Employment Tribunals Procedure: journalist entitled to copies of skeleton arguments, witness statements and documents referred to in the judgment

By Sarah Bowen
3PB Barristers

Guardian News & Media Limited v (1) Dmitri Rozanov (2) EFG Private Bank Limited (Media Lawyers Association Intervening)

1. The EAT (HHJ James Tayler) has held that an employment tribunal should have granted a journalist's application, made after judgment in a whistleblowing detriment and dismissal claim, for an order requiring the respondent to provide copies of skeleton arguments, pleadings, witness statements and 54 documents referenced in the judgment.

2. The EAT directed that the order for documents be made in favour of the Guardian subject to the payment of any reasonable copying costs (although expressed the hope they would be disclosed electronically at no cost).

The facts

3. Mr. Rozanov was employed by EFG as a UK Market Co-ordinator for Russia, Eastern Europe and CIS countries. He asserted that he had made a number of protected disclosures in relation to compliance and alleging failure to comply with regulatory requirements in respect of a number of specific transactions.

4. The proceedings were subject to an anonymity order in respect of EFG's clients and 4 specific individuals (under Rule 50 Employment Tribunal Rules 2013).

5. The Tribunal accepted that Mr. Rozanov had blown the whistle but went on to reject his claims of detriment and unfair dismissal.

6. Although some journalists attended the final merits hearing, the Guardian had not done so. Under rule 44 copies of the witness statements were available for inspection at the hearing.

The Guardian's application for documents

7. 7 weeks after the judgment was sent to the parties (and 4 months post-hearing), David Pegg (Journalist, the Guardian) applied to the employment tribunal for the aforementioned documents, removal of the rule 50 order and the tribunal bundle (in the alternative to the 54 documents referenced in the judgment). Mr. Pegg explained that he considered that the judgment raised matters of public interest namely:

> *"i) Evidence that EFG Private Bank Ltd repeatedly and deliberately colluded with high-risk clients and politically-exposed persons (PEPs) in breach of UK anti-money laundering regulations;*
>
> *ii) Evidence that an employee of EFG Private Bank Ltd attempted to facilitate a transaction of $100m sourced from associates of Ramzan Kadyrov, a Chechen warlord who has been credibly accused of serious human rights atrocities;*
>
> *iii) Evidence that senior management at EFG Private Bank, including its chief executive, failed to take action when evidence emerged that the same employee had failed to abide by anti-money laundering regulations." [emphasis added]*

8. He explained that he was requesting the documents for "journalistic reasons" including (1) to understand the judgment; (2) to ensure accurate and fair reporting of relevant matters. (3) the journalistic purpose of stimulating informed debate about matters of public interest; (4) to obtain further information about this matter that may assist in further enquiries.

9. Mr. Rozanov did not object to the application but EFG did. EFG initially sought to argue that the order could not be made because:

   (a) The tribunal had no remaining jurisdiction to make the order.

   (b) The tribunal had no power to require a party to provide the tribunal or Guardian with any documents.

   (c) If any such discretionary power exists, that the tribunal should decline to exercise it.

10. However, on 29 July 2019, before the tribunal made its decision, the Supreme Court handed down its judgment in **Dring v Cape Intermediate Holdings Limited [2020] AC**

629 and held:

"There can be no doubt at all that the court rules are not exhaustive of the circumstances in which non-parties may be given access to court documents…"

11. EFG thereafter accepted that the tribunal had the power to make the order sought, but contended that the power was subject to significant qualifications and restrictions. Its objection therefore rested on the basis that the tribunal should decline to exercise its discretion to make the order.

The ET's decision

12. The tribunal ordered copies of the ET1 and ET3 be sent to the Guardian but refused to lift the anonymity/redaction/Rule 50 order or to require EFG to provide the other documents requested.

13. It considered that the principle of open justice was engaged, but only to a limited degree.

The Guardian's appeal grounds

14. The Guardian appealed the decision in part. It did not challenge the refusal to access the trial bundle or to set-aside the Rule 50 order. In short, the grounds of appeal were:

(a) Ground 1 – The tribunal failed to properly define the scope of the open justice principle.

(b) Ground 2 – The tribunal's decision that granting the documents would not advance the open justice principle was perverse.

(c) Ground 3 – The tribunal's evaluation as to the proper balance between open justice and the countervailing factors tending away from disclosure was clearly wrong.

The legal principles

15. The EAT has set out an extensive and useful summary of the relevant legal principles in its judgment alongside consideration of the submissions made (paragraphs 30-88) within the following sub-areas:

(a) The principle of open justice (paragraphs 30-35);

(b) The public interest in justice being open (paragraphs 35-38);

(c) Convention rights that are relevant in considering issues of open justice (paragraphs 39-41);

(d) The role of the free press in open justice (paragraph 42-46);

(e) The role of rules of procedure e.g. CPR, ET Rules 2013, Presidential Guidance (paragraph 47-64);

(f) Disclosure of documents to third parties (paragraph 65-69);

(g) Referring to material in open court (paragraph 71);

(h) Balancing convention rights and proportionality applicable in the EAT (para 72-87).

(i) statements were available for inspection at the hearing.

The EAT's decision

The open justice principle

16. In respect of this principle, the EAT referred to the declaration of Lord Heward CJ in **R v Sussex Justices, Ex p McCarthy [1924] 1 KB 256, 259**:

'it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'. That was in the context of an appearance of bias, but the principle is of broader application. With only a few exceptions, our courts sit in public, not only that justice be done but that justice may be seen to be done." (cited in para 30)

"32. The EAT also cited Baroness Hale in **Dring** on the purpose of the principle:

> *"42 The principal purposes of the open justice principle are two-fold and there may well be others. The first is to enable public scrutiny of the way in which courts decide cases to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly. In A v British Broadcasting Corpn [2015] AC 588, Lord Reed JSC reminded us of the comment of Lord Shaw of Dunfermline, in Scott v Scott [1913] AC 417, 475, that the two Acts of the Scottish Parliament passed in 1693 requiring that both civil and criminal cases be heard "with open doors", "bore testimony to a determination to secure civil liberties against the judges as well as against the Crown" (para*

24).

43 But the second goes beyond the policing of individual courts and judges. It is to enable the public to understand how the justice system works and why decisions are taken. For this they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases. In the olden days, as has often been said, the general practice was that all the argument and the evidence was placed before the court orally. Documents would be read out. The modern practice is quite different. Much more of the argument and evidence is reduced into writing before the hearing takes place. Often, documents are not read out. It is difficult, if not impossible, in many cases, especially complicated civil cases, to know what is going on unless you have access to the written material." (cited in para 32)

17. In granting the appeal, the EAT noted that the tribunal had referred to the "overriding importance" of the open justice principle, but treated it as being far from overriding in this case. The EAT concluded that the tribunal's decision on the open justice principle was not strongly engaged was "fundamentally flawed" (para 90) because it did not consider the journalistic reasons why they wanted the documentation. These "journalistic reasons" were:

    (a) To better understand the matters referred to in the judgment;

    (b) To ensure that any reporting of the matter was fair and accurate;

    (c) For the journalistic purpose of stimulating informed debate; and

    (d) To obtain further information about the matter to assist in further enquiries.

18. The EAT considered the first two clearly fall within the two principal purposes of open justice and the second two have *"at least some foundation in the wider purposes"* referred to in case law (which is set out in the judgment sections summarised above). It was those reasons that were of particular relevance in considering the underlying purposes of the open justice principle and the tribunal has failed to refer to any of them in its judgment (para 91).

19. After its initial application the Guardian had sought to add two further matters of public interest, (a) the question of compliance with regulatory authorities and (b) EFG's handling of Mr. Rozanov's dismissal. The tribunal had rejected those as being genuine reasons why the Guardian considered the subject matter of the proceedings was of public interest and expressed that they were an afterthought. However, the EAT criticised the tribunal for not giving EFG the opportunity to respond to the suggestion

that it was being disingenuous.

20. Nor did the tribunal refer to the Guardian's statement that the documents sought would greatly assist in facilitating a better understanding of the case and judgment and so would allow fair and accurate reporting. The EAT considered these matters came within the core purposes of the principle of open justice.

21. Therefore, the EAT concluded that the tribunal took *"too narrow an approach to the open justice principle"* (para 94) and that it had erred in law in concluding that the open justice principle was not strongly engaged when the EAT considered the converse was the case (para 95). The Guardian set out proper journalistic reasons for seeking the documentation and the public interest in the underlying subject matter of the proceedings was something that should have also weighed in favour of granting the application.

Practicalities and proportionality

22. In respect of the practicality and proportionality of granting the application the EAT was entirely unpersuaded by EFG that it was in real practical difficulty in providing the documentation requested. HHJ Tayler expressed that it was "implausible" that EFG could not easily obtain clean electronic copes of the skeletons and witness statements from their computer records. There was no evidence presented that there was any such difficulty and no particular evidence of real difficulty or significant cost in providing copies of the redacted documents referred to in the judgment. A party seeking documents may be required to pay reasonable costs per **Dring**.

23. The EAT has criticised the concerns that the tribunal raised of its own motion as to practicality and cost which HHJ Tayler expressed, *"…harked back to days where boxes of hardcopy paper documents would have to be obtained and then the relevant documents would need to be extracted and individually photocopied. The judgment conjures up a picture of a solicitor's office of the 70s." (para 100)*

24. It was observed that in **Dring,** Baroness Hale noted that the increasing digitisation of court materials would make the provision of documentation easier and that this had accelerated during the pandemic. There was in any event no evidence as to cost from EFG before the EAT.

25. It was also noted by HHJ Tayler that is not always practical for the media to attend a hearing at the time it actually takes place due to resources, the impact of Covid and for other reasons. Whilst applications for documents should be made at trial where possible because it is "easier", the 6 weeks delay in the present case could not have resulted in any practical difficulty sufficient to counterveil the principle of open justice (para 101). HHJ Tayler considered any inconvenience that did occur to EFG was "minor" (para 106).

Comments

26. The 6 weeks delay in the present case was not enough to persuade the EAT that it led to impracticality or excessive costs in complying with the request for documents. In other cases this may not be the case and might swing the decision. The EAT has though fairly observed that there might be practical problems in dealing with an application after a hearing takes place where the request relates to documentation that raises Article 8 issues or otherwise infringes confidentiality rights of the parties or others. Such applications might need to be considered at a hearing in line with the suggestion in **Goodley v The Hut Group [2021] EWHC 1993**.

27. A party taking such points on practicality and costing in any objection to an application for documentation needs to provide evidence of that cost and impracticality. It is clear that submissions alone on such matters are unlikely to be given significant weight (unless glaringly obvious I would opine). Even then, this judgment has actually undermined arguments about practicality or cost because the EAT has cited Baroness Hales' observations in **Dring** (summarised above) and HHJ Tayler has observed that no costs are likely to be incurred in copying documents in the digital age or even for legal assistance in identifying and providing the same (para 104).

28. It was considered by the EAT to be relevant that the application in the present case was limited to particular documents thus reducing the scope of the exercise. Therefore, there may be a greater prospect in objecting where a lot of documentation is being sought.

29. There is a sage reminder in the final paragraph of the judgment that parties should bear in mind that a bundle will generally be open for inspection on or if appropriate after the hearing. Therefore, parties should try and limit the documentation included to

that which is necessary. This is a clear “pop” at some of the large bundles that regularly appear before the tribunals often containing reams of irrelevant documentation (we have all seen it).

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Sarah Bowen

Barrister
3PB Barristers

0121 289 4333
sarah.bowen@3pb.co.uk

3pb.co.uk