
>
> **(1). The Tribunal shall give reasons for its decision on any disputed issue, whether substantive or procedural (including any decision on an application for reconsideration or for orders for costs, preparation time or wasted costs).**
>
> **…**

(4). The reasons given for any decision shall be proportionate to the significance of the issue and for decisions other than judgments may be very short."

34. In reading any decision of an ET, I bear in mind that it is necessary to avoid overanalysing the reasons provided and engaging upon a pernickety critique, see Mummery J (as he then was) at paragraph 30 of **Fuller v London Borough of Brent** [2011] ICR 806; the key requirement is that the parties are entitled to be told why they have won or lost, see per Bingham LJ, in **Meek v City of Birmingham District Council** [1987] IRLR 250 CA.

Discussion and Conclusions

35. As the Respondents have observed, the ET decision under challenge did not amount to a final determination of the Claimant's application; the ET did not refuse to make the order but effectively decided to interpose a further procedural step before it made its determination.

36. Rule 92 of the **ET Rules** does not require that notification is given to other parties when an application for a witness order is made. That can be seen to be for good reasons. Pressure may be placed on a witness to discourage them from attending an ET hearing; that may be all the more so where the witness remains employed by a Respondent to the ET proceedings in question - even if an employer does not exert any direct pressure on the would-be witness, the employee in question may be reluctant to be seen to be siding with someone who is litigating against their employer. There may yet be other reasons why this provision is required. Although there is a general public interest in openness and transparency in legal proceedings, Parliament has plainly recognised that this may well be a necessary precaution to ensure justice in ET proceedings.

37. That said, as the EAT acknowledged in **Jones**, should the ET make an order for a witness to attend, the balance then swings back in favour of open justice and transparency: such a decision is then required to be sent out to other parties. Even if it might be permissible for the ET not to immediately communicate its decision in those circumstances (a point Kerr J considered but did not determine in **Jones**), the general rule requires that the decision will be notified to other parties when it is made. Those other parties will then have the ability to make representations to the ET if there is a proper basis for them to do so. The question that arises on the present appeal is whether the ET erred in considering it was appropriate to allow the

Respondents to make such representations *before* it made its decision on the Claimant's application.

38. As to whether the ET was allowed to adopt this course, I agree with Mr Epstein QC that must be permitted by the fact that Rule 92 allows for departure from the general rule; in this instance, the departure is from the absence of any requirement that the application for a witness order be copied into the other parties. In determining whether or not to adopt such a course, however, it must be right that the ET would first have to consider whether that would be in accordance with the interests of justice; whether, having regard to the overriding objective, that would enable it to deal with the particular case before it fairly and justly.

39. In this case, the ET was apparently troubled by the fact that Ms Larsen had entered into an NDA with the First Respondent; it was particularly concerned that Ms Larsen was in a vulnerable position and there might be further complexities arising from the making of an order that would compel her to give evidence. There was some reason for the ET to consider these matters as potentially relevant given that these were issues that Ms Larsen had herself referenced in explaining why she was no longer willing to give evidence on a voluntary basis for the Claimant. The Claimant, however, objects that allowing Respondents to make representations on applications for witness orders in such cases would encourage the misuse of NDAs (something she described as a perversion of justice).

40. Although, I consider it unhelpful to see this as setting any general precedent - the ET was concerned with this particular case, not with the use of NDAs more generally - I see, to some extent, the Claimant's concern. The Respondents have argued that there may be legitimate issues of confidence to which the ET would be entitled to have regard, but that really

seems to come down to the fact that Ms Larsen had entered into an NDA with the First Respondent; neither I nor the ET have been provided with any more detail as to the potential questions of confidence that are said to arise than that. The difficulty of not knowing the detail of the confidence thus asserted by the Respondents is that it is impossible to know whether this might be limited to matters that are legitimately confidential to Ms Larsen and the Respondents, or whether the NDA she has entered into purports, on a more general basis, to prevent her speaking about matters in respect of which there legitimately might be a broader interest and on which she would otherwise be able to give relevant evidence before an ET in proceedings brought by others (in particular, under the **EqA** and/or under the whistleblowing protections). The Claimant's particular concern is that an NDA, in such circumstances, might serve to allow the Respondents an opportunity to argue against the witness order when they would not normally be able to do so before it has been made.

41. While I thus recognise the Claimant's more general concern, ultimately I cannot see that her objection can go very far. If the ET made the witness order she seeks, it would be obliged to notify the Respondents and they would then be able to voice their disagreement, making representations about confidentiality at that stage. The ET apparently considered that a difficulty arose in determining whether there might be legitimate issues of confidentiality that would impact upon Ms Larsen's ability to give evidence. It can be taken to have seen that as relevant to the exercise of its discretion in determining whether or not to make a witness order and it apparently considered it would be assisted in making its decision by allowing for input from the Respondents at an earlier stage than would otherwise be the case. Although the mere fact of the existence of an NDA will not be determinative of the issues going to the ET's exercise of its discretion in this context, the particular matters covered by such an agreement might be relevant to the need to balance issues of relevance and necessity against the broader

interests of justice in a particular case. In the present proceedings, the ET had not got to this stage of its deliberations; it had made no final determination of relevance, necessity, or as to what the interests of justice might dictate in this case. It did not, however, see the existence of the NDA as necessarily irrelevant to those issues and it plainly considered that it might be assisted in its deliberations by first obtaining the Respondents' input.

42. In the circumstances, I am unable to say that the ET was not entitled to have regard to Ms Larsen's particular vulnerabilities and to her expressed concern that she could not give evidence given her agreement with the First Respondent. Although it might ultimately take the view that those matters are not determinative, it was open to the ET to wish to explore (for example) whether, notwithstanding any issues of confidentiality as might arise in her own case, Ms Larsen would still have relevant evidence to give in the Claimant's case such that it would make it appropriate for a witness order to be made compelling her to attend (an order that, because of her agreement with the First Respondent, it might be necessary for the ET to make).

43. Although therefore, I acknowledge the Claimant's concern, on a proper examination I am satisfied that the ET did nothing more than insert a permissible procedural step into its consideration of this application. That step was not outwith the **ET Rules** and can be seen as in accordance with the overriding objective and consistent with a more general concern to do justice in this case. It is certainly not a step that I can say was other than open to the ET exercising its case management discretion. That being so, I have to accept it is not for the EAT to interfere in this decision and for all those reasons I am duly bound to dismiss this appeal.