Appeal No. UKEAT/0004/19/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 31 January 2019

Before

THE HONOURABLE MR JUSTICE LAVENDER

(SITTING ALONE)

MR A WOLLENBERG — APPELLANT

GLOBAL GAMING VENTURES (LEEDS) LIMITED & OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR BRUCE CARR QC (of Counsel) Instructed by: Brahams Dutt Badrick French LLP Monument Place 24 Monument Street London EC3R 8AJ
For the Respondent	MR DANIEL TATTON-BROWN QC (of Counsel) Instructed by: Knights Plc Riverside Court Wilmslow SK9 1DL

SUMMARY

PRACTICE AND PROCEDURE - Postponement or stay

In considering an application for a stay, the Employment Tribunal ought to have considered the particular difficulty faced by a Claimant who contended that documents disclosed in related criminal proceedings were relevant to his employment claim, but also was prevented from demonstrating their relevance by the undertaking which he had given to the Crown Court not to use those documents for any other purpose.

THE HONOURABLE MR JUSTICE LAVENDER

1. This is an appeal against the Case Management Decision of Employment Judge Wyeth sitting in Watford that the trial listed to commence on Monday 4 February 2019 was to proceed, notwithstanding the Claimant's application for a stay of proceedings. That Decision was announced by letter dated 18 December 2018. The reasons for it were set out in more detail in answers given pursuant to the **Burns/Barke** procedure.

2. The ET1 claim form was presented on 12 November 2017. The Claimant says that he was unfairly dismissed by the First Respondent, Global Gaming Ventures (Leeds) Limited ("Global Leeds") at the instigation of the Second Respondent, Andrew Herd. He claims that his dismissal was automatically unfair because it was the result of his making what he alleges were protected disclosures.

3. The wider context is that the Claimant alleges that there was a conspiracy from the beginning of July 2017 between Mr Herd and Summit Partners Credit Advisors Plc ("Summit") to oust the Claimant from ownership or control of the Victoria Gate Casino in Leeds. Global Leeds was the operating company of the casino. It was a wholly owned subsidiary of Global Gaming Ventures Developments Limited ("Global Developments").

4. Global Developments was in turn the wholly-owned subsidiary of Global Gaming Ventures Holdings Limited ("Global Holdings"). Global Holdings was owned as to 75% by the Claimant and as to 25% by Mr Herd. Global Developments had borrowed from Summit on security which included a fixed charge over Global Holdings' shares in Global Developments.

5. The casino opened in January 2017. Its financial performance was below expectations. The Claimant and Mr Herd blame one another for this. In July, Global Developments failed to make the interest payment due to Summit. The Claimant contends that Summit and Mr Herd conspired to engineer this default.

6. On 17 August 2017, Summit appointed Receivers over the shares in Global Developments. The Receivers were Simon Kirkhope and Lisa Rickelton of FTI Consulting LLP. On the next day, Summit stated that its support for Global Developments was conditional on the Claimant's removal. He was removed as a Director and a week later he was suspended from his employment by Global Leeds.

7. On 15 September 2017, the Claimant brought Part 8 proceedings in the High Court against Global Holdings and Mr Herd in which he sought disclosure of documents relating to the proposed sale of the shares in Global Development by the Receivers. On 2 October 2017, the Receivers sold the shares in Global Developments to a company associated with Summit for £1. The Claimant contends that this was a fraud. The Claimant was dismissed by Global Leeds on 6 November 2017. As I have said, he presented his claim form to the Employment Tribunal ("ET") on 12 November 2017.

8. The High Court proceedings led to an Order made by the Court of Appeal on 30 January 2018, requiring Global Holdings and Mr Herd to disclose what turned out to be seven lever arch files of documents. These documents ("the Part 8 documents") were disclosed on 28 February 2018.

9. The Claimant has undertaken to the Court of Appeal that he will not use the Part 8 documents for any purpose other than discharging his duties as a Director of Global Holdings. The Claimant says that it became apparent from his review of these documents on 24 April 2018 that many of them are relevant to his employment claim and are both disclosable and documents on which he would want to rely. Indeed, in a letter dated 16 January 2019, the Claimant's solicitors stated that he considered that all of the Part 8 documents were relevant to the employment claim.

10. However, the Claimant has not applied to the Court of Appeal to be released from his undertaking to allow him to use the Part 8 documents in the employment claim although, on 4 July 2018, he obtained an Order from the Court of Appeal permitting him to use those documents in the private prosecution to which I will turn in a moment. The Part 8 proceedings are currently stayed pending the outcome of the private prosecution, although, it has to be said that the disclosure of documents gave the Claimant substantially the relief he was seeking in the Part 8 proceedings.

11. On 22 March 2018, the Claimant commenced a private prosecution of Summit, Mr Herd and the two Receivers alleging fraud in the sale of the shares in Global Developments. Paragraph 17(1) of the Claimant's information to the Magistrates' Court states as follows:

> **"ASW informed AH that he no longer had confidence in him as CEO, particularly given that the business, in its opening months, had underperformed, and was in danger of being unable to meet its financial covenants for Summit- at least in the short term. Thereafter, from about 1 July 2017, Summit and AH conspired to conceal information and communications between themselves from ASW, and further conspired with the Receivers:**
>
> **(i) to oust ASW from his directorships in Developments and Leeds; to dismiss him from his employment,**
>
> **….."**

It appears, therefore, that there may well be some overlap between the issues in the prosecution and the issues in the employment claim but notably concerning the reasons why the Claimant was dismissed.

12. As part of the criminal proceedings, on 4 September 2018 the Claimant obtained witness summonses as against FTI and Mr Batchelor, an employee of one of the Global companies, who were ordered to produce documents. FTI disclosed a substantial quantity of documents to the Claimant on 18 September 2018.

13. Documents were also disclosed by Mr Batchelor. However, I will focus on the FTI documents. Similar issues may arise in relation to the documents disclosed by Mr Batchelor, but there is the additional factor in relation to those documents that it can be argued that, insofar as they may be relevant, they ought to be disclosed by the Respondents in any event. In addition, if they are not disclosed, the Claimant can make specific disclosure applications. I am not dealing with an appeal against a specific disclosure application.

14. Meanwhile, the Defendants to the criminal proceedings applied for them to be dismissed. That application was initially due to be heard by Her Honour Judge Taylor in the Crown Court at Southwark on 13 and 14 September 2018, but it was adjourned to 10 and 11 December 2018. The hearing has now taken place, but Her Honour Judge Taylor's Decision is awaited.

15. The FTI documents are subject to an undertaking given by the Claimant to the Crown Court. The Claimant has not applied to be released from his undertaking to the Crown Court to allow him to use the FTI documents in his employment claim. His solicitor said on 21 November

2018, that he was advised that the making of such an application should only be considered once the dismissal application by the Defendants in the criminal prosecution had been resolved.

16. This advice has not been disclosed. I note that the advice is not that the application could not be made before the dismissal application had been resolved, merely that, for unspecified reasons, it should not be considered. Nor has the Claimant made a third party disclosure application to the ET against FTI.

17. On 10 April 2018, at a Preliminary Hearing, the Full Hearing was fixed for 4 February 2019 by agreement. Thereafter, the Claimant twice applied unsuccessfully for a stay of proceedings on the basis that there was an overlap of issues between the employment claim and the other proceedings. Those applications, as I say, were unsuccessful.

18. On 21 November 2018, the Claimant again applied for a stay, this time on the basis that he was unable to disclose the Part 8 documents or the FTI documents. In a letter of that date, the Claimant's solicitors said:

> **"We are also instructed, for the third time, to seek a stay of the Employment Tribunal proceedings until such time as there has been a final determination in the criminal proceedings such that our client may seek to be released from the undertakings or for them to be sufficiently varied so that a complete standard disclosure exercise can be carried out in the Employment Tribunal proceedings."**

19. The Claimant's application for a stay was one of a number of issues, particularly concerning disclosure, which arose in correspondence. The Employment Judge ("EJ") said as follows in the letter of 18 December 2018:

> **"Having read the extensive correspondence generated between the parties over the issue of disclosure by the claimant, and having carefully considered the representations therein, the claimant has shown no proper basis for being unable to comply with his disclosure obligations in this claim. The fact that claimant alleges to be aware of the existence (or in possession/custody) of documentation that he is apparently not legally entitled to disclose does not in any way prevent him from carrying out his disclosure obligations in respect of all other material he has in his possession, custody or control that may be helpful or harmful to his case. The trial has been listed for almost ten months. Any continued failure to comply with the duty**

of disclosure risks jeopardising the trial proceeding as listed. The parties will be aware of the potential sanctions that may apply against whoever maybe at fault in the event that the trial does not proceed on 4 February 2019 as it should. All parties, including the claimant are ordered to comply with their disclosure obligations as set out at paragraph 3 of my Order of 10 April 2018. Accordingly it is ordered that:

(1) Lists of documents are to be provided by no later than 4pm on 31 December 2018.

(2) Inspections is to be by 7 January 2019.

(3) An agreed bundle is to be in existence by 21 January 2019.

(4) Witness statements are to be exchanged by 4pm on Friday 25 January 2019.

If any party fails to comply with these revised orders in any material respect then there is every likelihood an Unless Order will follow. The parties and their representatives are reminded of their obligations in accordance with the overriding objective and in particular requirement to act proportionately and avoid unnecessary delay. This may well be a tight timetable due to the approach and conduct of those involved to date, but it is certainly not unmanageable. The trial listed for seven days commencing on 4 February 2019, is to proceed."

20. In his answers given to this court on 23 January 2019, the EJ expanded upon his Reasons as follows:

"(1) The submissions on behalf of the claimant both in response to the respondents' application of 15 November 2018 for further case management orders (with particular reference to disclosure) and in support of his application for a stay of proceedings, amounted to no more than a bare assertion that documents existed that he considered to be material to the issues in these proceedings but that he was unable to disclose. In respect of all the correspondence before me sent on his behalf, there was no explanation provided, even in general terms, as to the nature of those documents or why such documents would be relevant to the issues in this case.

(2) Taking account of all the written representations made, I was satisfied that the submissions made on behalf of the respondent (including opposing a postponement) had greater force than those made on behalf of the claimant and I regarded them to be compelling.

(3) When balancing the prejudice to each party the granting or refusal of the application for postponement, I had due regard to the Presidential Guidance (Seeking a Postponement of a Hearing 2013) and in particular considerations in paragraph seven of the Examples section within that Guidance.

(4) I had particular regard to the following matters when reaching my decision to refuse the claimant's request for a stay/postponement:

(4.1) The trial had been listed by agreement with parties at the Preliminary Hearing on 10 April 2018;

(4.2) The claimant has made two previous applications for a stay/postponement which had been refused and I was not persuaded by the claimant's submissions that there was any material change in circumstance;

(4.3) From emails included with the respondent's application of 15 November 2018 the claimant appeared reticent to comply with his duty of disclosure so as far as he was able to do so prior to the respondents' application;

(4.4) Prior to the correspondence on his behalf of 21 November 2018 the claimant had not previously referenced the undertakings he is said to have made the respective courts as a basis for requiring a postponement and did not provide any detail as to how long prior to his latest application he made these undertakings and had known about them;

> **(4.5) Postponing a hearing of this length would result in substantial delay with a likelihood of a further listing date not being available until the end of 2019 or possibly 2020.**
>
> **(5) For all of the above reasons, I was not satisfied the claimant had shown sufficient grounds to justify postponement. The apparent concerns about disclosure expressed by the claimant through his representative were not properly substantiated in the representations made on his behalf. Furthermore, a postponement would not be the interests of justice. Aside from placing a significant burden on the second respondent (as submitted by his representative), the inevitable substantial delay would not be the best interests of the parties generally. On that basis there was no reason to postpone the trial and I was able to timetable directions that enabled the trial to proceed."**

21. I note, although of course this happened after the EJ's Decision, that yesterday Stephenson Harwood, who represent the Receivers, and Kingsley Napley, who represent FTI, wrote to the Claimant's solicitors to make clear that their clients insisted on strict compliance with the undertakings given in the criminal proceedings, including objecting to any reference being made today to the Claimant's statement of case in the criminal proceedings, which was referred to at the hearing of the dismissal application on 10 and 11 December 2018. These letters underline the point that the Claimant will only be able to use the FTI documents if he applies to the Crown Court for a release from his undertakings. He has not done that yet.

22. I note also that there is reason to question whether an application of that nature, even if made relatively soon after the Claimant received the documents on 18 September 2018, would have been resolved by now, given a number of factors. First, I accept that he needed some time to consider a substantial volume of documents after he received them, and that the initial focus will have been on their use in the criminal proceedings. Secondly, any such application would undoubtedly have been strongly resisted. Thirdly, there is the time which would have been taken to have any application heard and determined in the Crown Court, as to which I have regard to the time taken in the criminal proceedings to hear with and decide the dismissal application.

23. A decision whether or not to stay proceedings is a case management decision. This Tribunal will normally be slow to interfere with case management decisions, unless either they

A are so unreasonableness as to be perverse or the ET either took account of irrelevant considerations or failed to take account of relevant considerations. In making a case management Decision, the ET is obliged to have regard to the overriding objective set out in Rule 2 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**. It is to deal with cases fairly and justly. It has a number of aspects which are relevant in the present case.

C

24. Broadly, the ET has to strike a balance between, on the one hand, what the Claimant contends is the potential for injustice if the hearing goes ahead without relevant documents and, on the other hand, the delay and expense which would necessarily be occasioned by an D adjournment. Among the relevant considerations was the question whether the Claimant was to some or any extent the author of his own misfortune by not applying sooner either for a third party disclosure order or for his release from his undertakings.

E

25. There are two grounds of appeal in the Notice of Appeal. The first was that the Tribunal gave inadequate Reasons. That has been dealt with by the provision of expanded Reasons. The second was that the Decision was perverse. However, in the light of the expanded Reasons, Mr F Carr also pursued the appeal on the basis that the Tribunal had failed to take account of a relevant consideration. Given that the Claimant did not have the benefit of the EJ's expanded Reasons when the Notice of Appeal was drafted, these matters could not be dealt with in the Notice of G Appeal. I do not consider that the Claimant should be precluded from advancing them.

26. Mr Carr rightly concentrated his submissions on the FTI documents, since his client has had the Part 8 documents and has appreciated their alleged relevance for much longer, but has H not applied to be released from his undertaking. In relation to the EJ's original Reasons, Mr Carr

submitted that they missed the point of the Claimant's application. To say that the Claimant could disclose the documents in his possession but not subject to undertakings did not address the potential injustice which might ensue if the hearing went ahead without the FTI documents.

27. In relation to the EJ's expanded Reasons, Mr Carr submitted in particular that the EJ appears even now not to have applied his mind to the reason given by the Appellant's solicitors as to why it was that he was unable to do that for which the EJ now criticises him. In their letter of 26 November 2018, BDBF said as follows, "The Claimant is precluded from further particularising the extensive materiality of the FTI disclosed documents material to the issues in the Tribunal proceedings on account of his current undertaking to the Crown Court."

28. In a normal case, what the EJ said in paragraphs 1 and 3 of his expanded Reasons would no doubt be a good reason for adjourning any application which involved the postponement of a hearing. This is reinforced by paragraph 7 in the examples section of the Presidential Guidance on Seeking a Postponement of a Hearing, which states as follows:

> **"Where the basis of the application is the late disclosure of information or documents or the failure so to disclose then details of the documents or information concerned shall be given; how they are relevant to the issues in the case; the terms of any Orders that already have been made by the Tribunal or requests made by the parties for such information or documents; and the response of the other party concerned."**

29. The EJ said that he had particular regard to this paragraph. However, Mr Carr submitted that this paragraph is really inapplicable to the facts of the present case because, as the Claimant's solicitors set out the letter which I have quoted, the undertaking prevents the Claimant from giving details of the FTI documents. Against that, Mr Tatton-Brown submitted that it was correct that the Claimant had made no more than a bare assertion that relevant documents existed and that the Claimant did not even give, in the letters, which were before the EJ, the explanation which was advanced before me today. Moreover, Mr Tatton-Brown submitted that what the

Judge said in paragraph 1 of the expanded Reasons was supported by the fact that the Claimant had not made an application for third party disclosure against FTI. However, that is not what the Judge said.

30. Another paragraph of the EJ's expanded Reasons which was the subject of particular attention in submissions was paragraph 4.2. Mr Carr submitted that the EJ was wrong to say that there was no material change in circumstance since the last application for a stay, since the Claimant had received the FTI documents during that period and had appreciated their relevance. Against that, Mr Tatton-Brown submitted that, on the Claimant's own case, there was an overlap between the criminal proceedings and the employment claim and that the Claimant must have believed when he made his application for a witness summons in the criminal proceedings that FTI had relevant documents.

31. Overall, it seems to me that Mr Carr is right to say that the EJ has not dealt in his expanded Reasons with the particular unusual problem faced by the Claimant in this case, which is that he was subject to the undertaking given to the Crown Court and that undertaking not only prevented him from disclosing the FTI documents, it prevented him from providing the sort of explanation as to the relevance of those documents which one would normally expect to see. That was a relevant factor to be taken into account and it does not appear that the EJ has taken it into account.

32. Of course, it was only a factor. It needed to be balanced, for instance, against the argument that the Claimant was the author of his own misfortune in that he had not applied for release from that undertaking. That in turn gives rise to issues such as whether an application would have been resolved by the time the EJ made his Decision.

33. To that extent, therefore, this appeal succeeds. However, I should record that I am not persuaded that the EJ's Decision was perverse. I recall that what the Claimant was making was an application for a stay. I note that even if a stay were to be granted, there was an open question as to the terms and duration of a stay. It is not immediately obvious to me why a stay was needed until the conclusion of a criminal trial, if there was to be one.

34. However, a stay may not in any event have been the appropriate response to the difficulties which the Claimant says he faced. That is a case management issue. I do not propose to say anything about the particular and more limited question whether the trial due to start next week should be adjourned. I leave that to the EJ next week, who will be familiar with all of the various case management issues and applications, including issues relating to disclosure, and who will be able to consider the issue of adjournment in its proper context.

35. It follows that the application for a stay should be remitted to the ET to be dealt with, no doubt, in the hearing starting next week. I do not propose to say any more about the merits of the application for a stay or for an adjournment, save to note that I have specifically only referred to the undertaking given to the Crown Court.

36. In relation to the undertaking which he gave to the Court of Appeal, the Claimant had already delayed considerably when EJ Wyeth made his Decision. If that had been the only undertaking binding the Claimant, then I would have dismissed this appeal.