EMPLOYMENT TRIBUNALS

Claimant: Mr A Ghosh

Respondents: 1. Judicial Appointments Commission
2. Ajay Kakkar
3. Susan Carr
4. Martin Chamberlain
5. Yvette Long
6. Ian Thomson

Heard at: London Central (in person)

On: 3 and 4 May 2023

Before: Employment Judge E Burns

Representation

For the Claimant: Represented himself
For the Respondents: Benjamin Cooper, KC
Robert Moretto, Counsel

JUDGMENT

The judgment of the Employment Tribunal is as follows:

(1) An employment tribunal is a court for the purposes of sub-section 139 of the Constitutional Reform Act 2005 ("CRA 2005") and can make the order for disclosure it has made in this case.

(2) All the complaints against R2, R3, R5 and R6 are dismissed upon withdrawal by the Claimant. This includes all complaints, to the extent that they were contained in the original (unamended) claim form, made under sections 110 – 112 of the Equality Act 2010 ("EA 2010").

(3) Any complaints made against R4 under sections 111 – 112 of the EA 2010 contained in the original (unamended) claim form are dismissed upon withdrawal by the Claimant.

(4) The application that the complaints made against R4 should be struck out fails. The complaints against R4 as an individual shall continue. For the avoidance of doubt, the complaints are:

(a) R4 directly discriminated against C because of race pursuant to section 13 of the Equality Act 2010 and should be held to be personally liable for doing as he acted as an agent of R1 pursuant to section 110(2); and

(b) R4 indirectly discriminated against C because of race pursuant to section 19 of the Equality Act 2010 and should be held to be personally liable for doing as he acted as an agent of R1 pursuant to section 110(2).

REASONS

THE HEARING

1. This preliminary hearing, held in public, concerned a case brought by the Claimant for direct and indirect race discrimination arising out of the recruitment exercise for appointment to the office of deputy judge of the High Court under section 9(4) of the Senior Courts Act 1981. The case is due to be heard at a final hearing starting on 6 November 2023 and taking place over 7 days.

2. The issues to be considered at the final hearing are recorded in the case management order made by Employment Judge Brown following a case management hearing held on 23 November 2022. The issues are as follows:

Direct Discrimination (s.13 EA 2010)

2.1 In not being invited to a selection day, was the Claimant treated less favourably than a candidate who did not share his protected characteristic, being a person of colour of Indian national origin, whose circumstances were otherwise materially the same as his, would have been treated?

2.2 If the Claimant has shown facts from which the ET could conclude that the less favourable treatment was because of race, have the Respondents shown that race was no part of the reason they acted as they did?

2.3 The Claimant compares himself with hypothetical white, or white including mixed-race, comparator.

Indirect Discrimination Claim (s.19 EA 2010)

2.4 For the purpose of his indirect discrimination claim, the Claimant contends that the selection process disadvantages black and brown candidates, including persons of colour of Indian national origin, and advantages white, including mixed-race, candidates.

2.5 Did the Respondents apply the following PCPs in the relevant selection process:

Giving preference to candidates who:

2.5.1 Were a barrister;
2.5.2 Were a QC [now known as a KC],
2.5.3 Were a partner in a Magic Circle law firm;
2.5.4 Had substantial experience of advocacy and/or litigation in the higher courts; and/or
2.5.5 Had significant judicial experience.

2.6 If so, did those PCPS put people who shared the Claimant's characteristics at a substantial disadvantage, compared to people who did not?

2.7 Did they put the Claimant at that disadvantage?

2.8 If so, can the Respondents show that the PCP was a proportionate means of achieving a legitimate aim?

3. The preliminary hearing was listed at the same time by Employment Judge Brown for the following purposes:

(a) What documents relating to the applications of other candidates would be disclosable under standard principles of disclosure;

(b) Whether the ET is a court such that it can authorise disclosure of such documentation under section 139 of the Constitutional Reform Act 2005;

(c) Whether disclosure can be effected lawfully in accordance with the 2005 Act through redaction of any potentially identifying material, even if the ET is not a court

(d) If disclosure is directed, what measures need to be put in place to maintain the confidentiality of other candidates, independent assessors and any others, including whether all or part of the hearing should be heard in private under s10A of the ETA 1996 and Rule 50 of the ET Rules; and

(e) Whether the claims against the individual Respondents should be struck out.

(f) directions for the Final Hearing.

4. By the time of the preliminary hearing, purpose 3(c) had fallen away. In addition, both parties had made additional applications for specific disclosure of documents that were not included in category 3(a) and so the determination of these applications was added.

5. There had been discussions between the parties as to whether the hearing should be held in public or not. They were in agreement that the strike out applications needed to be heard in public. In addition, they wanted other matters to be made public because they agreed that they were of significant public interest. I have therefore included my decision as to whether an employment tribunal is a court for the purposes of section 139 of the Constitutional Reform Act 2005 in this judgment, but also appended the case management order I made to this judgment so that it will be in the public domain it is entirety.

6. I reserved my decision on the strike out application, 3(e) but made decisions on all of the other matters during the course of the hearing. I gave reasons orally during the hearing. At the end of the hearing, the parties indicated that they wanted written reasons for my decision on section 139 (3(b) above) in case they wanted to pursue an appeal, but none of my other decisions.

7. There was an agreed bundle of 416 pages which included a witness statement from Dr Richard Jarvis, the Chief Executive of R1, in support of the need to take measures to protect the confidentiality of certain individuals. Although not in agreement with the entirety of the statement, the Claimant accepted the need to protect confidentiality and agreed with the measures proposed. He therefore did not wish to cross examine Dr Jarvis.

8. I thank the Claimant and Counsel for the Respondents for their helpful skeleton arguments and submissions during the course of the hearing.

BACKGROUND

9. It is necessary to set out some of the background to the case, however in doing so, I note that I heard no evidence (other than in relation to the need for a derogation from the principle of open justice) and therefore make no general findings of fact. I believe the following to be undisputed, except where noted below. If this is not correct, I apologise.

10. As set above, the case concerns a recruitment exercise for Deputy High Court Judges. The exercise was launched by R1 on 12 January 2022. The exercise was to recruit to 28 vacancies.

11. R1 is a body corporate established under section 61 of and Schedule 12 to the Constitutional Reform Act 2005 ("the CRA 2005")). Pursuant to Schedule 12 to the CRA 2005 and the Judicial Appointments Commission Regulations 2013, it consists of 15 Commissioners, including the chairman. The statutory function of R1 is to select persons for recommendation for judicial office, when requested to do so by the Lord Chancellor under s.87 of the CRA 2005.

12. Each candidate wishing to participate in the exercise was required to submit an application form and details of two independent assessors (referees). The referees were required to complete documents assessing the relevant candidate which were confidential and not to be shared with the candidate. The criteria to be applied were published having been approved by R1's Board of Commissioners on 14 October 2021.

13. R1 received 238 applications in total. Three were immediately excluded because they did not meet the eligibility requirements.

14. The first stage of the selection process was a paper sift, based on the candidates' applications and their referees' documents. It was carried out on a name-blind basis, that is the candidates' names were removed from the papers seen by the sift panels and instead each candidate was identified by a number.

15. The exercise was carried out by four sift panels, each comprising a judicial and a lay panel member. Successful candidates were then invited to selection days. R1 wanted the sift stage to narrow the field to around three candidates per vacancy.

16. The sift panels were tasked with scoring each candidate. They were required to giving them scores A - D for (1) Legal and Judicial Skills, (2) Personal Qualities and (3) Working Effectively which they then used to give them an overall grade. A candidate who scored "A" overall was an outstanding candidate; "B" was a strong candidate; "C" was a selectable candidate; and "D" was a candidate who was not presently selectable.

17. The Claimant submitted an application on 14 February 2022. His application, together with the documents completed by his referees were assessed by a panel comprising R4 and R5. R5 was the lay panel member and chaired the panel. R4 is a judge of the Queen's Bench Division of the High Court. In total they assessed the applications of 67 candidates.

18. R4 and R5 gave the Claimant the grade C for each of the three relevant criteria and an overall Grade of C. How and why, they reached this decision is at the heart of this dispute. The Claimant's case is that R5 would have scored him more favourably, but was persuaded by R4 to lower her scores. He also believes that his race was obvious from the contents of his application and this is what led R4 to so act. In addition, and/or alternatively he believes that the criteria applied by R4 and R5 were skewed by them in a way which indirectly discriminated against him on grounds of race.

19. The consequence of giving the Claimant a grade C was that he did not progress to the next stage of the recruitment process. In total, 83 candidates did progress, all of whom had higher grades that the Claimant. Of the 67 candidates assessed by R4 and R5, twenty progressed.

20. R1 has subsequently collated the statistics for the race of these 67 candidates as follows:

    - 14/50 candidates identifying themselves as white scored high enough to progress (28%)
    - 4/9 candidates identifying themselves as Asian or Asian British scored high enough to progress (44%)
    - 1/4 candidates identifying themselves as black scored high enough to progress (25%)

- 1/4 candidates identifying themselves as from mixed ethnic groups scored high enough to progress (25%)

IS THE ET A "COURT" WITHIN SECTION 139 CONSTITUTIONAL REFORM ACT 2005 (CRA 2005)?

21. The first matter I deal with in this judgment is whether I could order disclosure of the following material held by R1:

(a) the application forms submitted by the candidates in the recruitment exercise;

(b) the forms completed by their referees; and

(c) the assessment forms and notes completed by the people responsible for assessing them.

I shall refer to this material as the "Candidate Material" for sake of ease of reference.

22. Before me, it was not disputed that at least some of the candidate material held by R1 would need to be disclosed. In addition, it was not disputed that the Candidate Material was confidential by reason of section 139 of the CRA 2005

23. Section 139 of the CRA 2005 says:

(1) A person who obtains confidential information, or to whom confidential information is provided, under or for the purposes of a relevant provision must not disclose it except with lawful authority.

(2) These are the relevant provisions—

(a) sections 26 and 27 and regulations under section 27A;

(b) Part 4;

(c) regulations and rules under Part 4.

(3) Information is confidential if it relates to an identified or identifiable individual (a "subject").

(4) Confidential information is disclosed with lawful authority only if and to the extent that any of the following applies—

(a) the disclosure is with the consent of each person who is a subject of the information (but this is subject to subsection (5));

(b) the disclosure is for (and is necessary for) the exercise by any person of functions under a relevant provision;

(c) the disclosure is for (and is necessary for) the exercise of functions under section 11(3A) of the Supreme Court Act 1981 (c. 54) or a decision whether to exercise them;

(d) the disclosure is for (and is necessary for) the exercise of powers to which section 108 applies, or a decision whether to exercise them;

(e) the disclosure is required, under rules of court or a court order, for the purposes of legal proceedings of any description.

(5) An opinion or other information given by one identified or identifiable individual (A) about another (B)—

(a) is information that relates to both;
(b) must not be disclosed to B without A's consent.

(6) This section does not prevent the disclosure with the agreement of the Lord Chancellor and the Lord Chief Justice of information as to disciplinary action taken in accordance with a relevant provision.

(7) This section does not prevent the disclosure of information which is already, or has previously been, available to the public from other sources.

(8) A contravention of this section in respect of any information is actionable, subject to the defences and other incidents applying to actions for breach of statutory duty.

(9) But it is actionable only at the suit of a person who is a subject of the information.

24. The Claimant's Candidate Material had been already disclosed to him because all relevant parties had consented. The parties agreed that in order for R1 to be able to disclose the Candidate Material of any other candidates, without risking any of the individuals involved being in a position to bring proceedings against it, a court order was required pursuant to sub-section 4(e). The question I had to consider was whether the employment tribunal was a court for these purposes.

25. The parties took me to a number of authorities where an employment tribunal has been held to be a court, but also others where the opposite decision view has been taken. Neither party suggested I was bound by any of those authorities. Both agreed that Bean LJ's observation at paragraph 23 in *Watson v Hemingway Design Ltd & others* [2021] ICR 1034 that: "*The authorities indicate that whether a tribunal is to be treated as a court for the purposes of a statute or rule depends on context*" was correct.

26. R1's concern, that the employment tribunal was not a court for the purposes of this case, stemmed from the comments of HHJ Auerbach in the QBD of the High Court in the case of *Acas v Woods [2020] EWHC 2228*.

27. That case, like this one, concerned a legislative provision prohibiting disclosure of information without a court order. The relevant statutory provision in question was section 251B of the Trade Union and Labour Relations (Consolidation) Act 1992 (the 1992 Act).

28. Mr Woods had worked for Acas as a conciliator. In 2018 allegations were made about his conduct which led to an investigation and the preparation of an investigation report and ultimately his dismissal. The investigation report contained, amongst other things, allegations that Mr Woods had behaved unprofessionally in connection with certain collective consultations. Because of this, the report contained information captured by section 215B of the 1992 Act and a court order was needed before it could be disclosed.

29. Before HHJ Auberbach, the parties were in agreement that an order of the High Court was needed to satisfy section 251B. As was sitting as a High Court judge and cod make the order he did not therefore need to decide the point, but nevertheless, as he noted in his judgment, because the issue had been flagged and to some extent explored before him, he decided to address it.

30. HHJ Auberbach noted that employment tribunals are not superior courts of record and that just because some references to courts in some legislation have been interpreted as including employment tribunals, it does not follow that all references should be so interpreted. He suggested that an important consideration is the language used in the relevant legislation being construed and whether within it separate references to courts and tribunals are made or whether the term courts is used generically.

31. His view was:

> *"….the 1992 Act contains provisions relating to various judicial bodies, some of which are called courts and some not, including the Employment Tribunal, the Central Arbitration Committee and the Certification Officer. Generally it refers to bodies which are not called courts, by using their respective names. I was referred to section 8(4), by way of example, which refers to "any proceedings before a court, the Employment Appeal Tribunal, the Central Arbitration Committee, ACAS or an employment tribunal". That is within Part I, but there are other examples in other Parts of the Act.*
>
> *Nor can it be assumed that the drafter of the 2013 Act must have overlooked this feature of the 1992 Act, bearing in mind that the Part of the 2013 Act in which section 10 finds itself also contains provisions concerning Employment Tribunals. Given all of that, it seems to me that, had Parliament intended that "court order" in section 251B should embrace an order of the Employment Tribunal, it would have said so expressly, or by way of inclusion of a further definitional provision. It may be thought by some anomalous that an Employment Tribunal cannot order the disclosure of information within scope of section 251B for the purposes of Employment Tribunal proceedings; but one can envisage policy arguments both ways. I cannot say that Parliament cannot have intended this result or that this was plainly an oversight." (paragraphs 33 and 34).*

32. I consider that HHJ Auberbach's comments are helpful, and I fully appreciate R1's concern. I do not consider that HHJ Auberbach is suggesting that in all cases where there a separate reference to an employment tribunal to a court this is conclusive. I interpret his comments as saying that, because there are so many separate references to courts and different judicial bodies in the 1992 Act, he considered a strict interpretation should be applied notwithstanding the anomalous result. I also think he was saying, in addition, that ultimately, he could not be sure this was correct and, in any event, because he could make the relevant order, he did not need to decide the point.

33. I did need to decide the point. And my decision was that the employment tribunal is a court for the purposes of section 139 CRA 2005. My reasons are as follows.

34. First, I was taken to one reference in the CRA 2005 where courts and tribunals are referred to separately. That reference is in section 3. Section 3 is the section which deals with guaranteed judicial independence. When enacted in 2005, sub-section 3(7) said that the judiciary included (a) the judiciary of the Supreme Court (b) any other court established under the law of any part of the United Kingdom and (c) any international court.

35. The section was subsequently amended by virtue of the enactment of the Tribunals, Courts and Enforcement Act 2007. This was the legislation which introduced the concept of Employment Judges as opposed to Tribunal Chairman. The 2007 Act added a new sub-section 3(7A) to ensure that Employment Judges along with a range of other tribunal roles also benefited from guaranteed judicial independence.

36. Before, the Respondents argued that if the employment tribunal was a court, the amendment to section 3 of the CRA 2005 would not have been required. I agree this is correct, but I do not consider that the creation of this single separate reference to tribunals means I have to decide that the reference to a court in section 139 excludes an employment tribunal.

37. I take this view, in part, because the reference is singular and only occurs once. In addition, I consider it is relevant that this one single reference was introduced as an amendment via a piece of legislation that was intended to enhance the powers of a range of different tribunals. When that context is taken into account, I consider it is entirely plausible, to use HHJ Auberach's word, that there was a drafting oversight. In my judgment, the likelihood is that when the new subsection 3A was introduced, the relevant statutory draftsperson failed to appreciate that a consequence would be that a further consequential amendment to section 139 would be helpful to clarify how the word court was used in that section.

38. More significantly, however, I consider the anomaly that a limited interpretation of the word court in section 139 would create is too much of an anomaly in this case.

39. One of the obvious claims that might arise out of a judicial appointments process is a claim of discrimination under the EA 2010. The EA 2010 is specifically drafted to enable applicants for positions of public office to challenge discrimination in the appointment process. The relevant provisions are found in sections 50 and 51. The judicial body which is identified in the EA 2010 as the appropriate one to hear and decide such claims is the employment tribunal. If parliament had wanted it any other way, it could have assigned a different court to have this function, as it has for other types claim under the Equality Act 2010. Given that we are the judicial body that has the power to determine these sensitive cases, it would be hugely anomalous to find that we cannot order disclosure of key relevant material.

40. Although a similarly anomalous situation was thought to have arisen in the *Woods* case, I consider it can be distinguished. What is protected by section 251B of the 1992 Act is not information that one would normally envisage being relevant to employment tribunal proceedings. In fact, quite the opposite is true. The normal expectation is that information held by Acas would not ordinarily form part of our proceedings because of the nature of the undertaken by Acas. Material held by Acas would therefore would only ever need to be ordered to be produced in an employment tribunal in exceptional circumstances which would justify the need to seek permission from a higher court. In contrast, a claim for discrimination in a judicial appointments process is invariably going to involve some examination of material relating to candidates. To force the parties to have to apply to a higher court, and possible pay a fee to do so, in every case is a very unattractive option.

41. I therefore decided that I could order disclosure of the Candidate Material and did so. The orders I made are contained in the appended case management order.

SHOULD THE CLAIMS AGAINST R4 BE STRUCK OUT?

Introduction

42. The Claimant's original claim was against 5 individuals in addition to R1. The Respondents applied to strike out all of claims against the individuals under rule 37(1)(a) on the basis that the claims had no reasonable prospects of success.

43. The starting point was that the language of section 51 EA 2010 does not enable claims to be brought against individuals and, with the exception of R6, the Claimant had made no reference to any of the ancillary provisions found in sections 110 – 112 in his original claim.

44. The Claimant's primary connection was that this interpretation of his original claim was not correct and that it was implicit in his claim form that he intended to rely on the ancillary provisions when he named the individual respondents. However, in order to protect his position, to the extent that he was required to do so, he applied, in writing, during the hearing to amend his claim to make this clear. In that amendment application he sought to

pursue complaints against R2, R3, R4 and R5 in reliance on sections 110, 111 and 112 of the Equality Act 2010.

45. As the hearing developed the Claimant changed his position and decided to withdraw all complaints against all individual respondents, including R6, with the exception of the complaints pursued under section 110 against R4. I have therefore dismissed all such complaints on withdrawal, and taken the precaution of making it clear that this extends to complaints under section 110, 111 and 112 to the extent that they were contained in the original claim form. This is because I did not have to decide whether they were or not.

46. The only individual respondent that remained was R4. The Claimant said he believes that R4 should be held personally liable for directly and indirectly discriminating against him because of his race. The Claimant wishes to pursue his complaints against R4 relying on section 100. His argument was that R4 was acting as an agent of R1 and as such can be held to be personally liable for his discriminatory conduct in addition to R1.

47. The position argued before me, on behalf of R1 and R4 (together the Respondents for the purposes of this section of my judgment), was that the claim against R4 should not be allowed to proceed, in any event, for several reasons. I summarise them below.

48. The first argument was the Claimant did not say in his original claim form that he was asserting liability should be attributed to R4 by virtue of his status as an agent of R1. Instead, the complaints of direct and indirect race discrimination against R4 as pleaded are expressed to be complaints under section 51 EA 2010. The complaints should therefore be struck out as having no prospects of success because section 51(4) EA 2010 operates such that complaints can only be pursued under section 51 against R1.

49. The Respondents also argue that I should not allow the Claimant to amend his claim to clarify that the complaints are brought against R4 as an agent of R1 because the complaints in their amended form are still not particularised adequately in relation to the relationship of agency, there are legal problems with them that mean they cannot succeed and in any event, there would be little or no prejudice to the Claimant, when compared to the prejudice to the Respondents, in not allowing the amendment because he will still be able to pursue his complaints against R1

50. Alternatively, the Respondents argue that if I am not with them in relation to the interpretation of the pleadings, I should nevertheless strike the complaints out against R4 because of the lack of particularisation, two legal problems and because the statistics show they are bound to fail.

51. I will address the two legal problems in more detail below. I shall refer to the arguments as the ‘section 51(1) argument’ and the ‘*Murray* argument’, so named after the decision of Lady Stacey sitting in the Scottish EAT case of *Murray v Maclay Murray Spens LLP* (2018] IRLR 710.

52. Before retiring to consider my decision, I also discussed the possibility of making deposit orders as an alternative to the possibility of strike outs. I explained how these worked to the Claimant and gave him some time to research them. He was reluctant to provide details of his financial position, but informed me that he was able to pay the maximum deposits that might be engaged in relation to the two complaints against R4 if required.

Relevant Background Law

53. In this section I set out summaries of the general law relating to interpreting pleadings, amendments, strike out and deposit orders that I had in mind when making my decisions. I have not included any background law relevant to the 'section 51 argument' and the '*Murray* argument' as this is explained in the analysis and conclusions section.

Interpreting Pleadings

54. Two important principles of tribunal litigation are:

    (a) A tribunal does not have jurisdiction to determine claims that are not contained in the facts set out in the claim form.

    (b) A respondent needs to know the case that they need to meet.

55. There are a number of authorities which deal with the importance of the not straying from the pleaded case as contained in the claim form.

56. Relevant authorities include Mr Justice Langstaff (then president of the EAT) in *Chandhok v Tirkey* [2015] ICR 527, EAT and *Chapman v Simon* [1994] IRLR 124 and *Ahuja v Inghams* [2002] EWCA Civ 1292) and *Tough v Commissioners for HM Revenue and Customs UKEAT/0255/19*.

57. Langstaff P observed in the *Chandhok* case, at paragraph 17 that:

    "…..*the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits….."*

58. He adds at paragraph 18:

    'In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. ***It requires each party to know in essence what the other is saying, so they can properly meet it;*** *….. That is why there is a system of claim and response, and why 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.' (bold emphasis added)*

59. Mrs Justice Elizabeth Laing in *Adebowale* stated at paragraph 16:

"*In my judgment the construction of an ET1 is influenced by two factors: the readers for whom the ET1 is produced, and whether the drafter is legally qualified or not. The ET1, whether it is drafted by a legal representative, or by a lay person, must be readily understood, at its first reading, by the other party to the proceedings (who may or may not be legally represented), and by the EJ. The EJ is, of course, an expert, but (as this litigation shows) should not be burdened by, or expected by the parties to engage in, a disproportionately complex exercise of interpretation. The EJ has the difficult job of managing a case like this, and the EJ's task will not be made any easier if this Tribunal imposes unrealistic standards of interpretation on him or on her.*"

60. Our system of justice does, of course, include a process whereby the information contained in the claim form and response can be developed. Requests for further information are a regular feature of employment tribunal litigation and an order for further information was made in this case. Such further information is intended to elucidate further detail of the claims in the claim form.

61. The basic principles that apply when ordering further information have been summarised by Wood J in *Byrne v Financial Times Ltd* [1991] IRLR 417 at 419: (EAT) as follows:

"General principles affecting the ordering of further and better particulars include that ***the parties should not be taken by surprise at the last minute****; that particulars should only be ordered when necessary in order to do justice in the case or to prevent adjournment; that the order should not be oppressive; that particulars are for the purpose of identifying the issues, not for the production of the evidence; and that complicated pleadings battles should not be encouraged."(again bold emphasis added)*

62. In *Secretary of State for Work and Pensions (Jobcentre Plus) v Constable [2010] All ER 190, further information was ordered in a case* where the claim was of automatically unfair dismissal for having made a protected disclosure. The EAT expressed the view that the Respondent was entitled to know what the Claimant claimed the disclosure was, when, how and to whom it had been made, and how it was alleged to have led to the dismissal. It ordered particulars to that effect to be provided. The Claimant did not have to amend the claim form in order to add this information into his claim.

Amendments

63. Where an amendment is required, the leading case is *Selkent Bus Company Ltd (trading as Stagecoach Selkent) v Moore* [1996] IRLR 661, in which it was held that when considering an amendment, the following are relevant factors:

- The nature of amendment

- The applicability of time limits
- The timing and manner of the application

64. However, as confirmed in the case of *Vaughan v Modality Partnership* [2021] ICR 535, EAT, having considered the relevant factors, which are not limited to those identified in the *Selkent* case, we must balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it and make our decision accordingly. As noted by HHJ Tayler giving the judgment in that case, this requires consideration of:"*the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding." (paragraph 21).*

He further notes:

"Refusal of an amendment will self-evidently always cause some perceived prejudice to the person applying to amend. They will have been refused permission to do something that they wanted to do, presumably for what they thought was a good reason. Submissions in favour of an application to amend should not rely only on the fact that a refusal will mean that the applying party does not get what they want; ***the real question is will they be prevented from getting what they need."*** *(emphasis added, paragraph 22)*

65. In *Galilee v Commissioner of Police of the Metropolis* [2018] ICR 634, it was confirmed that I am able to allow an application to amend subject to the time limits issue being resolved at the final hearing, alebit that I am not obliged to do this, however.

66. Another factor that can be considered is the merits of a claim. Where there is a factual dispute between the parties, a tribunal taking the merits into account must guard itself against the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored.

Strike Outs and Deposit Orders

67. The Tribunal's power to strike out claims and responses is found in Rule 37(1) of the Tribunal Rules. The relevant parts of Rule 37(1) for the purpose of this hearing say the following:

"At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

that it is scandalous or vexatious or **has no reasonable prospect of success**. (emphasis added).

68. The overriding objective in Rule 2 of the Tribunal Rules is also relevant at all times when considering applications of this nature. It says:

"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(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 as compatible with proper consideration of the issues; and
(e) saving expense.

69. A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

70. The courts have repeatedly warned of the dangers of striking out discrimination claims on the grounds that they lack prospects of success, particularly where "the central facts are in dispute" e.g. in *Anyanwu v. South Bank Student Union* [2001] ICR 391 at [24] and [37] and *Ezsias v. North Glamorgan NHS Trust* [2007] ICR 1126 at [29].

71. However, while exercise of the power to strike out should be sparing and cautious, there is no blanket ban on such practice.

6. The question of striking out discrimination claims was considered by the Court of Appeal in *Ahir v. British Airways Plc* [2017] EWCA Civ 1392, where Underhill LJ stated at [16]: "Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment."

72. Rule 39 of the Tribunal Rules says:

"(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has <u>little reasonable prospect of success</u>, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit."

73. The purpose of a deposit order is to identify at an early stage claims with little prospect of success so as to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs if the claim failed. Their purpose is not to make it difficult to access justice or to effect a strike-out by another route (*Hemdan v Ishmail and anor* 2017 ICR 486, EAT).

74. Similar considerations apply to those required as in a strike out application under rule 37(1)(a) where a claim is said to have no prospects of success.

75. When determining whether to make a deposit order, I am not restricted to a consideration of purely legal issues. I am entitled to have regard to the likelihood of the party being able to establish the facts essential to his case, and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward (*Van Rensburg v Royal Borough of Kingston-upon-Thames* UKEAT/0095/07).

76. The same caution should be exercised in discrimination claims where there are disputed facts as when considering applications for a strike out under rule 37 (*Sharma v New College Nottingham EAT 0287/11* applying *Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL*). The test of 'little prospect of success' under rule 39 is however plainly not as rigorous as the test of 'no reasonable prospect' under rule 37 and the consequences of a deposit order are not as severe as a strike out order. It therefore follows that a tribunal has a greater leeway when considering whether to order a deposit.

77. An order should be for payment of an amount that the paying party is capable of paying within the period set (*Hemdan v Ishmail* [2017] IRLR 228, EAT) taking into account his or her net income and any savings. The employment tribunal must give its reasons for setting the deposit at a particular amount (*Adams v Kingdom Services Group Ltd* UKEAT/0235/18).

Analysis and Conclusions

Is an Amendment Necessary?

78. The first question I considered was whether the claim required amendment or not, or whether it should be read as implicitly including a reference to section 110 EQ 2010. I have concluded that it should be and that no amendment is required for the Claimant to be able to pursue the complaints against R4 as an agent of R1.

79. I reached this conclusion as a result of considering the general practice of employment tribunals when dealing with complaints that are brought against both a corporate employer (the main respondent) under section 39 or 40 of the Equality Act 2010 and against individuals who are employees or agents of that main respondent. In my experience, we do not insist that claimants cannot pursue such claims unless they have made it expressly clear that the mechanism by which they are seeking to establish individual liability is via section 110. Instead, presumably because this is understood to be the default mechanism for establishing individual liability, we allow claims to go forward where they do not state this expressly.

80. The position is different where individual liability is argued to arise under sections 111 and 112. I would always expect a claimant to plead such a compliant with precision because otherwise, the default of section 110 is assumed to apply.

81. I do not consider the position is or should be any different for claims pursued against a main respondent under section 51 EA 2010 and individuals who may be employees or agents of that main respondent.

82. In both cases, whether there is a complaint under section 39 EA 2010 and a complaint under 51 EA 2010, it is always going to be helpful if the claimant states whether or not he is asserting that the proposed individual respondent is an employee or agent of the main respondent, and provides some detail of the basis of such an assertion. However, this kind of detail is not a necessary piece of information that needs to be included in the claim form in order to have a valid claim. It can legitimately be provided by way of further and better particulars at a subsequent date.

83. In my judgment that is what has happened here. The Claimant has intended to rely on section 110 and the argument that R4 has acted as an agent of R1 from the start and that should be treated as implied by his pleadings by default.

84. With regard to the lack of any details as to how R4 can be an agent of R1, I agree that the claim form does not explain this. The Claimant has now explained his position on this however. He says that if R4 was not an employee of R1, he must have been an agent of R1. Although not a sophisticated argument, given that the law on agency under the Equality Act 2010, is not settled, and to my knowledge this particular question has not been considered previously, it appears to me to be a legitimate argument for him to make such that I cannot say it has no or even weak prospects of success.

85. If the Respondents feel they need more details from the Claimant to understand his argument, they can make a request for further information.

Strike out Application

86. Having decided that the original claim without amendment included a claim against R4 as an agent of R1 relying on section 110, I then considered the strike out application. There were essentially three grounds as explained earlier:

- The section 51(1) argument
- The Murray argument
- The statistics argument

The Section 51 Argument

87. The Respondents argued the agency argument cannot work in this particular case because of the types of conduct which are prohibited by sub-section 51(1) EA 2010. In relation to this argument, it is helpful to set out sub-section section 51(1) in full, but also sub-sections 39(1), 1091(1) and (2) and 110 (1).

88. Sub-section 51(1) EA 2010 is the section under which a claim of discrimination can be pursued against R1 by a candidate in one of its recruitment exercises. It says:

A person (A) who has the power to make a recommendation for or give approval to an appointment to a public office …. must not discriminate against a person (B)—

(a) in the arrangements A makes for deciding who to recommend for appointment or to whose appointment to give approval;

(b) by not recommending B for appointment to the office;

(c) by making a negative recommendation of B for appointment to the office;

(d) by not giving approval to the appointment of B to the office."

89. Section 39(1) EA 2010 is the equivalent provision when an applicant for employment wishes to pursue a discrimination and is useful for comparison purposes. It says:

An employer (A) must not discriminate against a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment."

90. Sub-sections 109(2) and 110(1) EA 2010 provide the mechanism for employees and agents to be individually liable for discrimination. Sub-section 110(1) says:

A person (A) contravenes this section if-

(a) A is an employee or agent,
(b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and
(c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

91. Sub-sections 109 (1) and (2) EA 2010 say:

> *(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.*
>
> *(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.*

92. The Respondents argue, correctly in my judgment, that in this case, only the conduct prohibited by sections 51(1)(a) and (b) are relevant. They say sub-section 51(1)(a) addresses the process adopted by R1 when undertaking a judicial recruitment exercise and sub-section 51(1)(b) concerns R1's decision whether or not to recommend someone for appointment. I understand that the Claimant relies on 51(1)(b) against R4 as he says R4's conduct led to the decision.

93. The Respondents say that R4 cannot be held individually liable for the decision not to recommend someone for appointment, even if he is an agent of R1, because R4 was not responsible for the recommendation decision. The Respondents argue that all R4 did was to assess a selection of candidates and grade them A to D. He was not even responsible for deciding how many candidates he assessed would go through to the next stage.

94. The Respondents argue that there can therefore be no individual liability of R4. This is because in order to have individual liability, the third limb in section 110(1)(c) has to be satisfied such that, the doing of the thing that R4 did, must amount to a contravention of the Equality Act 2010 by the principal. The thing R4 did was to assess the candidates, but the alleged contravention was the decision not to recommend the Claimant for appointment which is something peculiar to R1 and for which only R1 can ever be responsible.

95. This argument is compelling when a narrow interpretation is taken of section 51(1) (c). I have decided not to strike the claim out.

96. My reasoning is because such a narrow interpretation appears to me to create a lacuna in the coverage of the Equality Act 2010. Imagine if unknown to R1, it engages someone to do assessments for it who has a particular view about a particular race and who deliberately sets out to ensure candidates of that particular race do not progress. We would rightly think this to be a heinous thing and instinctively feel as if it ought to be something for which that person should be able to be held personally liable under the Equality Act 2010. Although a narrow interpretation of section 51(c) appears to prevent this, at least via section 110, giving a wider interpretation to section 51(1)(c) could enable this.

97. I have considered the analogous situation in an employment context when sub-section 39(1)(c) applies and the assessor is either employed by or acting as an agent of the employer. We do not, so far as I am aware, give a narrow interpretation to sub-section 39(1)(c) so as to mean that the only

person who can be held personally liable for racism in a recruitment process is the final decision maker.

98. Instead, I consider that employment tribunals interpret section 39(1)(c) widely enough to capture anyone involved in the overall selection process, thereby ensuring they could be held personally liable for the part they play in a racist outcome. In the circumstances where racism has taken place at an early stage in a selection process, it would be unfair to hold the final decision maker personally liable. They would not have taken race into account when making their appointment. The issue would be that the pool of people they were interviewed had already been manipulated.

99. When I asked the Respondents if I they thought this analysis was wrong, they did not disagree with me and more significantly were not able to point me to any case law where section 31(1)(c) had been so narrowly interpreted. Instead, they sought to argue the position is different under section 51, but I do not consider there is any obvious reason why it should be.

100. My conclusion, therefore, is that the complaints against R4 ought to be allowed to proceed to the final hearing as it is not obvious, at this stage, that they will fail. The final interpretation given to sub-section 51(1) (c) will be for the final tribunal panel. I add that I did not consider the Claimant's position, on this argument, to be sufficient weak to justify a deposit order.

Murray Argument

101. The second argument for the strike out was directed at the indirect discrimination complaint. Relying on the *Murray* case. The Respondents argued that the claim against R4 should be struck out because of the Claimant's argument that the PCPs applied were those of R1 and not simply the sifting panel that assessed his claim. The Respondents said that any PCP applied more widely than by the particular sift panel alone would *"by definition be that of the JAC and not that of any individua*l and so applying Murray, there could no potential for individual liability.

102. During the course of the hearing, the Claimant clarified that he was effectively arguing the position in the alternative. His primary argument was that the PCPs he has identified and that are contained in the list of issues were of widespread application in the alternative, However, in the alternative, he would wish to argue that R4 applied the skewed PCPs as an individual.

103. In light of this, I decided not to strike out the indirect discrimination case against R4 and also not to make a deposit order. How R4 made his assessments will be a matter of evidence.

Statistics Argument

104. The third ground on which the strike out application was sought was on the basis of the substantive merits of the claim based on the statistical outcome of the sift panel's work. They argue that the statistics show that non-white candidates did better that white candidates, with Asian candidates doing

best of all. They argue this demonstrates that the Claimant will not be able to show that he was a member of a pool that suffered disadvantage and also put it forward as strong evidence that there was no direct race discrimination by either member of the sift panel.

105. I have decided not to strike the claim out against R4 on this basis.

106. The Respondents did not argue that the claim should be stuck out against R1 on this basis, although it would seem to me that this argument would apply equally to R1's liability. I am assuming that they did not make this argument because they recognise that it is important that judicial appointment decisions are subject to the scrutiny of employment tribunals where allegations of race discrimination are made.

107. Against that backdrop, any statistical evidence would need to be extremely compelling to justify a strike out at a preliminary stage. In this case, the sample that has been used is small, because of the small number of people considered by the sift panel and that has to be considered when taking them into account.

108. In addition, we know that the panel also operated on a name-blind basis. The Claimant's concern about this is that some candidates may have been better at 'disguising' their ethnicity than others and that therefore the statistical outcome does not tell the whole story. There is therefore a need to consider the evdience in detail.

Amendment

109. Finally, although not necessary for me to decide based on my interpretation of the original claim form, I have considered in the alternative whether I would have allowed the amendment. I confirm that I would have done so because in my judgment the balance of the injustice and hardship falls in favour of allowing the amendment.

110. I took a number of factors into account when weighing the question.

111. Despite considering himself to be an exceptional candidate for the post of deputy high judge, the Claimant's experience is as a non-contentious solicitor. He has limited experience of litigation and none of employment tribunal processes. He argued, and I accept, that his lack of experience and objectivity in this case may have led to his failure with regard to the original claim form.

112. The application to amend has been made early enough in the overall proceedings so as not to cause significant delay. Ultimately it will not prevent the case from being able to progress to the already listed final hearing. The Respondents may want the opportunity to present a further Amended Response, to deal with the new arguments, but this can be easily addressed in the time frame available.

113. Including consideration of the individual complaints against R4 under section 110 will also not add much to the final hearing. It has always been

envisaged that R4 will need to be present at the hearing to give evidence and the scope of that evidence does not change hugely. The only additional evidence required will be in relation to the status of his relationship with R1 and whether this amounts to a relationship of agency and principal. I anticipate that this question is more likely to be covered in legal submissions rather than lengthy evidence and can easily be fitted into the hearing slot, particularly as the claims against the other individual respondents have been withdrawn.

114. I do not consider the nature of the amendment application engages the time limit provisions. Even it does, my decision would have been to that such time points can be determined at the final hearing. Bearing in mind that the just and equitable test would apply, I do not consider time be a reason for not allowing the amendment.

115. The prejudice to R4 is that he will be a respondent to the claim rather than a witness and that will inevitably mean that it will take up more of his time. However, given that his actions will be under scrutiny either way, I do not consider this to be significant enough a reason not to allow the amendment.

116. The Respondents point out that the Claimant will not be prejudiced by not being able to pursue his claim against R4 because he has his claim against R1. This is the case in the vast majority of claims where Claimants bring claims against individuals as well as their employers or prospective employers. As long as it is potentially legally correct that personal liability can attach to R4 as an individual, the Claimant ought to be pursue a claim against him. Given my views on the arguments put forward by the Respondent, I do not consider them to justify not allowing the amendment to proceed.

_____

Employment Judge E Burns
23 May 2023

Sent to the parties on:

24/05/2023

For the Tribunals Office

APPENDIX

EMPLOYMENT TRIBUNALS

Claimant: Mr A Ghosh

Respondents: 1. Judicial Appointments Commission (R1)
2. Ajay Kakkar (R2)
3. Susan Carr
4. Martin Chamberlain
5. Yvette Long
6. Ian Thomson

Heard at: London Central (in person)

On: 3 and 4 May 2023

Before: Employment Judge E Burns

Representation

For the Claimant: Represented himself
For the Respondents: Benjamin Cooper, KC
Robert Moretto, Counsel

RECORD OF A CASE MANAGEMENT HEARING

This document is in two parts. You must read it all as it contains important information.

PART 1: CASE MANAGEMENT ORDERS

The following orders were made pursuant to the Employment Tribunal Rules. Please note that the Tribunal has various powers to deal with non-compliance with orders including: (a) striking out the claim or the response; (b) barring or restricting participation in the proceedings; (c) vacating any listed hearing dates: and/or (d) awarding costs in accordance with the Employment Tribunal Rules.

Final hearing

(2) The final hearing in this case will begin on 6 November 2023 as envisaged in the case management order made on 23 November 2022.

Documents (other than Candidate Material)

(3) By **25 May 2023**, the First Respondent is ordered by consent to ask Ms Cooper if she can identify the grades that are scribbled out on the document on page 349 of the preliminary hearing bundle, either by reading her writing or through recollection, and confirm her answer in writing to the Claimant.

(4) By **25 May 2023**, the First Respondent is ordered by consent to provide the Claimant with a copy of the evaluation referred to at point 6.2 in the minutes of the Board meeting of the First Respondent dated 14 October 2021 (page 256 of the preliminary hearing bundle),

(5) In addition to the above, it is noted that by **25 May 2023** the First Respondent will provide an unredacted version of material on page 343 of the preliminary hearing bundle to the Claimant on a voluntarily basis.

(6) By **25 May 2023**, the Claimant is to provide the Respondent with any contract between his personal service company and Excello Law, his invoices for work undertaken in the last three years and evidence of payments made by Excello to him in satisfaction of such invoices. The latter can be in the form of bank statements showing payments.

Disclosure of Candidate Material to the Claimant and Orders to Protect Confidentiality

(7) Subject to the orders below, by **1 July 2023** the First Respondent is ordered by consent to disclose the following to the Claimant:

(i) the application forms
(ii) the forms completed by the candidate's independent assessors
(iii) the forms completed by the relevant sift panel members, namely Ms Cooper and Chamberlain J and any notes they may have made

in respect of the 20 candidates who were assessed by the sift panel made up of Ms Cooper and Mr Justice Chamberlain (the "Candidate Material")

(8) By **1 July 2023** in relation to the 66 candidates who were assessed by the sift panel made up of Ms Cooper and Chamberlain J, the First Respondent is ordered by consent to provide the following information on an anonymised basis, providing it is possible to ascertain it from their application forms and /or referee forms:

(i) whether the candidate was a barrister or solicitor;
(ii) whether the candidate was a QC at the time of their application;
(iii) whether the candidate was a partner in a magic circle law firm;
(iv) whether the candidate had previous judicial experience and what this was;

(v) in the case of any solicitors, whether their application reveals experience of advocacy.

(9) The following orders are made in accordance with s.10A of the Employment Tribunals Act 1996 and Rule 50 of the Employment Tribunal Rules in respect of the Candidate Material:

(i) The First Respondent is ordered to redact:

(i) all names;
(ii) any other information from which any person (natural or legal) could be identified by the Claimant, and
(iii) any other information from which any litigation, proceedings or matter upon which advice has been given, could be identified by the Claimant.

(ii) only one copy of the documents redacted in the manner described above are to be provided to the Claimant by the First Respondent, in hard copy form.

(iii) The documents are not to be included in any electronic bundle or transmitted by email to or by the Claimant.

(iv) The Claimant is ordered to keep the documents securely locked when not being used for these proceedings or transported to and from the ET. The Claimant is to provide the First Respondent with details as to how they will be secured by **25 May 2023**.

(v) The Claimant is not to copy the documents.

(vi) Within 28 days of the conclusion of these proceedings, the Claimant is ordered to return the documents to the First Respondent. For these purposes the conclusion of these proceedings means the date on which the deadline for any appeal against the judgment of the ET on liability expires or, in the event of any appeal(s), the date on which all such appeal(s) and/or further appeal(s) are finally determined and any deadline for any further appeal (if any) expires.

(vii) The Claimant may only use the documents for the purpose of these proceedings in which they have been disclosed. That is, he must not read or show or disclose them, or any of the information contained within them, to any other person except as required by law or with the permission of the ET or court (as set out in *IG Index Ltd v Cloete* [2015] ICR 254, Christopher Clarke LJ, at para 40).

(10) Subject always to any orders made by the Judge or Tribunal Panel with conduct of the relevant hearing, the following orders are made in accordance with s.10A of the Employment Tribunals Act 1996 and Rule 50 of the Employment Tribunal Rules in respect of the Candidate Material:

(i) Any part of a hearing during which the Candidate Material is considered and/or evidence is given about it, be heard in private.

(ii) The Candidate Material and the evidence given about it should be contained in a "closed" bundle, which should be prepared in hard copy only and which should not be made available to the public.

(iii) No person may publish or cause to be published the identity of any candidate or independent assessor or other person referred to in any of the Candidate Material (other than as contained in a public part of the ET judgment or reasons).

(iv) To the extent possible, the Candidate Material should not be referred to in any ET judgment or reasons. Alternatively, it should only be referred to in a way which does not make those who are referred to identifiable, or to the extent that it is not possible, that any such matters should be included in a confidential annex that is not made public.

Final Hearing Bundles

(11) By **8 September 2023**, the parties must agree which documents are going to be used at the final hearing, including which documents shall be contained in the closed bundle. The respondent must paginate and index the documents.

(12) The digital and hard copy page numbers should match.

Witness Statements

(13) The claimant and the respondent shall prepare full written statements containing all of the evidence they and their witnesses intend to give at the final hearing and must provide copies of their written statements to each other on or before **29 September 2023.** No additional witness evidence will be allowed at the final hearing without the Tribunal's permission.

(14) The written statements must:

- be typed in double or 1.5 line spacing;
- have numbered paragraphs;
- set out the relevant events in chronological order, with dates;
- contain all the evidence which the witness is called to give;
- be cross-referenced where relevant to the documents in the bundle (including references to the page numbers of those documents);
- state clearly if they contain evidence that can be heard in public or evidence that can only be heard in a private hearing
- contain only evidence relevant to issues in the case;
- state the source of any information not acquired at first hand;
- be signed and dated.

Final Preparations for the hearing

(15) By **16 October 2023** the parties are to write to the tribunal to confirm whether the case will be ready for the hearing. If it appears that the case will not be ready for the hearing, they should explain why in the email.

(16) The parties are ordered to produce a 'cast list', chronology and hearing timetable which should be agreed, if possible. The respondent should provide a first draft to the claimant with a view to them being finalised by **27 October 2023**.

(17) By **2 November 2023** the respondent is to email a copy of all materials held digitally for use by the tribunal panel or a link to a site from which they can be downloaded, to londoncentralet@justice.gov.uk.

(18) In addition, as the hearing is held in person, for the tribunal's use the parties are required to liaise to ensure that the following is brought to the tribunal, on the morning of the first day of the hearing the following

(a) five of the open witness statements (which includes a copy to be made available for inspection in accordance with rule 44);
(b) five copies of the open bundle (this includes a copy to be made available to the public, if appropriate),
(c) four copies of the closed bundle, which should contain the clsoed witness statement,
(d) three hard copies of the chronology, a 'cast list' and hearing timetable.

The parties should also ensure they have sufficient copies of the written materials for their own use.

The parties must arrive at the tribunal building by 9:15 am on the first day of the hearing to ensure that they get through security. The parties must ensure that the tribunal's papers are placed by them in the tribunal room before 9.30 am. They should not wait for a clerk.

Inaccuracies

(19) The parties must inform each other and the Tribunal in writing within 14 days of the date this is sent to them, providing full details, if what is set out in this document about the case and the issues is inaccurate and/or incomplete in any important way.

Other matters

(20) Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible.

(21) The parties may by agreement vary the dates specified in any order without the tribunal's permission except that no variation may be agreed where that might affect the hearing date.

PART TWO: SUMMARY OF KEY DISCUSSIONS

(22) The background to the hearing is set out in the judgment to which this document is attached.

(23) In addition to the two decisions contained in the judgment, I was required to decide a number of applications for specific disclosure and make case management orders for the final hearing.

(24) The most contentious decision concerned whether I should order the First Respondent to disclose the Candidate Material for all of the candidates considered by the relevant sift panel or just that for the 20 candidates that went on to the next stage of the process. The First Respondent accepted that the material should be disclosed, subject to various safeguards, for the 20 candidates but not all of them. However, it offered in addition, to provide in an anonymised format, a breakdown of the other 66 candidates against the criteria identified by the Claimant. Having considered the submissions made by both sides, I ordered the full (subject to redaction) disclosure to be limited to the 20 candidates who went on to the selection days. I gave oral reasons for my decision and was not asked to provide written reasons.

(25) Both parties were in agreement that I should exercise the tribunal's powers under section 10A of the Employment Tribunals Act 1996 and Rule 50 of the Tribunal Rules to put safeguards in place to protect the confidential information contained in the Candidate Material. I record here that I am satisfied, based on the clear and cogent witness evidence provided, that there is a need to deviate from the general principle of open justice in this case. In reaching this decision, I had regard to the respective and competing Convention rights of the parties and third parties involved contained in articles 6, 8 and 10, the statutory obligation of confidentiality contained in the CRA 2005 as well as the general public interest in open justice and in the public reporting of court proceedings. I am satisfied that the orders made are no more onerous than strictly necessary to achieve their purpose, which is to keep the identity of the candidates, their independent assessors and other individuals mentioned in the Candidate Material confidential.

(26) Notwithstanding the above, in making the relevant orders, I was mindful that I had not seen the Candidate Material in its redacted form. I have therefore tried to make it clear that the judge or tribunal panel with future conduct of this case may wish to review the orders. I would encourage them to do so.

(27) In addition, with the parties' agreement, I am publishing this case management order so that anyone with a legitimate interest in challenging the orders can learn of them and make an application under Rule 50(4).

(28) In addition to the issue of disclosure of the Candidate Material, I also considered applications for specific disclosure made by the Claimant and the Respondents. Most of these were resolved through discussions.

(29) I did not order the First Respondent to conduct a search of the computer used by Mr Justice Chamberlain for any earlier drafts of the template he completed when assessing the Claimant's application that might have been autosaved. I considered this to be disproportionate based on the way he described his process in his email dated 1 May 2022 (page 361 of the preliminary hearing bundle) and reviewing the forms including Ms Cooper's forms (pages 153 - 156). I gave more detailed oral reasons for my decision and was not asked to provide written reasons. I also did not order the Claimant to disclose his tax returns or overall income. Again, in summary, my view was this was disproportionate as such information was not necessary to fairly dispose of the claim. I have more detailed oral reasons for my decision and was not asked to provide written reasons.

_____

Employment Judge E Burns
23 May 2023

Sent to the parties on the same date as the judgment to which this is attached as an appendix.