Neutral Citation Number: [2021] EWCA Civ 26

Case No: A2/2020/0771

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
Mr Justice Kerr

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/01/2021

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))

LORD JUSTICE BEAN

and

LORD JUSTICE PHILLIPS

- -

Between :

TIM SARNOFF	**Appellant**
- and -	
YZ	**Respondent**

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- -

Ms Diya Sen Gupta QC (instructed by **Latham & Watkins (London) LLP**) for the **Appellant**
Mr Jonathan Cohen QC and **Mr Christopher Milsom** (instructed by **BlackLion Law LLP**) for the **Respondent**

Hearing date: 24th November 2020

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Approved Judgment

Lord Justice Underhill:

1. The Appellant is a US citizen who lives and works in California. He was an independent representative on the board of The Weinstein Company Holdings LLC ("the US parent"), which is the parent company of the Weinstein Company LLC ("the US company"): both companies are Delaware companies. One of the Co-Presidents of the US company was the film producer Harvey Weinstein. The Respondent claims to have been employed by either the US company or a UK subsidiary. She claims that she was subjected to sexual harassment by Mr Weinstein. She has brought proceedings in the Employment Tribunal under the Equality Act 2010 against the companies by one or other of which she says she was employed, against Mr Weinstein himself and also against a number of other individuals, including the Appellant and other representatives on the board of the US parent ("the Executives"). In summary, her case against the Executives is that by failing to prevent Mr Weinstein's conduct they "knowingly helped" him within the meaning of section 112 of the Act. The Appellant disputes both the legal and the factual basis of the claim against him.

2. On 21 September 2018 Employment Judge Tayler in the Central London Employment Tribunal made a general order against all the parties for disclosure of relevant documents. The Appellant applied for that order to be set aside. By a decision dated 17 July 2019 EJ Tayler declined to do so.

3. The Appellant appealed to the Employment Appeal Tribunal ("the EAT") on the single issue of whether the Employment Tribunal had power to make an order for disclosure against a party who was not in Great Britain. By a judgment handed down on 6 May 2020 Kerr J dismissed the appeal.

4. This is an appeal against that decision, with the permission of the EAT itself. The Appellant has been represented by Ms Diya Sen Gupta QC and the Respondent by Mr Jonathan Cohen QC and Mr Christopher Milsom. At the conclusion of Ms Sen Gupta's submissions we did not find it necessary to call on Mr Cohen and said that the appeal would be dismissed. These are my reasons for that decision.

5. I should note by way of preliminary that the Executives have claimed that the Employment Tribunal does not have territorial jurisdiction to entertain the claims against them, and Ms Sen Gupta made it clear that the present appeal was being pursued without prejudice to that position. However, the Tribunal has declined to direct a preliminary issue as regards jurisdiction, and there has been no appeal against that decision. Although there was some discussion at the hearing of this appeal about the difficulties of determining the jurisdiction issue at the same time as the substantive issues, that question is not before us and it would not be appropriate to say anything about it.

6. I should start by setting out the relevant provisions of the Employment Tribunal Rules of Procedure (which constitute Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013). They are to be found under the heading "Case Management Orders and other Powers", which covers rules 29-40.

7. Rule 29 is headed "Case management orders". It reads:

> "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."

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", but I need not set it out: the only point that I need make is that it does not include an order for disclosure.

8. Rules 30-40 set out a number of somewhat miscellaneous particular powers of the Tribunal. We are concerned only with rule 31 and, tangentially, rule 32, which read as follows:

> "*Disclosure of documents and information*
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> 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."

9. The basis of the Appellant's application was that the Employment Tribunal's power to make an order for disclosure derives (only) from rule 31 and is accordingly only available against a party who is "in Great Britain". There might be room for debate about the precise meaning of that phrase, but it could on no view apply to the Appellant, who lives in California and has not at any material time been in Great Britain. The Respondent's primary case in response was that the power to make orders for disclosure against a party derives from the general power in rule 29 to make case-management orders: rule 31 did not apply because it was concerned only with disclosure against non-parties. She also advanced alternative arguments which I need not set out here.

10. EJ Tayler declined to accept that rule 31 was concerned only with disclosure against non-parties, but he held that the Tribunal nevertheless retained the power to make an order for disclosure against a party outside Great Britain because of the provision in the second sentence of rule 29 that the particular powers identified in the following rules did not restrict the general case-management power which it conferred: see para. 71 of his Reasons.

11. In the EAT Kerr J did not accept that argument and held that the power to make the impugned order did indeed derive from rule 31; but he felt able, in reliance on the *Marleasing* principle, to give the words "in Great Britain" what he accepted was a strained construction 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": see para. 69 of his judgment.

12. It will be simplest for me to state my conclusion at this stage, and the reasons for it, before turning to the contrary arguments. I agree with both the Tribunals below that the Employment Tribunal had power to make the impugned order, and accordingly that the appeal should be dismissed. But I believe that there is a more straightforward route to that result than that taken by either EJ Tayler or Kerr J, since in my view Mr Cohen was right to submit that the relevant power derives from rule 29 and that rule 31 is concerned only with disclosure against non-parties: that being so, the words "in Great Britain" simply do not apply.

13. The starting-point is that rule 29 confers on the Employment Tribunal a "general power" to make case management orders and that the following rules create what it describes as certain "particular powers". Those particular powers are evidently concerned with matters which the rule-maker for one reason or another thought required specific provision: they certainly do not cover all matters on which a tribunal is likely to have to make orders in the course of managing a case.

14. I accept that at first sight the particular power conferred by rule 31 may look as if it is intended to apply to all orders for disclosure, against both parties and non-parties: its wording, including the heading, is very general. (Kerr J described this as "the literal reading".) I also accept that if that were the intention it would be at least strongly arguable, contrary to EJ Tayler's approach, that it is not legitimate to use the general power under rule 29 to order disclosure outside the terms of the particular power under rule 31. But in my view a more considered reading of the rule in the context of this group of provisions as a whole leads to the conclusion that its intended scope is narrower. I would make four points:

    (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[1]. 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

[1] In Scotland a sheriff likewise has power to issue a "witness citation", though we were not taken to the relevant provisions.

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.[2]

15. Taking those points together, I believe that the Respondent's construction of rule 31 as being concerned only with disclosure against non-parties is the more natural meaning even if regard is had only to its language and the structure of this group of rules. But it is in any event clearly a possible meaning; and in my judgment it must, applying ordinary domestic rules of construction, be preferred to the Appellant's in order to avoid consequences which I do not believe that the rule-maker can have intended. Kerr J described those consequences at paras. 43-46 of his judgment, which read:

> "43. Next, I consider some of the consequences of that literal construction [sc. the Appellant's construction of rule 31]. They are odd. If Ms Sen Gupta's plain and ordinary meaning is the correct one, Mr Cohen must surely be right that many thousands of wrong orders for disclosure have been made by tribunals against persons not present in Great Britain when the orders were made. In my experience, such orders are commonplace and tribunals often do not trouble to ask themselves where the disclosing party is. That does not rule out the literal construction but is a noteworthy consequence of it.
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> 44. If [the Appellant's] construction is right, Ms Sen Gupta accepts that the geographical barrier to disclosure applies equally to a claimant as it does to a respondent. That is right; the rule cannot bear one meaning for a party claiming and another for a party defending or, indeed, a non-party. A further bizarre consequence of the literal interpretation, therefore, is that a person may bring a claim, leave Great Britain, pursue it from abroad and thereby avoid giving disclosure.
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> 45. It is true that a party, whether claimant or respondent, seeking to avoid disclosure by leaving Great Britain, or giving 'cherry picking' self-serving and selective disclosure, could be subject to procedural sanctions such as striking out a claim for abuse of process or debarring from defending. Those draconian remedies would be available while

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[2] The relevant rule in England and Wales is rule 31.17 of the Civil Procedure Rules, giving effect to section 53 of the County Courts Act 1984. Again, we were not taken to the position in Scotland, but the Sheriff has power in certain circumstances to order the production of documents by third parties.

> the lesser and more obviously proportionate remedy – an order for specific disclosure – would not be. That is an unsatisfactory feature of the literal construction.
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> 46. Next, the literal construction can produce arbitrary and fortuitous results. A tribunal can make an order for disclosure against a person fleetingly in transit at Heathrow airport. The same person cannot be ordered to disclose if the order is made before the aircraft lands or after it takes off for Paris, Belfast or Shanghai with the person on board. A tribunal could, in theory, be specially asked to sit and make a disclosure order at a time when the person is known to be temporarily in Great Britain. A person who comes from overseas to give live oral evidence at the tribunal can be ordered to make disclosure; while the same person cannot be ordered to make disclosure if he or she gives evidence from abroad over a video link."

At para. 66 he described the Appellant's construction as one "which produces injustice and something close to absurdity".

16. Ms Sen Gupta argued that Kerr J had exaggerated the supposedly absurd consequences of the Appellant's construction. She made again the point which Kerr J summarises at para. 45; but I agree with him that the fact that a tribunal might try to use various procedural devices of doubtful appropriateness to try to make up for the absence of a power to order disclosure is not a satisfactory substitute for the absence of the power in the first place. She also pointed out that there was no evidence, beyond Kerr J's reliance on his own experience, about how often in practice the Appellant's construction would preclude a tribunal from ordering a disclosure against a party. Most respondent employers are incorporated and will in the nature of things be "in" Great Britain in the sense of having their seat or a place of business here. Admittedly individual claimants and respondents might be physically outside Great Britain at the time that proceedings are commenced and/or that an order for disclosure is sought to be made; but the artificial and fortuitous consequences described by Kerr J at para. 46 could be mitigated if the phrase "in Great Britain" were construed as referring to habitual residence or some such concept. That is true as far as it goes, but the fact remains that there will be many cases in which an individual party will not be in Great Britain in any sense. Even ignoring a case like the present, where there is a serious issue over whether the tribunal has jurisdiction, there are many circumstances in which employees who at the times material to the claim lived and/or worked overseas are nevertheless entitled to bring proceedings in Great Britain under the 2010 Act, or the Employment Rights Act 1996; or they may simply have moved abroad since. Thus, although it may be possible to take issue with one or two of the particular examples given by Kerr J, in my view he was right to regard the consequences of the Appellant's case as highly unsatisfactory; and I do not believe that they can have been intended by the rule-maker.

17. I would add that the Appellant's construction is in my view contrary to rule 2, which reads (so far as material):

> "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)-(e) …
>
> A Tribunal shall seek to give effect to the overriding objective in *interpreting*, or exercising any power given to it by, these Rules [emphasis supplied]. …"

Parties could not be said to be on an equal footing where one party who was in Great Britain was liable to be ordered to give disclosure but the other was not because they were overseas.

18. The only authority to which we were referred as potentially bearing on this issue is the decision of the EAT, on appeal from an employment tribunal in Scotland, in *Weatherford UK Ltd v Forbes* [2011] UKEATS 0038/11. The claimant brought unfair dismissal proceedings against his employer, a UK company. The tribunal made orders that the respondent disclose various documents which, on the evidence, were not in Great Britain but in the USA and which were held not by the respondent itself but by its parent, Weatherford International Ltd ("WIL"), a Bermuda corporation based in Texas, or its lawyers. The order was made under rule 10 of the then Rules, which were contained in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004. Rule 10 (1) conferred on chairmen a "general power to manage proceedings" and paragraph (2) gave a series of "examples" of orders that could be made in the exercise of that power: rule 10 (2) (d) is in identical terms to rule 31 of the current Rules. Lady Smith held that it was not competent for the tribunal to make the order that it did. At paras. 55-58 of her judgment she says:

> "55. The Ordinary Cause Rules of the Sheriff Court, unlike their predecessor (1983) do not expressly confer power on the sheriff to order the recovery[3] of documents but there is no doubt that it is within the power of the sheriff to do so; … The sheriff cannot, however, order the production of documents outwith Scotland. The procedure set out in the Evidence (Proceedings in Other Jurisdictions) Act 1975 (which applies to both court and tribunal proceedings) is available where the documents are in another part of the UK. Where the documents sought to be recovered are, however, outwith the UK, the Ordinary Cause Rules of the Sheriff Court provide for a letter of request procedure. ...
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> "56. I consider that the Employment Judge fell into error in three respects. First, he was wrong to interpret rule 10(2)(d) as requiring reference to the sheriff's powers only for the scope of the documentary material recoverable. The rule plainly limits the powers of the Employment Judge to order the recovery of documents to those available to a sheriff save only that, since the jurisdiction of the Employment Tribunal extends to the whole of Great Britain, he may go further than the sheriff and issue the order against a person outwith Scotland if they are situated elsewhere in Great Britain. To that extent,

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[3] In Scottish civil procedure "recovery" of documents is broadly equivalent to disclosure.

> but only to that extent, the rule gives the Employment Judge greater power than that possessed by the sheriff.
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> 57. Secondly, whilst the rule does not, in terms, restrict recovery of documents outwith Great Britain, what is relevant is the power of the sheriff, which does not extend to such recovery. As above noted, the sheriff could not order recovery of documents in the US; the letter of request procedure would require to be used.
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> 58. Thirdly, there was no material before the sheriff on which he could conclude that the documents were in the possession or under the control of the Respondent yet he has ordered the Respondent to produce them, recognising that he cannot make the order directly against WIL as they are situated in the US. The Respondent is a subsidiary of WIL. It is not to be expected that it would be in a position to direct WIL, its parent company, in any respect."

19. I do not believe that that decision has any bearing on the issues before us. The essential distinction from the present case is that the documents in question were not in the possession or control of the respondent and thus that the order was directed to a non-party. Accordingly Lady Smith did not have to consider whether rule 10 (2) (d) applied to disclosure against parties as well as non-parties. (I would add that her first and second reasons in fact turn on the location of the documents rather than on whether WIL could be said in any sense to be "a person in Great Britain"; but it is not necessary to consider that aspect.)

20. The arguments against my conclusion about the scope of rule 31 can be found in the reasons given by EJ Tayler and by Kerr J in the tribunals below for rejecting Mr Cohen's primary submission. In her submissions before us Ms Sen Gupta primarily supported the approach of Kerr J.

21. As for EJ Tayler, he held that rule 31 applied to orders for disclosure against a party (in Great Britain) as well as against a non-party because the term "person" necessarily included a party: see paras. 62-66 of his Reasons. That is no doubt correct as a matter of language, but I do not think that it is conclusive. If the context shows that the purpose of rule 31 is to confer power to order disclosure by non-parties, it is legitimate to read "person" as directed only to that case.

22. As for Kerr J, at para. 54 of his judgment he refers to Mr Cohen's argument "that rule 31 … governs disclosure orders made against non-parties, while the general case management power in rule 29 enables a tribunal judge to make a disclosure order against a *party* located outside Great Britain" and continues:

> "55. I cannot accept that interpretation. It seems to me clear that rule 31 is intended to govern the making of disclosure orders against parties as well as against non-parties. Disclosure is a central part of litigation procedure, both in the ordinary courts and in employment tribunals. It is invariably the subject of bespoke rules and not conducted in accordance with generic case management rules. The cross-reference to the power of the county court and in Scotland the sheriff supports that approach.

> 56. Ms Sen Gupta is correct to submit that the generic case management power in rule 29 is there to enable case management decisions to be made which are not the territory of bespoke rules. I do not agree with Mr Cohen that the words of rule 29 ('the particular powers identified in the following rules do not restrict that general power') give the tribunal *carte blanche* under rule 29 to make orders for disclosure and the summoning of witnesses beyond the powers conferred by rules 31, 32 and 33. Those words in rule 29 are there to preclude an argument that the absence of an express rule governing a particular type of case management decision – such as a stay, joinder or severance – negates the power of a tribunal to make order of that type."

23. The premise of that reasoning is that orders for disclosure between parties will necessarily be the subject of bespoke rules. I see the point, but I do not think that that is axiomatically the case. I accept that disclosure is the subject of specific rules under the CPR, and before them the Rules of the Supreme Court, but it is wrong to view the Employment Tribunal Rules through the prism of the CPR – not least, though not only, because they apply in Scotland as well as in England and Wales, and the Scots system of civil procedure is wholly distinct[4]. As we have seen, the 2013 Rules adopt a very different approach to case management orders. They do not attempt to set out comprehensively the kinds of order that a tribunal can make: rather, they provide for a general power, albeit going on to make special provision for various particular situations. As I have already said, I regard it as understandable that the rule-maker should have thought it appropriate to make special provision for disclosure orders against non-parties but unnecessary to do so as regards parties. With respect, I do not think that the fact that rule 31 refers to the powers of the County Court or the Sheriff advances the argument: it is equally explicable if the rule is concerned only with orders against non-parties. (On this basis the point addressed by Kerr J at para. 56 does not arise.)

24. In the Tribunals below consideration was given both to the terms of the provision under which the 2013 Rules were made, being section 7 of the Employment Tribunals Act 1996, and to the terms of earlier version of the Rules and their drafting history. But Kerr J regarded neither as giving any real assistance. I agree, and I base my conclusion squarely on a purposive construction of the relevant provisions themselves.

25. Having reached my conclusion by that route I need not consider Ms Sen Gupta's challenge to the different route adopted by Kerr J (see para. 11 above), save to say that she made several cogent points.

26. It is for those reasons that I concluded that the appeal should be dismissed.

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[4] In this connection I note that at para. 58 of her judgment in *Weatherford* (see para. 13 above) Lady Smith says that the applicable rules in the Sheriff's Court "do not expressly confer power on the sheriff to order the recovery of documents but there is no doubt that it is within the power of the sheriff to do so". But I do not put too much weight on that because she may be referring only to orders against non-parties.

Bean LJ:

27. I agree.

Phillips LJ:

28. I also agree.