

Employment Tribunals have the power to order disclosure by a third party outside of Great Britain

By [Sarah Bowen](#)

3PB Barristers

***Sarnoff v YZ* [2021] EWCA Civ 26**

1. The Court of Appeal (Underhill LJ, Bean LJ and Phillips LJ) has held that an employment tribunal order requiring disclosure by a third party outside of Great Britain was lawful.

Facts

2. A sexual harassment claim was brought in the Tribunal against Harvey Weinstein and other respondents including Mr. Sarnoff. At the material time Mr. Sarnoff was an independent representative on the board of The Weinstein Company Holdings LLC which is the US parent company of the Weinstein Company LLC. Both companies are Delaware Companies. One of the Co-Presidents of the Weinstein Company LLC was Harvey Weinstein.
3. The claimant, 'YZ', claimed to be employed by either the Weinstein Company LLC or a UK subsidiary. She brought claims under the Equality Act 2010 before the employment tribunal against the companies, Harvey Weinstein, Mr. Sarnoff and a number of other individuals including other representatives on the board of the US parent company.
4. The claimant's case against Mr. Sarnoff is that by failing to prevent Mr. Weinstein's conduct they "knowingly helped" him commit harassment within the meaning of the 'aiding contraventions' provisions under s.112 Equality Act 2010.
5. Mr. Sarnoff lives and works in California and has not been at any material time in Great Britain. He resists the claim on the basis of both its legal and factual basis.

The relevant ET rules/principles

6. Employment practitioners will be familiar with the rules relevant to this decision, but for ease of reference they are set out below.
7. The Employment Tribunal Rules of Procedure (which constitute Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013) provide for “Case Management Orders and other Powers” under rules 29-40.
8. Rule 29 is headed “Case management orders”. It provides as follows:

“The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. The particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.” [emphasis added]

9. The term “case management order” in rule 29 is defined in rule 1 (3) (a) as “... an order or decision of any kind in relation to the conduct of proceedings, not including the determination of any issue which would be the subject of a judgment”. Paragraph (3) (b) defines “judgment”, it does not include an order for disclosure.
10. Disclosure is dealt with in Rules 31 and 32 which provide as follows:

“Disclosure of documents and information

31. The Tribunal may order any person in Great Britain to disclose documents or information to a party (by providing copies or otherwise) or to allow a party to inspect such material as might be ordered by a county court or, in Scotland, by a sheriff. Requirement to attend to give evidence.

32. The Tribunal may order any person in Great Britain to attend a hearing to give evidence, produce documents, or produce information.” [emphasis added]

11. The Marleasing principle has been found to be relevant in the present case. Under the Marleasing principle, the courts are required to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive (***Marleasing SA v La Comercial Internacional de Alimentacion SA C-106/89 and Pfeiffer v Deutsches Rotes Kreuz C-397/01 at para 113.***)

Arguments in the ET and EAT

12. At a preliminary hearing, YZ sought disclosure from Mr. Sarnoff, who was living and working in California and had not at any material time been in Great Britain. Mr. Sarnoff argued that the Tribunal did not have the power to order such disclosure against him.
13. Mr. Sarnoff's argument was based on the submission that the ET's powers of disclosure derive only from Rule 31 and therefore, that disclosure could only be ordered against a party who is "in Great Britain". Whilst it was accepted that there might be some debate about what that phrase means it could not be extended on any view to Mr. Sarnoff who was on no interpretation "in Great Britain".
14. On behalf of YZ, it was primarily argued that the power to make disclosure orders against a party derives from Rule 29 (the power to make case management orders) and that Rule 31 did not apply because it was concerned only with disclosure against non-parties.
15. EJ Tayler sitting in Central London ET, rejected the argument that Rule 31 was only concerned with disclosure against non-parties but considered he had the power to order disclosure against a party outside of Great Britain under Rule 29. Accordingly, EJ Tayler made a general order against all parties for disclosure of relevant documents. EJ Tayler rejected an application by Mr. Sarnoff to set that order aside.
16. Mr. Sarnoff appealed to the EAT on the issue but Kerr J, dismissed the appeal. In doing so, Kerr J. did not agree with EJ Tayler's exact reasoning, but held that the power to make the order did derive from Rule 31. He felt able, in reliance on the Marleasing principle, to give the words "in Great Britain", what he accepted was a strained constructive, a meaning by which they *"must be taken to refer to the location of the employment tribunal making the disclosure order, not to the location of the person against whom the order is made."* (paragraph 69 of his judgment).
17. Therefore, albeit for different reasons, both the ET and EAT agreed that that order could be made.

The Court of Appeal

18. The Court of Appeal dismissed Mr. Sarnoff's appeal and agreed that the order could be made. However, it found a "more straightforward route" in reaching that conclusion (paragraph 12). It concluded that the power to do so arises from Rule 29 and that Rule 31 is only concerned with disclosure against non-parties. Therefore, the words "in Great

Britain” do not apply to the circumstances of the present case.

19. The Tribunal rules are to be read as Rule 29 conferring a “general power” to make case management orders and thereafter “particular powers” that the drafters considered needed specific provision. However, those “particular powers” of which Rule 31 is one do not cover all matters on which a tribunal is likely to have to make orders in the course of managing a case (paragraph 13).

20. Rule 31 applies to all orders for disclosure against non-parties (paragraph 14) not parties. The following four points were made to support this conclusion:

“14...

- (1) *The power conferred by rule 31 is to make an order against “any person”: that phrase on its natural reading is obviously wider than “a party”, which is what one would expect in a provision concerned with ordinary disclosure between parties (cf. the language of rule 31.2 of the Civil Procedure Rules (“the CPR”).*
- (2) *Rule 31 reads as a pair with rule 32, which starts in identical terms, likewise referring to “any person”. Rule 32 is evidently intended to confer a power broadly equivalent to the power of a court (in England and Wales) under CPR 34 to issue a witness summons against a non-party. That suggests that the purpose of rule 31 likewise is to confer a power to make orders against non-parties.*
- (3) *Reading rule 31 (and rule 32) as concerned with orders against non-parties makes sense of the limitation of the power to making orders against persons in Great Britain. It is easy to see why the rule-maker should take the view that it was exorbitant for the Employment Tribunal to have the power to make orders against persons not in the jurisdiction and who were not themselves parties to the proceedings: there is no such power in the ordinary courts. But I can see no rational basis for a similar restriction in the case of disclosure by a party: I say more about this at para. 15 below.*
- (4) *It is understandable that the rule-maker would make a distinction of this kind between orders for disclosure between parties, which fall under the general power in rule 29, and orders for disclosure against a non-party, which are the subject of specific provision. The former are a matter of routine case management in all but the most straightforward cases. By contrast, ordering a non-party to disclose documents, or to permit their inspection, is non-standard, and it makes sense that it should have been thought appropriate to make it the subject of special provision by reference to the*

regime for third-party disclosure in the County Court or the Sheriff's Court."

21. In delivering the judgment Underhill LJ., endorsed this construction of the rules applying the ordinary domestic rules of construction to avoid consequences that he did not believe that the rule-maker intended. These consequences were set out in detail by Kerr J., who in paragraph 66 of his own judgment said Mr. Sarnoff's construction was one "*which produces injustice and something close to absurdity*". Kerr J's, observations in the EAT and have been cited by the Court of Appeal in their judgment (at paragraph 15). Consequences include:

- (a) the fact that many thousands of incorrect disclosure orders have been made by the ET against persons not living in Great Britain;
- (b) such orders are common;
- (c) any interpretation would also have to apply to Claimants also;
- (d) one possible conclusion of Mr. Sarnoff's argument would mean a person can bring a claim, leave Great Britain and pursue it from abroad whilst avoiding disclosure;
- (e) a person travelling from overseas to giving evidence in person can be ordered to disclose but not if they do via video link from abroad.

22. The Court of Appeal also concluded that Mr. Sarnoff's construction would not be in accordance with the overriding objective.

Comment

23. The Court of Appeal's guidance on Rules 31 and 32 are very welcome as are the general comments about general powers of disclosure under Rule 29.

24. Another interesting point of law arises in the present case but is yet to be determined namely, whether the ET has the territorial jurisdiction to entertain the claims against Mr. Sarnoff (and the other executives being sued individually in the same litigation). The Tribunal has declined to grant a preliminary hearing on the issue and that has not been appealed. Accordingly, jurisdiction is currently to be heard alongside liability.

25. Disclosure can be a prickly issue in the Employment Tribunal, where the rules are not as specific as those in the Civil Procedure Rules or Supreme Court. However, on this point Underhill LJ., considered, "*it is wrong to view the Employment Tribunal Rules through the prism of the CPR...*" (paragraph 23) in that they do not attempt to set out comprehensively the kinds of order that the Tribunal can make but provide a general power and special

provision for various particular situations. There is therefore a great degree of scope in the Tribunal.

26. The Tribunal's powers are the same as the County Court under Part 31 of the CPR. Although the practice directions that accompany it are not necessarily binding (*South Tyneside Council v Anderson and ors* EAT 0002/05). The applicability of the CPR in the Tribunal was recently considered by the EAT in ***Santander UK plc and ors v Bharaj* EAT 0075/20** in the context of an application for specific disclosure. In ***Santander***, it was confirmed that a tribunal's disclosure order cannot go beyond what would be allowed under the CPR.
27. There are clearly strong grounds for applying a purposive interpretation of the rules in the present case due to the dire and confusing consequences that might arise if Mr. Sarnoff's submitted interpretation is correct. It would no doubt have resulted in a lot of satellite litigation over disclosure.
28. In addition, to Rule 29, 31 and 32, practitioners are reminded that the tribunal also has power under Rule 33 to use the procedure laid down by the Council Regulation (EC) No.1206/2001 to request evidence through the courts in EU Member States. Such a request may relate to inspection of documents or other objects.

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Sarah Bowen

Barrister
3PB

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

3pb.co.uk