

In the High Court of Justice of the Isle of Man
Civil Division - Ordinary Procedure

Between

DEPARTMENT OF HEALTH AND SOCIAL CARE
and
DR ROSALIND RANSON

Claimant

Defendant

Judgment delivered by
His Honour The Deemster Corlett
on 11 October 2022

Introduction

1. This judgment concerns the Department's appeal dated 4 August 2022 which was heard by me on the morning of 6 October 2022. Following the filing of suitably concise written submissions and oral submissions by Mrs Clough for the Department and Mr Halsall for Dr Ranson I reserved judgment. I commend both counsel for the economy and concision of these submissions.

2. The appeal is in respect of paragraph 33 of an order made by the Employment and Equality Tribunal (EET) on 1 August 2022. The paragraph reads:-

"Besides, providing the two certificates as above, Ms Heeley must provide details of the entire approach she adopted to ensure proper disclosure and highlighting and explaining where and how matters had gone wrong. Mr Murray rightly reminded the Tribunal that there had been a very late request by the Respondent for an adjournment before the commencement of the January Hearing which was refused. The Tribunal also recalled that Ms Heeley had explained the shortage of support staff during preparation."

3. Ms Heeley is a solicitor on the staff of the Attorney General's Chambers and represented the Department until recently in the EET claim brought by Dr Ranson against the Department. There is no restriction on rights of audience in the EET, hence Ms Heeley, who is not a Manx advocate, was able to represent the Department. As is well known, Dr Ranson has the benefit of a judgment of the EET dated 9 May 2022 by which the EET decided that Dr Ranson had been unfairly dismissed and had suffered detriments as a result of having made protected disclosures. This decision was made after a ten day hearing in January and February 2022. I understand that a remedies hearing has been fixed for January 2023.

4. The Department seeks the quashing of paragraph 33 of the 1 August 2022 order. Primarily, the notice of appeal challenged that paragraph because it is said that the EET had thereby erred in law by requiring a legal adviser to breach legal professional privilege (LPP). Such privilege does of course belong to the client and it had not waived privilege.

5. It was common ground at the hearing of the appeal that it is not permissible for the EET to make an order which has the effect of breaching LPP (there being no relevant exceptions in this case eg fraud, to the applicability of LPP). Indeed the EET itself made it clear, having received a query on 8 August 2022 from Dr Ranson's solicitors, that it had no intention of making an order which had this effect.

6. The EET's clerk helpfully replied in these terms (on 9 August 2022):-

"With reference to the recent Directions Hearing and the subsequent Order of 1 August 2022, the Tribunal has been asked, on behalf of Dr Ranson, to clarify whether the terms of the Order relating to Ms Heeley in paragraph 33 were intended to impose on her an obligation to breach legal professional privilege. Because there has now been an appeal to the High Court concerning the wording of this paragraph, the Chairman considers it to be within the overriding objective under Rule 7 of the Employment and Equality Tribunal Rules to clarify the situation. This may not only save expense but also time both ultimately for the Tribunal as well as the High Court.

The Chairman does not recall any such argument being raised by Mr Murray during the Hearing because otherwise, with hindsight, the wording would have been similar but would have carved out a proviso regarding legal professional privilege. The Tribunal panel had no intention of requiring any breach but felt that the wording that was provided was intended to require Ms Heeley to explain the approach adopted to the disclosure process in a complex situation."

7. LPP therefore was not an issue at the appeal hearing and had probably not been an issue since the EET's clarification on 9 August 2022. However, the Department maintained that, notwithstanding the EET's clarification, paragraph 33 remains an issue and that it was an error of law for it to have been made because leaving aside LPP issues (as per paragraph (4) of the Grounds of Appeal):-

"on any sensible reading the Tribunal's Disclosure Concerns and the explanations identified by it as being required in its Decision and Reasons dated 9 May 2022 (annexed at the end of the Order) are all matters which the Appellant (via its current or former employees or shared service providers (GTS) could answer and in respect of which Ms Heeley is in no position to personally answer as a witness."

8. This ground of appeal is further expanded upon at paragraph 17 of the Grounds of Appeal:-

"(4) Error in relation to the matters which required explanation by the Appellant – all capable of being explained by the Appellant or shared service providers to the Appellant

17. The Disclosure Concerns identified in the Decision and Reasons dated 9 May 2022 contained 4 key paragraphs requiring explanations:

810 Mrs Magson's Day books

824 and 829 Transfer of data from DHSC to Manx Care when Manx Care went live on 1 April 2021 and ensure (a) ongoing accessibility and (b) ensuring appropriate searches were undertaken of any documents transferred to Manx Care

846 Modification of operation of Teams Chat"

Recent EET Orders

9. The EET held a "disclosure hearing" on 30 and 31 August 2022 and in its reasoning following that hearing (dated 1 September 2022) recorded that it had recently received comprehensive affidavits on behalf of the Department from three individuals. The EET also directed, by paragraph 1(a) that:-

"On or before 4PM on 15th September 2022, Chambers of the Attorney General, is invited to consider provision of such fulsome information as is possible to assist the Tribunal in the manner envisaged up until the making of the Order of 1st August 2022. This would include meeting the points now advanced by Mr Segal in his written and oral submissions. It would also include the points made by Mr David Ashford. In the event that, by then, the para 33 Appeal to the High Court is still pending, the Tribunal requires to know the likely timeframe for that to be resolved."

10. Paragraphs 31 to 37 of the EET's reasoning dated 1 September 2022 is also of relevance. These paragraphs refer to the serious allegations raised against Ms Heeley on behalf of Dr Ranson regarding the disclosure process. They record the fact that an appeal had been filed against paragraph 33 and reiterated that the EET had never intended to put Ms Heeley in the position of having to breach her client's legal professional privilege.

11. The next development was the filing in the EET of a witness statement from Ms Heeley dated 14 September 2022. It is plain that this statement was made pursuant to the EET's "invitation" contained in its directions of 1 September 2022 and not pursuant to paragraph 33 of the order of 1 August 2022. The statement sets out matters of fact, mainly pointing out that assertions by Dr Ranson's lawyers that four specific documents had not been disclosed to them by Ms Heeley were false. I add that as to two other documents, I was told by Mrs Clough that other evidence submitted to the EET had addressed issues of their disclosure.

12. The EET then issued further short directions dated 21 September 2022, paragraph 4 of which, in relation to the filing of Ms Heeley's statement, states:-

"Having now had the advantage of the input from Ms Heeley, the Tribunal specifically leaves it to those advising Dr Ranson as to whether they will require anything further from her, subject to the outcome of the pending Appeal."

13. Despite enquiries from the Department's advocates it appears that no definitive indication has yet been given by those acting for Dr Ranson as to whether they consider it necessary to "require anything further from" Ms Heeley. This may be a reasonable stance to adopt in light of the current challenge to the validity of paragraph 33.

14. In the concise agreed bundle of materials there are further historic orders of the EET detailing disclosure hearings and issues which pre-date the liability hearing. I have noted

orders of 9 and 30 November 2021 which refer to the possibility of an order being made against Ms Heeley to provide an affidavit, an application which it is later recorded was not pursued. I note that there were disclosure hearings on 23 December 2021 and 7 January 2022, held in the immediate run-up to the liability hearing.

15. That the EET had major concerns about disclosure cannot be in any doubt. In the EET's order (more akin to a judgment) dated 1 August 2022 at paragraph 20 it recorded Mr Murray (then appearing for the Department) as putting the position in this way:-

"The Department fully accepts that the Disclosure Hearing may well want to look at the reasons why documents were missed, what searches were undertaken by whom, how the Department acted on any advice as to search obligations and the relevance and how, when and why any documents were deleted or became inaccessible."

16. For the EET to hold a "disclosure hearing" as it did on 30 and 31 August 2022 is unusual. I held in my judgment dated 26 August 2022 that such a hearing is however within the EET's powers, relevant as it potentially is to issues of costs and certain issues of damages.

The Construction of the Order under Appeal

17. Mrs Clough submitted that although her appeal relates to paragraph 33 of the EET's order of 1 August 2022, that paragraph had to be read and construed in conjunction with paragraph 1(a) of a "directions order" also dated 1 August 2022. This was expressed as a consent order and it required the Department by 5 August 2022 to:-

"Serve on the Complainant and file with the Tribunal a single copy of any witness statements/affidavits addressing the questions posed by the Tribunal in its decision dated 09 May 2022 at paragraphs 810; 824; 829; 833 to 835 and 846 together with a bundle of paginated documents referred to;"

18. These references to paragraphs in the liability judgment require to be explained. Paragraph 810 of the liability judgment concerns the "Day-Books" of Mrs Magson, then the CEO of the Department. The EET needed an explanation as to why certain parts of these books were either disclosed late or not at all.

19. Paragraph 824 concerns the non-disclosure of documents which were held by Manx Care, the new legal entity which took over the operation of the health service on 1 April 2021. Paragraph 829 relates to the transference of documents from the Department to Manx Care.

20. Paragraphs 833 to 835 relate to the alleged concoction of documents. It seemed to be common ground at the appeal that the issue of concoction was to be dealt with by Expol, a firm of private investigators instructed by the Department. I had understood that there was to be a hearing of the EET in November 2022 to deal with this issue although I now believe this is no longer required.

21. Paragraph 846 requests an explanation concerning the operation of an automatic destruction system for electronic communications in 2020/21.

22. Mrs Clough's submission accordingly was that the EET had made an error of law in requiring Ms Heeley to provide a statement about matters which were plainly not within her personal knowledge. At the very least, the EET ought to have first required officers, servants or agents of the Department (and not its lawyer) to provide this information. She supported this submission by pointing to the fact that the EET itself, having since the order of 1 August 2022 received further documents, affidavits and statements from the Department, now appeared to be content with what had been produced, such that they are now seemingly content to leave the paragraph 33 ball firmly in the court of Dr Ranson.

23. Mr Halsall on the other hand submitted on behalf of Dr Ranson that as things stood as at 1 August 2022 and with a disclosure hearing fixed for 30 August 2022 the EET were perfectly entitled to use their wide case management discretionary powers to make the paragraph 33 order, particularly as it had been faced with extensive disclosure issues over many months. He submitted that it was obvious that the EET had no intention of subverting the Department's LPP. They had immediately confirmed this to Dr Ranson's solicitors when asked to do so. The EET's order, he submitted, is worded somewhat differently in respect of Ms Heeley as compared to the other witnesses (see paragraph 32 of the order). The EET was however entitled to receive evidence as to how the Department's solicitor had, as a matter of fact, discharged her onerous duties to ensure that disclosure was properly achieved. This would not involve disclosing legal advice but would relate to how, as a matter of fact, she had discharged her personal, professional obligations. Ms Heeley had in fact already provided a statement to the EET on 14 September 2022. This had dealt with factual issues and had clearly assisted the EET but without breaching LPP.

The Disclosure Duties of an Advocate or Solicitor

24. What are these "onerous duties"? I do not intend to write a mini-treatise on the obligations of an English solicitor or Manx advocate in this context. I am content to rely, as were both Mrs Clough and Mr Halsall, on Chapter 18 of "Disclosure" (5th Edition) by Matthews and Malek, the latter (Hodge Malek KC) being an Acting Deemster. It is however worth emphasizing certain aspects of the extent of a lawyer's duty in this regard. At paragraph 18.03 it is stated that:-

"The solicitor's duty extends to explaining to his client the existence and precise scope of the disclosure obligation and the need to preserve documents. The solicitor has a duty to take steps to ensure that his client knows what documents have to be disclosed. Merely informing the client of the terms of the relevant rules is not enough."

25. And at paragraph 18.09:-

"The solicitor has an overall responsibility of careful investigation and supervision in the disclosure process and he cannot simply leave this task to his client. The best way for the solicitor to fulfil his own duty and to ensure that his client's duty is fulfilled too is to take possession of all the original documents as early as possible. The client should not be allowed to decide relevance – or even potential relevance – for himself, so either the client must send all the files to the solicitor, or the solicitor must visit the client to review the files and take

the relevant documents into his possession. It is then for the solicitor to decide which documents are relevant and disclosable.”

26. While the authors of “Disclosure” note the view (at paragraph 11.12) that there is force in the submission that “advice or assistance in collating, listing, spring-cleaning, storing, transporting and warehousing documents” is not privileged, they rightly qualify this by referring in footnote 102 to Three Rivers District Council v Bank of England (No 6) [2005] 1 AC 610 where the House of Lords held that communications between the Bank’s Inquiry Unit (set up to deal with the Bingham Inquiry into banking supervision) and its lawyers regarding presentation of its case to the Inquiry were privileged. It therefore seems to me beyond question that advice given by Ms Heeley to the Department about the widest range of disclosure issues are protected by LPP.

27. It is clear from the authorities that a failure by a solicitor or an advocate to discharge his or her duties in relation to disclosure can lead not only to adverse inferences being drawn against the client, but also to wasted costs orders against the lawyer and/or a contempt finding. The extent to which our system of civil justice depends on the integrity of advocates in this respect (for example in ensuring disclosure of relevant documents which are unfavourable to the client) cannot be overemphasized.

The Tribunal’s Powers and their Exercise in this Case

28. That the EET had the power in principle to make an order obliging Ms Heeley to provide information is not in doubt. Rule 15 of the Employment and Equality Tribunal Rules 2018 give the Chairperson the power to make orders in order to manage the proceedings. In particular Rules 15(2)(c) and (d) provide that:-

“15(2) Examples of orders which may be made under paragraph (1) are orders

(c) requiring the attendance of any person in the Island either to give evidence or to produce documents or information;

(d) requiring any person in the Island to disclose documents or information to a party, and to allow a party to inspect such material as might be ordered by the High Court;”

29. The question is whether this discretion was properly exercised when making the paragraph 33 order.

30. It is clear from several authorities, the most recent perhaps being the Court of Appeal decision in Z v Z [2018] 4 WLR 52, that solicitors may be properly called to give evidence when the court concludes that the solicitor had been acting as a “man of business” and was to be questioned only concerning factual topics and not with a view to revealing legal advice or instructions which went to the provision of legal advice. Paragraphs 24 to 26 of Munby LJ’s judgment is helpful in confirming what may be thought to be an obvious point, namely that the exceptional step of requiring a solicitor or advocate acting for a party to give evidence (or even to provide a written statement) should only be taken when other avenues have been exhausted:-

"24. Mr Shepherd characterises as "extraordinary" the wife's "failure" to apply for a preservation order before seeking to obtain evidence from Mr Kerman, and criticises the fact that no explanation for this has been offered. He submits that Mr Kerman should not have been brought in until all other means had been exhausted.

25. I can understand Mr Shepherd's concerns. The calling of a solicitor to give evidence in circumstances such as this, especially if coupled with the making of an "anti-tipping-off" order, is pregnant with potential embarrassment for the solicitor and difficulties for the client: see the highly pertinent observations of Hughes J, in re H (Abduction: Whereabouts Order to Solicitors) [2000] 1 FLR 766, 769-770, 773. As Hughes J recognised, such orders may have the effect of inhibiting frank discussion between solicitor and client and, even worse, of destroying the confidence the client has in the solicitor's independence.

26. The point, I emphasise, extends beyond solicitors and cases involving legal professional privilege to other professionals – accountants, actuaries, bankers and doctors, for example – whose relationship with a client, customer or patient is founded on mutual trust and confidence. Judges must be alert, in considering whether to make such orders in relation to a professional person, to the risk of potential damage to the professional relationship, just as they must be alert to identify whatever possibilities there may be for obtaining the necessary information from an alternative source."

31. This court's power to interfere with an order of the EET are limited by statute. In essence, an appeal to this court can only succeed if a question of law arises (section 127 of the Equality Act 2017). I dealt at some length with the relevant test on such an appeal in Department of Health and Social Care v Tinwell [2020] MLR N-12 (23 June 2020) (at paragraphs 13 to 15), and I will not repeat those passages. As counsel reminded me, the position may be briefly summarised by referring to Galilee v Commissioner of Police of the Metropolis [2018] ICR 634 at paragraph 85:-

"In my judgment, challenging the exercise of judicial discretion on appeal depends on exactly the same principles as any other challenge on appeal to this tribunal: if the challenge is to succeed, it must be based on an error of law and if there is such an error then the appeal will succeed notwithstanding that the order under appeal is a case management decision. In Broughton v Kop Football (Cayman) Ltd and Others [2012] EWCA Civ 1743 Lewison LJ said this:

"51. Case management decisions are discretionary decisions. They often involve an attempt to find the least worst solution where parties have diametrically opposed interests. The discretion involved is entrusted to the first instance judge. An appellate court does not exercise the discretion for itself. It can interfere with the exercise of the discretion by a first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree. So the question is not whether we would

have made the same decision as the judge. The question is whether the judge's decision was wrong in the sense that I have explained.""

32. The question I must ask myself is whether paragraph 33 of the 1 August 2022 order offends against those principles. I have concluded that it does not for the following reasons:-

1. I do not accept Mrs Clough's submission that paragraph 33 must be read subject to paragraph 1(a) of the shorter order of 1 August 2022. While somewhat confusing to have to make sense of two separate orders issued on the same day, it seems to me that the EET in so doing is dealing with two entirely distinct issues. Paragraph 1(a) is addressing specific issues highlighted in the liability judgment whereas paragraph 33 is requiring Ms Heeley to provide details of the approach she adopted to ensure that her client gave proper disclosure. I am satisfied that she could provide this information without breaching her client's LPP. In order to satisfy paragraph 33 she would be obliged to set out precisely what, as a matter of fact, she personally did in order to discharge her onerous duties to the EET. While it may be objected that the wording used in the order is a little less precise than that used in the High Court, I bear in mind that the EET is largely master of its procedure and may properly adopt a different, less formal drafting style. I have concluded that, in light of the content of the liability judgment and of Mr Murray's acceptance (referred to above) that disclosure had "gone wrong", there is nothing objectionable, in the sense of its being an error of law, in the EET requiring Ms Heeley to "highlight and explain where and how matters had gone wrong".
2. I consider that as at 1 August 2022 with the disclosure hearing pending, the EET were entitled to use their rule 15 powers in the way set out in paragraph 33. They were in the best possible position to assess the long-standing disclosure issues which had plagued their deliberations. They were entitled to come to the view that, the key witness Miss Magson being out of the jurisdiction and seemingly reluctant to provide information voluntarily, their best hope of getting near to the truth about disclosure was to require Ms Heeley to provide information about how she personally had approached disclosure. The EET were entitled to conclude that other avenues were closed to them. They knew that they should not bring about a breach of LPP and did not at any time intend to do so. It may well be that, in light of subsequent disclosure during the months of August and September, the EET are rather more relaxed about disclosure issues and perhaps if the matter were before them now (in October 2022) they might have a different view. I cannot venture into that territory in detail or with certainty, although the EET's order of 21 September 2022 suggests this to be the case. If there are outstanding issues as to compliance with paragraph 33 it is of course a matter in the first instance for Dr Ranson's lawyers to make an application to the EET. I consider that paragraph 33 is in the circumstance a valid and reasonable order to have been issued.
3. I also find it difficult to accept Mrs Clough's submission that the EET fell into error because they misunderstood Mr Murray's submissions as to who might best assist the EET at the disclosure hearing. Mrs Clough says that Mr Murray did not mention Ms Heeley at all at the hearing on 29 July 2022, yet the EET had "presumed" (see paragraph 29 of the lengthy "order" of 1 August 2022) that Ms Heeley was included

in the list of those who would be called by the Department. While I agree that it is somewhat odd that Ms Heeley was not named in the oral submissions to the EET on 29 July 2022, this does not entail my finding that she was not properly to be made the subject of an order. As I have held, I consider that she was and is capable of providing factual, relevant evidence to the EET.

33. In the circumstances, I must dismiss the Department's appeal. The issue of costs may, I anticipate, prove to be contentious. Should the parties not agree, I will fix a hearing to determine the point.

His Honour The Deemster Corlett