Do not Pass Go, Do Not collect £200:

The dangers that generalised assessments of credibility and orders for sequential disclosure can pose

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***Mayanja v City of Bradford Metropolitan District Council* [2025] EAT 160**

Overview / Executive Summary

Whilst the full case summary is set out in detail below, for those short of time I consider there are two key takeaways / reflections to note:

1. Broad or generalised assessments of credibility such as in this case *'where in conflict we prefer the evidence of ...'* pose an inherent risk on appeal (aptly demonstrated in this case) of the entire claim needing to be remitted and restarted as opposed to just a small part of that claim. Such a generalised approach and statements are thus best avoided by the ET and practitioners should think twice before inviting such broad findings to be made.

2. Sequential as opposed to contemporaneous orders for disclosure and inspection appear a sensible, more efficient and cost saving approach where LIPs are involved and the employer invariably holds the majority (if not all) of the relevant documents. However, ordering sequential disclosure (i.e. for the Claimant to simply add further documents to an existing disclosure bundle) places ***the primary obligation*** on the Respondent to provide the relevant documents and arguably might expose the Respondent to a danger of re-litigation on relevant new evidence being 'discovered' by the Claimant after the fact that it would otherwise not have been had there been an order for mutual disclosure and inspection.

The Background Facts

The Claimant ('C') brought claims of breach of contract, direct and indirect race discrimination and victimisation which all ultimately pertained to the decision not to progress his application

for a role with the Respondent Council ('R'). A key area of dispute was that C maintained that he had been offered a job, whereas R maintained that no offer had been made but rather C was merely informed he was the preferred candidate in an ongoing process.

C also brought a complaint of racial harassment in respect of a comment allegedly made during the recruitment process by Ms. Clipsom of *'this is not Africa, the procedure in this country is you prove all former employee details'.*

The ET's Decision

The ET dismissed all claims and went on to award costs of £2000 against C as they found C uncredible and that he had fabricated the harassment claim and constructed the contract claim on a basis he knew to be untrue.

The ET's Rationale

The ET had found the C's evidence to be uncredible in various respects. In respect of the harassment claim the ET noted the material inconsistency between the C's ET1 and his witness statement, the latter not referencing 'Africa' which the ET found surprising as this allegation was at the core of the harassment complaint. The ET further noted the fact that the telephone records did not support C's contention of any such conversation having taken place and the fact that C's account as to the date of the alleged conversation and the actual words alleged to have been used varied and was not consistent. Overall the ET preferred the evidence of Ms. Clipsom in respect of this matter who denied any such comment had been made or any conversation even on the dates suggested.

The ET also generally stated that they found Ms. Clipsom to be a reliable witness and **that where there was conflict, they preferred the evidence of Ms. Clipsom.**

Part of the reasoning for that finding on credibility was the fact that C had maintained in his claim and written statement that Ms. Clipsom had left a voice message and sent an email on 18 and 19th October 2021 confirming an offer of employment and yet there was no such email in the bundle and then during cross examination C appeared to make concessions in respect of the same. The only email the ET had in the bundle around this time was dated 20th October which referenced C as the 'preferred candidate'. However, it is pertinent to note that there were several other reasons as to why the ET found the evidence of Ms. Clipsom compelling and credible.

The ET's Reconsideration Decision

C applied for reconsideration and provided new evidence which he suggested was 'fraudulently excluded' from the initial bundle. That new evidence was an email from Ms. Clipsom of 18th October 21 which clearly did make a job offer in the following terms:

> *'Tried ringing but I think your phone may be switched off. I'm pleased to say we'd like to offer you the job. Can I give you a ring in the morning to confirm that you want to take it, and discuss start date etc.'*

The ET treated the reconsideration decision as limited to the costs judgment, held that the email could have been disclosed by C if he had exercised 'reasonable diligence' but admitted the new evidence as it was accepted as credible by R. The ET further accepted that due to a change in R's email system there had been no deliberate concealment of the email by the R. The ET went on to find that whilst the email of 18th October 2021 had no impact on its finding that the harassment claim was fabricated, which remained the ET's view, it did impact and undermine the ET's other bases for awarding costs and so the ET accordingly reduced its award of costs from £2000 to £200.

The EAT's Decision

HHJ Tayler held that the decision of the ET was fundamentally unsafe and accordingly set it aside in respect of all complaints because all of the claims failed due to the ET preferring the evidence of Ms. Clipsom in all respects. HHJ Tayler remitted the matter to a differently constituted ET to determine all of the complaints afresh. The remaining costs judgment (for £200) was also set aside.

The EAT's Rationale

HHJ Tayler in his reasoning clearly zoned in on the ET's sweeping statement of *'where there is a conflict we prefer her evidence'* and cautioned ETs of the risk of making such broad assessments:

> *When the liability judgment is read as a whole it is clear that the fundamental reason for the decision of the Employment Tribunal that the claimant was lacking in credibility was that there was no evidence of the job offer that the claimant relied upon.* ***This case demonstrates the risk of making an overarching assessment of credibility that then is relied on in all further assessments. The Employment Tribunal held***

> ***that Ms Clipsom was a reliable witness and that "where there is a conflict we prefer her evidence".*** *The foundation upon which that assessment was made was the conclusion that she had not offered the job to the claimant.* (Para 38, emphasis added).

HHJ Tayler, whilst acknowledging that there were various other grounds upon which the ET held C's evidence to be inconsistent or uncredible, considered that the ET's rejection of the C's contention that he received a job offer and the acceptance of the adamant evidence of Ms. Clipsom that she had not offered a job to C was the central foundation for the ET's generalised determination of credibility. Accordingly, the entire decision of the ET was rendered unsafe. To quote HHJ Tayler:

> *The decision of the Employment Tribunal was built on foundations of sand because the Employment Tribunal adopted the approach of preferring the evidence of Ms Clipsom to that of the claimant where there was any conflict. If that generalised determination on credibility had not been made, it is unclear whether the decisions would have gone against the claimant in all the other respects.* (Para 39)

The Sequential Disclosure Issue

Whilst strictly obiter, HHJ Tayler held that had the ET not accepted the new evidence (i.e. the email of 18th October offering the job) could be relied upon by the C at the reconsideration hearing, he himself (HHJ Tayler) would have permitted the admission of the new evidence in the appeal as he accepted that C could not have been expected to disclose the new evidence exercising *'reasonable diligence'*.

It is of course only in very rare / limited circumstances that the EAT is usually prepared to consider the admission of new evidence on appeal that was not before the ET. HHJ Tayler referenced the 3 conditions that must be fulfilled as set out some time ago by Lord Denning in **Ladd v Marshall [1954] 1 WLR 1489** and essentially replicated as the relevant factors to be considered by Para 8.12.6 of the EAT PD 2024, namely whether the new evidence in question:

a. could have been obtained with reasonable diligence for use in the Employment Tribunal;
b. is relevant and would probably have had an important influence on the decision of the Employment Tribunal;
c. is apparently credible.

Given the new evidence in question was at the heart of the C's own case and was an email sent to him and thus within his possession at the time of the original hearing, HHJ Tayler's finding that *'the claimant could not have been expected to disclose the new evidence exercising reasonable diligence'* might appear on first reflection to be, well, wrong. However, this finding of HHJ Tayler turned on the ET's somewhat unusual orders for disclosure in this particular case.

The ET had ordered R to first send C a proposed draft trial bundle index and then for C to consider whether there were any additional documents that he required to be in the trial bundle as being relevant and necessary to determining the issues. If so, C was to enter a brief description in the Index and *'to send a copy of any such additional document for inclusion in the trial bundle if he has the same'.*

HHJ Tayler found that in light of the ET's orders set out above that strictly speaking there was no order for disclosure. HHJ Tayler went onto explain:

> *The Order was made on the basis that the respondent would have primary responsibility for the preparation of the bundle. The claimant was entitled to expect that the respondent would disclose relevant documentary evidence. I accept that the claimant assumed that there was no email offering the job because if there was such an email it would have been disclosed by the respondent.* (Para 33)

Ultimately, HHJ Tayler held that C could not have been expected to disclose the new evidence exercising 'reasonable diligence' and his rationale for why his view differed to that of the ET on this issue was explained:

> *The Employment Tribunal considered that there was an equal obligation on the claimant and the respondent to disclose the email of 18 October 2021, however it is clear that the Employment Tribunal when making the orders to prepare for the liability* ***placed the primary obligation on the respondent to provide the relevant documents.*** *In the particular circumstances of this case I consider it was reasonable of the claimant to rely on the respondent exercising proper care when doing so.* (Para 37, emphasis added)

Reflection on the Sequential Disclosure Issue

Orders for sequential disclosure are, in my experience in recent years, becoming increasingly commonplace. Indeed, there is much to commend them – they save cost and are efficient.

However, this judgment of HHJ Tayler, whilst strictly obiter and based on case specific and somewhat unusual facts, does begs the question: *'does simply ordering sequential disclosure (i.e. for the Claimant to simply add further documents to an existing disclosure bundle) not place* ***the primary obligation*** *on the respondent to provide the relevant documents?'*

If so, is the respondent employer not clearly exposed to a potential danger of re-litigation on new evidence being 'discovered' by the claimant after the fact which it otherwise would not have been had there been simply a more typical order for mutual disclosure and inspection?

Personally, I consider that we can have our cake and eat it – namely benefit from the cost saving efficiencies of sequential disclosure whilst at the same time avoiding the potential risk identified by HHJ Tayler in this case. Care perhaps needs to be taken in the form of the ET's order for disclosure and inspection that is made. For example, clearly and fully outlining to the claimant their obligations in respect of disclosure and the searches that they should undertake *regardless* and which ought to occur *prior* to any exchange of lists, would I consider, make it very difficult for a claimant to later seek to draw analogy to the 'unusual facts' of this case and to sincerely state that such evidence such as an email sent to them on a key issue could not have been obtained with 'reasonable diligence' for use in their own ET proceedings.

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