IN THE EMPLOYMENT TRIBUNAL **Case Number: 2300819/2019**

LONDON SOUTH

BETWEEN

DR. CHRISTOPHER DAY

Claimant

-and-

(1) LEWISHAM AND GREENWICH NHS TRUST
~~(2) HEALTH EDUCATION ENGLAND~~ **Respondents**

CLAIMANT'S APPLICATION FOR SPECIFIC DISCLOSURE FOLLOWING LATE DISCLOSURE BY RESPONDENT ON FRIDAY NIGHT AND MONDAY MORNING

---

1. It has long been the case that C has been concerned that R had not conducted an adequate disclosure exercise and / or provided adequate disclosure.

2. The exercises of discovery and disclosure in adversarial litigation involve a certain amount of trust in the other party and the other parties' legal representatives. In some cases with a lengthy, complex and hard fought history – such as this one – that trust is difficult to muster.[1] Given very late disclosure on Friday and this morning, C no longer has any faith that a valid discovery exercise has been carried out by R and / or that adequate disclosure has bene made by R.

3. There are a number of unexplained disclosure deserts in the material supplied by R. C now strongly suspects that the reason for that is that relevant material has not been disclosed.

4. On Friday night after 9.30pm, R's solicitor sent further disclosure under cover of an email stating:

> The Trust considered it had disclosed all relevant documentation to the issues in this claim. However, it recognises its ongoing disclosure obligations and has been carrying out further searches during the course of witness evidence and the issues that have arisen. The Trust has identified the attached relevant email today following a conversation between David Cocke and Dr Harding, in light of the cross examination focusing on Dr Harding's input into the October 2018 statement. The document was identified by Dr Harding. We apologise on behalf of the Trust for its late disclosure. We have asked the Trust to make further checks to ensure that no further relevant documentation exists and will confirm the position as soon as possible.

5. Attached was not one email but a chain of four emails:

---

[1] Failure of disclosure have long plagued this case. It may be recalled that there was a delay between 2014 and 2018 whilst the worker status point was litigated which was resolved only upon the production of an LDA document which neither respondent had previously disclosed

a. From Janet Lynch to Doctors Aitken, Patel, Harding, Luce and Brooke, cc'd to David Cocke dated 22 October 2018 at 20:29 attaching a draft of what would become the 24/10/18 statement;
b. From Duncan Brooke to Janet Lynch and Doctors Aitken, Patel, Harding and Luce, cc'd to David Cocke dated 22 October 2018 at 20:28;
c. From Dan Harding to Dr Brooke, Janet Lynch and Doctors Aitken, Patel, and Luce, cc'd to David Cocke dated 23 October 2018 at 8:48
d. From David Cocke to Drs Harding and Brooke, Janet Lynch, Drs Aitken, Patel and Luce dated 23 October 2018 at 12:38.

6. The emails themselves refer to the fact of or likely existence of other undisclosed material:
    a. Janet Lynch refers to her attachment having had input from Capsticks, David and Ben and having "already been through a number of iterations" and "Liz has seen an earlier version". No previous iterations have been disclosed. No communications between Janet Lynch, 'David', 'Ben' or 'Liz' have been disclosed. The process by which the statement of 24/10/18 was put together is highly relevant to the question of causation, which will be the central issue for the tribunal in this case;
    b. Mr Cocke's email makes a suggestion which implicitly invites a response – no such response have been disclosed;

7. C on Saturday 2 July 2022 wrote to R as follows:

> I refer to your email of yesterday timed at 21:36 attaching a copy email chain from 22/23 October 2018 between, amongst others, Janet Lynch, David Cocke and Dan Harding regarding the draft public statement from the Trust.
>
> We will want this adding to the hearing bundle and ask that you take appropriate steps to paginate and add.
>
> Please also forward the original email disclosed electronically, as we wish to identify its meta data.
>
> Background
>
> In my email to you of 27 May, I requested:
> Please … provide disclosure of the documentation evidencing sign off of the 24th of October 2018 statement by the senior doctors concerned and any others who signed it off.
>
> In your email to me of 9th June you replied:
> …, we understand that individuals did not literally sign-off the statement (i.e., indicate in writing that they were happy with it or not) and that no further documents have come to light following a reasonable search that fall within the ambit of standard disclosure relating to "sign off" of the statements.
>
> We were therefore surprised to receive your email and attachment yesterday which raises serious concerns as to whether a proper search has been conducted and whether there may be other the documents which have not been disclosed.
>
> Request
>
> We therefore ask that search be conducted of, and relevant document be disclosed comprising :

Communications to and from the relevant individuals listed below ("the relevant individuals") about events at Croydon ET between 1-15 October 2018.

Communications to and from the relevant individuals after the settlement of the 2018 proceedings concerning the public reaction and reaction from junior doctors or other internal NHS staff to media and other statements made about the case (including but not limited to Norman Lamb MP statements to Parliament and the press)

Communications to and from Roddis Associates from the relevant individuals during the 2018 hearing and thereafter

Communications sent from the relevant individuals to Ben Travis or David Cocke about the case

The relevant individuals as referred to above are Dan Harding, Duncan Brooke, Janet Lynch, Elizabeth Aitken, Mehool Patel, Peter Luce, Peter Roberts, Richard Breeze, Kate Anderson, Mick Jennings, and Val Davidson.

The communications referred to above include any WhatsApp, and text messages and any communications on personal emails.

The Claimant is very concerned that despite the Respondent saying there was nothing to disclose this recent exchange has now been disclosed and seeks a full and frank explanation as to what steps were taken to identify documents for disclosure in these proceedings relating the sign off the public statements the subject of these proceedings (the relevant documents), who took those steps and when, and who was asked for documents.

As we are in the midst of proceedings, we ask for a substantive reply to this email by [8am Monday 4th July] , and if no satisfactory response is received by then reserve the right to make an immediate application to the tribunal for an order for specific disclosure and an order that the Respondent under rule 29, provides within 3 days a witness statement/affidavit from a duly authorised officer of the Respondent comprising a full and frank explanation as to what steps were taken to identify the relevant documents for disclosure in these proceedings.

8. The emails appears to show that the text circulated was subject to input from Drs Brooke and Harding. Submissions at the conclusion of the case will be made as to the extent to which the content of the draft statement was endorsed by these individuals and the extent to which the content of their emails was misleading. In addition it would appear that Drs Brooke and Harding identified one of the concerns that C has raised about the correlation between his concerns and the Peer Review; and the failure to mention his earlier concerns from 2013 about ICU provision. It identifies that Mr Cocke was aware of the failure to refer to the Claimant's earlier 2013 disclosures and that a deliberate decision was taken to make the statement even more misleading as a result of that exchange.

9. These emails are not merely relevant to a specific issue that has arisen during the course of evidence. It is relevant to a core part of C's case that has not only been evident since the claim was presented to the tribunal but has also been highlighted on a number of subsequent occasions. It therefore casts in doubt the integrity of the whole of the discovery and disclosure exercise by R.

10. On Monday morning at 7:23 a further email was received from R's solicitor with further late disclosure. The email states:

> 1. We will have completed pagination of the email sent to you on Friday for inclusion in the bundle prior to 10am today and attach what we understand to be the original email.
>
> 2. The email sent to you on Friday came to light as a result of one of the Trust's witnesses, David Cocke, making further enquiries of clinicians who may have been sent draft or final versions of the press statements. Mr Cocke made those enquiries as a result of the way in which the Claimant's case had changed over the course of the hearing, and in particular the Claimant's questioning of Ben Travis, which made it clear that the Claimant had the concerns about the involvement of clinicians in the preparation of the press statements. The email in question was forwarded to us at 18.07 on Friday and we forwarded it on to you at 21.36. Whilst we apologise on behalf of the Trust for the late disclosure, it has come about for the reasons set out in this paragraph. The case sought to be developed in the Claimant's oral evidence and in cross examination – namely, that one or more of the four doctors referred to by Mr Allen were responsible for the impugned statements as a result of hearing the Claimant's evidence in the 2018 hearing – is not referred to in the Amended Grounds of Complaint or List of Issues, so their involvement in the statements was not previously relevant.
>
> 3. As a result of the email being sent to us, we asked the Trust to check with each individual to whom the email was circulated whether or not there are any further emails that should be disclosed, specifically relating to the drafting/issuing of the press statements issued by the Trust. These individuals are Liz Aitken, Dan Harding, Duncan Brooke, Mehool Patel and Peter Luce. As a result of those enquiries, three further emails have come to light that we now disclose, as attached to this email and set out below. These emails will also been paginated on the basis that they should be included in the bundle.
>
> a. Email from David Cocke to Dan Harding at 18.48 on 17.10.18
> b. Email from David Cocke to various at 14:16 on 24.10.18
> c. Email from Peter Luce to various at 18.50 on 4.12.18
>
> 4. Liz Aitken, Dan Harding, Duncan Brooke, Mehool Patel and Peter Luce have all confirmed over the weekend that they can locate no other emails relevant to the drafting/issuing of the press statements, despite the searches that they have made. Some of them have pointed out that, more generally, two to three years ago the Trust moved to an updated version of /format for NHSmail and, where emails were not archived in a particular way, messages appear to have been lost. These individuals have searched for WhatsApp and text messages that may be relevant to the issues involved in the current Tribunal but have confirmed that no such relevant communications exist. Those latter searches have been carried out without prejudice to our view they fall beyond what constitutes a reasonable search in the context of this case.
>
> 5. We note that you have asked for Janet Lynch, Peter Roberts, Richard Breeze, Kate Anderson, Mick Jennings and Val Davison to conduct searches similar to those named above. Janet Lynch is no longer employed by the Trust and can no longer access Trust emails. Val Davison is currently on leave but she conducted searches of the her Trust email inbox as part of the preparation for this claim (as did all other board members in post in October 2018, who remained employed with the Trust at the time the search was conducted) and she did not locate any relevant correspondence for disclosure. The same applies to Kate Anderson, who has also searched her WhatsApp and text messages and has not found anything relevant to this case. We have no basis on which to believe that Peter Roberts, Richard Breeze or Mick Jennings would have communications relevant to the issues in this case and have made no specific requests of them. If you wish to specify why you consider that they would have relevant communications, and why searching their email accounts would constitute a reasonable search, then we can consider whether to do so.
>
> 6. We should point out that we consider that the emails are supportive of the Respondent's case and adversely affect your client's belatedly articulated case on the doctors' involvement.

Therefore, despite the concerns expressed in your letter, there is clearly no reason why these emails should have been disclosed earlier, other than further checks being made by the Respondent in the light of the way in which the Claimant's case is now being put.

7. In relation to the four points listed in your email, which form the basis of your request, the Trust has no basis on which to believe that further disclosure relevant to the issues in this case exists. It has, however, as described above, made specific enquiries of the individuals included in the email trails set out above (where practical), in order to ensure that if any further relevant documents exist, they can be disclosed. We do not consider that there is any basis for a specific disclosure application to be made on the basis of the four points set out in your letter, particularly as no specific disclosure is requested.

8. We add that we have made specific enquiries as to why these emails were not identified as a result of the previous searches of Mr Cocke's emails. The explanation lies in the fact that he has historically had difficulties with his emails and has had to delete emails to free up storage space (before the current claim was lodged). He has rechecked his email folders to search for these new documents and has not found them. He infers that they were innocently deleted as part of his attempts to free up storage space. He was not previously aware that any potential emails might have been "lost".

11. Ten further emails are attached:
    a. 17/10/18 8:48 from Dan Harding to David Cocke
    b. 17/10/18 17.15 from David Cocke to Dan Harding
    c. 17/10/18 18:08 from Dan Harding to David Cocke
    d. 17/10/18 18:28 from David Cocke to Dan Harding
    e. 17/10/18 18:45 from Dan Harding to David Cocke
    f. 17/10/18 18:48 from David Cocke to Dan Harding
    g. 24/10/18 10:39 David Cocke to Drs Patel, Harding, Luce, Brooke, cc'd to Dr Aitken and Janet Lynch
    h. 24/10/18 14:18 David Cocke to Drs Patel, Harding, Luce, Brooke, cc'd to Dr Aitken and Janet Lynch
    i. 4/12/18 16:14 from David Cocke to Drs Aitken, Patel, Harding, Luce, Brooke, cc'd to Janet Lynch and Ben Travis
    j. 4/12/18 18:50 from Peter Luce to David Cocke, Drs Aitken, Patel, Harding, Brooke, cc'd to Janet Lynch and Ben Travis

12. R's email also makes a disclosure request of C.

13. Some of the assertions made in R's solicitors email are tendentious nonsense and in general the email raises more questions than it answers:

    a. The Claimant's case has not changed as alleged at point 2 of today's email. It has always been his case that the statements were detrimental on grounds of his protected disclosures. That no discovery exercise had been carried out on the communications of the recipients of the protected disclosures (Drs Roberts, Harding, Brooke, Luce and Patel) is a clear failure in the disclosure exercise. If there had been any doubt about their relevance, that would have lifted upon reading C's witness statement and upon the request for the identity of those senior clinicians and upon the application made to the tribunal for that information;
    b. It would appear that there has been no discovery exercise ever conducted on Janet Lynch's communications (which explains part of the disclosure

desert in the bundle). Any suggestion that her email archive cannot be interrogated because she has left the trust must be nonsense;

c. The emails so far disclosed are largely supportive of the Claimant's case and undermine the evidence given thus far and to be given by the Respondent. The suggestion at point 4 of R's email today that they are supportive is wrong – but even if it was right, their late disclosure after articulation of evidence in chief and cross examination is an egregious error on the part of R;
d. In relation to point 8, there was no previous indication that disclosure was incomplete because of historic difficulties with Mr Cocke's emails. He has not made that assertion in his witness statement. The contention that he 'innocently deleted' emails which contradict his own witness statement is not accepted by C. In any event two of the emails also cc Mr Travis – and a serac of his inbox should have produced them – as would any reasonable search in relation to the medical professionals had it been carried out.

14. The consequence of this late disclosure problem are multifold:
    a. It demonstrates that the initial discovery exercise carried out by R was inadequate. This puts in grave doubt whether there are other documents relevant to the issues which have not been disclosed. This concern goes beyond the specific issue about input into the public statement of 24/10/18 referred to in the recently disclosed emails;
    b. Pending a proper discovery exercise, the evidence in the case cannot proceed;
    c. There is some doubt as to whether the emails just disclosed are accurate and the actual emails itself need to be disclosed so that their meta data can be verified;
    d. It puts in serious doubt whether this tribunal at this hearing can come to a fair decision – that is a point that must wait for full disclosure as must any question of whether R's response should be struck out for abuse of process;
    e. It points to the inferences that the tribunal will be asked to draw from the multiple failures by R to disclose relevant documents. It is of particular note that once protected disclosure and detriment are established, it is largely R's burden under s48(2) ERA 1996 to show the reason for the detriment;
    f. It makes clear that the evidence given by Mr Travis to the tribunal was inaccurate (to put it mildly) as is the evidence in the signed witness statement of Mr Cocke. That will be the subject of submissions in due course if this matter proceeds;
    g. C will have to be allowed to address the content of these emails in evidence to the tribunal. In order to most closely replicate the manner in which he would have chosen to do so, he should be permitted to do so in a supplementary witness statement which would also necessitate a return to oral evidence.

15. C wishes to know:
    a. When these documents were brought to the attention of R's solicitors?
    b. What mechanism and methodology was used to conduct the original discovery exercise?

        i. Whether these documents did emerge during the discovery exercise and if so why they were not disclosed?
c. What additional searches have been carried out since the original discovery exercise?
    i. After the previous failure to disclose relevant documents (the letters and attachments to the 18 stakeholders) and the criticism by EJ Kelly [585];
    ii. After the request for the names of the 'senior team', 'senior clinicians' and 'senior doctors' on 27 May 2022;
    iii. After the application to the tribunal for the names of the 'senior team', 'senior clinicians' and 'senior doctors' on 14 June 2022;
    iv. After the application for the names of the 'senior team', 'senior clinicians' and 'senior doctors' was made to the tribunal on the morning of 22 June 2022.
d. What further searches have been carried out during the witness evidence at the hearing?
    i. What methodology was used to perform such searches?
    ii. To the extent that any such searches could have been carried out prior to the hearing, why were they not carried out?

16. The Relevant Case Management and Disclosure history is as follows below.

17. The claim was presented on 6 March 2021 [365-401]. The notice of claim is dated 25/4/19 [402-404]. Therefore, since shortly after 25/4/19, R will have been aware that C was claiming that he was claiming that the content of 3 public statements by R was detrimental (para 29 [389], paras 32 and 33 [390-393]) including in relation to the references in those statements to the external investigation [top of 391] (Roddis reports); and the 2017 Peer Review [bottom of 392 to top of 393].

18. The first CM PH was on 1/10/19 before EJ Sage – face to face – pre-pandemic – it was too early to make disclosure orders [443 @ 445, para (11)]

19. The next CM PH was on 13/11/20 – C attended in person – by video - before EJ Andrews – disclosure order made [489 @ 490-491, paras 4 and 5]

> 4. On or before **18 December 2020** the parties shall send to each other a list of all documents which are or have been in their possession or power relating to the matters in issue in these proceedings. On or before **23 December 2020** the parties shall request from each other any copy documents from the lists that they require and on or before **8 January 2021** they shall send to each other any copies so requested.
>
> 5. The parties shall comply with the date for disclosure given above, but if despite their best efforts, further documents come to light (or are created) after that date, then those documents shall be disclosed as soon as practicable in accordance with the duty of continuing disclosure.
>
> 6. 'Documents' includes letters, notes, emails, memos, diary entries, audio or visual recordings, text messages and any other legible records. The Tribunal does not have facilities for playing audio or visual recordings. If any party wishes to play a recording they must bring suitable equipment (certified PAT tested).

20. That was the first opportunity to provide proper disclosure.

21. R did not disclose the letters to the 18 stakeholders despite them being 'relevant to the issues' and in not doing so, R 'failed to comply with its discovery obligations' was a failure according to EJ Kelly on 2/9/21 [581 @ 585 paras 2(m)(v)(1) and (2)]

    (1) We consider that there would be minimal hardship to R1 in allowing the amendment (other than the obvious one of having to face a further claim) and, specifically, no hardship in allowing it out of time. This is not a case where R1 has shown, for example, that it cannot collect relevant evidence because of the delay. R1 will have to deal with the substantive content of the 18 Letters in any event because it is essentially the same as the information on its website which is part of the current claim. We also consider that the 18 Letters sent by R1 to the claimant on 22 January 2021 were relevant to the issues; had they not been relevant, we consider R1 would have resisted supplying them on the basis that they were irrelevant, in the face of the claimant's request for specific discovery. To that extent, R1 failed to comply with its discovery obligations. If the amendment is not allowed, R1 may be seen to be benefitting from its failure.

    (2) We consider that the claimant would still have a substantive claim to bring if the amendment is not allowed. However, we can see that sending allegedly detrimental material to specific local stakeholders is more clearly potentially damaging to the claimant than merely posting information on a website where it cannot be said who will see it, if anyone. Therefore, allowing the amendment may be important to the quantum of damage if the claimant succeeds in his claim.

22. C only discovered the existence of these letters because they were referred to in passing in documents disclosed by HEE.

23. This failure to have discovered and to have disclosed relevant documents in breach of a tribunal disclosure order should have prompted another attempt by R's solicitors to obtain relevant documentation from R relevant to the issues in the case. This was the second opportunity to provide proper disclosure. If such an attempt did take place, it was either inadequate in its scope or thwarted by R.

24. C's clearly claim from the outset has related to the communications of 24/10/18, 4/12/18 and 10/1/19. That any internal communications relating to the statements of 24/10/18, 4/12/18 and 10/1/19 are relevant to the issues must be beyond doubt from the start of the discovery exercise.

25. Mr Cocke's witness statement exchanged on 24 May 2019 at para 15 stated in relation to the 24/10/18 statement: "Janet Lynch told me that she had obtained internal sign off on the statement from the senior doctors who had been involved in the Tribunal case." That information should also have triggered a search for any relevant communications between Janet Lynch, the senior doctors and anyone else at R about the content and tone of the 24/10/19 statement.

26. On 27/5/22, C wrote to R as follows:

    I refer to the witness statement of David Cocke and in particular:-

a. paragraph 4 where he refers to reactive statements "that were issued in relation to Dr Day" being "agreed and signed off by members of the senior team including the trust's chief executive and Janet Lynch",

b. paragraph 14 where he states "the concerns raised by Dr Day in 2013 had focused on junior doctor staffing levels (this was my understanding from senior clinicians and Mrs Lynch)", and

c. paragraph 15 where it is said that Janet Lynch "told me she had obtained internal sign off on the statement from the senior doctors who had been involved in the Tribunal case".

Can you please confirm
1. who comprised the senior team at all material times as referred to at paragraph 4 of Mr Cocke's statement?

2. who were the senior clinicians from whom Mr Cocke had gained his understanding as referred to at paragraph 14 (as extracted above)?

3. who were the senior doctors who had given internal sign off to the 24th of October 2018 statement on the Trust website as referred to at paragraph 15 (as extracted above)?

Please also provide disclosure of the documentation evidencing sign off of the 24th of October 2018 statement by the senior doctors concerned and any others who signed it off. Mr Cocke refers to the generic process for the sign off of reactive statements, which we assume incudes the statements published on the trust website. Can you please therefore provide disclosure of documentation evidencing sign off of any other statements published by the trust the subject of these proceedings by members of the senior team and any senior or other doctors or clinicians.

27. The response from R on 6/6/22 was:

"In relation to your email dated 27 May 2022, your three requests for further information can be dealt with in cross-examination of David Cocke. This is the proper way in which to challenge or seek clarification on matters raised in his witness statement. It is not appropriate to do so via email correspondence. In relation to "sign off" of public statements, you will again have the opportunity to question Mr Cocke on that point. However, we understand that individuals did not literally sign-off the statement (i.e. indicate in writing that they were happy with it or not) and that no further documents have come to light following a reasonable search that fall within the ambit of standard disclosure relating to "sign off" of the statements. The only further document that has been provided to us by our client as a result of your query is attached. It is provided notwithstanding that it is not obvious that it is relevant to the issues in dispute. It is email correspondence between NHSE/I and the Trust in relation to one of the statements. Please let me know if you would like this included in the bundle."

28. To the extent that this response suggests that any further search had been conducted, either it had not been or if it had been it was clearly inadequate. This was the third opportunity for a proper discovery exercise to have taken place – and it clearly did not take place.

29. C made an application to the tribunal on 14 June 2022 for an order that R reveal:
    a. who comprised the senior team at all material times as referred to at paragraph 4 of Mr Cocke's statement?
    b. who were the senior clinicians from whom Mr Cocke had gained his understanding as referred to at paragraph 14?

c. who were the senior doctors who had given internal sign off to the 24th of October 2018 statement on the Trust website as referred to at paragraph 15 of Mr Cocke's statement?

30. This was the 4th opportunity to provide adequate disclosure. It was not taken up by R.

31. Written and oral submissions on this point were made to the tribunal on Wednesday 22 April 2022. Written submissions on behalf of C stated: "This is information which is likely to be contained in a documentary record – indeed it is striking that no such documentation has been disclosed." This was a 5th opportunity to look for an then provide adequate disclosure. The opportunity was missed.

What are a party's disclosure obligations in the employment Tribunal

32. Until a tribunal makes an order, there is no duty of dislosure.

33. To comply with an order for disclosure, a party will be expected to carry out a reasonable search of electronic communications, given that many documents relevant to the issues in the case will only exist in an electronic format. Assistance may be found in Practice Direction 31B to the CPR, which deals specifically with the requirements of electronic disclosure in civil court claims and aims to encourage, and assist, parties to agree a proportionate and cost-effective approach to the disclosure of electronic documents.

34. In *Birds Eye Walls Ltd v Harrison* [1985] ICR 278, the EAT outlined two general principles employment tribunals should bear in mind when considering the question of disclosure:

    a. the duty not to withhold from disclosure any document the suppression of which would render a disclosed document misleading is a 'high duty' that should be interpreted broadly and enforced strictly by tribunals;
    b. a tribunal should ensure that a party does not suffer any avoidable disadvantage where that party can show at any stage of the proceedings that he or she has been at risk of having his or her claim/defence unfairly restricted by being denied the opportunity of becoming aware of a document in the possession of the other side material to the just prosecution of the party's case.

35. Once an order for disclosure has been made, it imposes an obligation that remains continuous throughout the proceedings — *Scott v Inland Revenue Commissioners* [2004] ICR 1410 CA.

36. The Court of Appeal in *Sarnoff v YZ [2021] EWCA Civ 26* has clarified that:
    a. Orders for disclosure against parties to proceedings are made by the tribunal exercising its case management power under *rule 29* of the ET rules.
    b. Orders for disclosure against third parties are provided for, and limited by, *rule 31* of the ET rules.

37. In civil proceedings, a party is required to undertake a reasonable, but not an exhaustive, search for documents which should be disclosed. CPR 31.7(2) provides that the relevant factors in deciding the reasonableness of a search include:
    a. The number of documents involved;
    b. The nature and complexity of the proceedings;
    c. The ease and expense of retrieval of any particular document; and
    d. The significance of any document which is likely to be located during the search.

38. In civil proceedings, where a party has not searched for a category or class of document on the grounds that to do so would be unreasonable, they should state this in their disclosure statement and identify the category or class of document (CPR 31.7(3)).

39. In *Square Global Ltd v Leonard* [2020] EWHC 1008 (QB), the High Court made it clear that a legally represented party should not be left to decide the relevance of documents for the purpose of disclosure and that legal representatives have a duty to the court to complete that task and carefully ensure that proper and full disclosure is made.

40. The requirement to carry out a reasonable search for disclosable documents will in most cases require the parties to carry out a search for electronic communications. Many documents relevant to the issues in the case will only exist in an electronic format. Practice Direction 31B to the CPR deals specifically with the requirements of electronic disclosure in civil court claims.

41. Given the clearly inadequate discovery and disclosure exercise carried out this far, the tribunal is requested to order that R performs a proper discovery exercise and sets out an explanation of its methodology for searches for relevant documentation expressly addressing:
    a. The potential sources considered;
    b. The steps taken to preserve documents;
    c. The process for 'Harvesting' documents, which includes searching for and locating relevant electronic documents including the classes of documents searched and the search terms used and including the identity of the individuals whose email accounts were searched;
    d. Any process for filtering the results of that search;
    e. All of the questions set out in CPR practice direction 31B.