Employment

Applications for witness orders: opportunities to respond

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Claimants and respondents in the employment tribunal should always think carefully before applying for the tribunal to use its power under rule 32 to order the attendance of a witness to give evidence. While it can be a powerful course of action, there is a significant risk that such a witness will be hostile and uncooperative. Even if they would be willing to give helpful evidence in the normal course of events, they may still be employed by the alleged wrongdoer or otherwise restricted, such that no one can be sure what precisely they will say.

The two primary criteria for the grant of a witness order remain as set out by Sir John Donaldson in *Dada v Metal Box Co Ltd* [1974] IRLR 251, namely that of "relevance" and "necessity". Sometimes overlooked, however, is the statement in *Dada* to the effect that such applications should only be made once efforts to persuade the witness to attend voluntarily have been made: "we agree that witnesses should always be invited to attend by the applicant before he applies for witness orders." The grant of a witness order is a discretion, not an absolute right, and the overriding objective suggests that voluntary methods should always be used before the tribunal is asked to compel a witness. Remember that "relevance" is not necessarily a binary criterion. Evidence can be relevant but either of peripheral significance or absolutely central to the case. The case for granting a witness order in the latter example is plainly stronger, and the tribunal is entitled to take such considerations into account.

Even if the tests of "relevance" and "necessity" are met, the tribunal retains a discretion and must weigh the witness order in the balance against the wider interests of justice. As set out in *Haydock v GD Cocker & Sons Ltd* UKEAT/215/02/RN, "refusal to attend without an Order by a witness who can give prima facie relevant evidence will not automatically lead to the making of an Order." In that case, the tribunal had correctly refused to make an order because, in order to adduce any relevant evidence, the applicant would have had to cross-examine the witnesses being compelled to attend, which would have been impermissible.

Until recently, one could reasonably assume that if a witness order was being sought, there would be no opportunity for the other side to the litigation to provide their view to the tribunal before the application was determined. While *Jones v Secretary of State for Business, Innovation and Skills* UKEAT/0238/16 was authority for the proposition that once a witness order has been granted it is usually necessary for the other side to be informed (per rule 60), it had not been understood that such a requirement applied to the application itself. Indeed, rule 92, which governs the requirement to copy the opposing party into any communication with the tribunal, contains an explicit "carve out" in respect of rule 32 applications.

However, while the recent decision of the EAT in *Christie v Paul, Weiss, Rifkind, Wharton & Garrisson LLP and others* UKEAT/0137/19/BA stopped far short of imposing a requirement on the tribunal to allow opposing parties to comment on a witness order application, it did make clear that the tribunal has a discretion to seek such comment in the interests of justice. In *Christie*, the first instance tribunal was particularly concerned about both the potential vulnerability of the witness and the fact that she had entered into a non-disclosure agreement (NDA) with the respondent. Despite the appellant's submissions to the contrary, the EAT made it plain that the existence of an NDA was a factor which could justify asking an opposing party to make representations about the potential granting of a witness order.

While both the SRA and Law Society have made plain that NDAs should always contain a carve out allowing witnesses

to give evidence in court or tribunal proceedings, the precise terms of the NDA might still be relevant matters for the tribunal to consider when reaching a decision on the witness order. As HHJ Eady made plain in *Christie*: "the particular matters covered by such an agreement might be relevant to the need to balance issues of relevance and necessity against the broader interests of justice in a particular case."

Given the apparently inexorable tide against NDAs over recent years, this is a rare example of the existence of an NDA actually being of some assistance to a respondent. While it is by no means determinative, the existence of such an agreement may provide an opportunity for a respondent to answer an application before it is determined, rather than facing the uphill battle of having to persuade the tribunal to reverse a witness order already made.

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Matthew Sellwood is frequently instructed in the Employment Tribunal, and has recently also appeared in the Employment Appeal Tribunal. He has conducted successful defences in a range of multi-day hearings involving elements of unfair dismissal, discrimination and whistleblowing, and also advises across the whole range of employment law. As both a former employer at a public authority and a former trade union representative at a national charity, he brings a pragmatic view to employment litigation and is able to view 'both sides' of any issue.