Seeing the Wood for the Trees - And Saving a Few Hectares Too

Submitted by Jessica Armfelt on Thu, 12/17/2020 - 11:43

Please indulge this brief sojourn through my sepia-toned memories. There is a point… I promise.

I recall, many moons ago now, working for a very large law firm prior to qualification. Like many of us starting in the legal profession I worked as a paralegal in a commercial-property department. I undertook work for a number of 'Pub Co' clients for which I was billed out on a fixed-fee basis. Despite this, my 'WIP' had to be recorded against each file. This didn't make sense to me; why did I need to record time when I was charging a fixed fee? The existence of one, negated the need for the other to my mind. And, in any event, I had completed the Bar Vocational Course. What the hell was 'WIP'?

One day, momentarily forgetting my jejune status, I asked that very question of an equity partner. "Dazza", he responded (his equity-partnership status allowing him to supplant the portmanteau formed from a washing powder and a Geordie footballer for my name) "it is precisely because you are on a fixed fee that you are required to record your time. How else do I know whether I'm charging enough for you?" Boom. Paradigm shift. I saw the logic of this. My view on time recording, my paradigm, was forever altered. I had been 'WIP'd'!

For those of us appearing at Bristol Employment Tribunal, the imposition of strict page counts in relation to tribunal bundles represents a familiar paradigm. For those practising from outside the gravitational pull of Bristol or the South West, the principle seems counter-intuitive and antithetical to the proper administration of justice.

Being a peripatetic practitioner, from my home base near Cardiff, I've been able to contrast different practices adopted by different tribunals. In Wales, there is generally little restriction on bundle sizes and witness statements. Appearing in Bristol ET and witnessing first-hand how *displeased* an employment judge (no names) was at the lack of observance of the limits he had imposed I remember thinking that this seemed a trite unfair. However, being more frequently subject to the practice convinced me of its utility to everyone. Now, I think it should form the basis of every case management hearing.

The EAT has recently emphasised its view on case management powers and how this relates to bundle sizes in the case of *Miron v Adecco*. The appeal related, *inter alia*, to case management decisions made by both EJ Dawson and Regional Employment Judge for the South-West region, EJ Pirhani. At a preliminary hearing on 16 March 2020, EJ Dawson had refused an application to remove the 350-page limit on the size of the bundle and also remove the word limit in regard to the Claimant's witness statement. The Claimant formed the view that this decision was an '*…absurd and*

unscientific limitation[s]…' and that this denied him a fair trial. DJ Gullick heard the appeal and was not of a similar view.

At para. 64 of his judgment he unequivocally rejected the Claimant's contention, forming the view that the actual purpose and effect of limiting bundle sizes and witness statements was to attempt to ensure the fairness of a hearing. He considered EJ Dawson's decision to effect rule 41 of the Employment Tribunal Rules of Procedure 2013 and limit bundle sizes was both proportionate and reasonable in the circumstances. He formed the view that the Claimant was simply seeking to procure a decision from the EAT that he could supplant for that of EJ Dawson. DJ Gullick formed the view that there was no error at law in EJ Dawson's decision and therefore absolutely no reason to overturn the limitation imposed.

Is this type of case management order really so unusual or '*absurd*' ?

The distillation of evidence in this way is not unique to the employment judges of the South West: take a look at paragraph 5.1 of CPR, PD 27a. Family practitioners are accustomed to this and have been reminded in no uncertain terms as to the consequences of derogation (see *Re L (A Child) (2015)*). It occurs in other disciplines as well.

Whilst there may be some, perhaps limited, argument that to impose these restrictions actually erodes the overriding objective as opposed to enhancing it (see the decisions of *Tarn v Hughes* and *McKinson v Hackney* in relation to the limitation of discrimination claims) I don't agree. We've all been faced with the litigant in person who cannot be swayed from the view that 600 pages of emails is critical to their case. Active case management of this type is not unusual in other areas of law and does help in the effective management of a case. And truthfully, what percentage of our bundles do we actually refer to during the currency of a hearing? 60%? 50%. Less…?

For me, whilst the natural reaction is to rail against such restrictions, I think it should be actively embraced. When used judiciously it actually augments the trial process and allows for better management of our clients' needs and wishes. If the limit appears to be too restrictive it can always be reviewed if there is a good reason for doing so. In my experience, the judges at Bristol take an entirely pragmatic view and have always accommodated where the case required it and the application was made in good time.

So, if the practice of the South West is different to your current experience, I would encourage you to embrace it. If you practice in a region where such an approach isn't utilised suggest it. It's a useful tool, make it *de rigueur* in your proposed case management orders. Change your paradigm. Like me, become 'WIP'd'.

"Dazza"

Darren Stewart

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