BARWIL AGENCIES LIMITED v. SALMON

SUPREME COURT (Schofield, C.J.): January 16th, 1997

Employment—Industrial Tribunal—procedure—discovery—by Industrial Tribunal Rules, r.10(1)(b), Tribunal has power of Supreme Court—court's strict discovery procedure not mandatory before Tribunal and preferable for parties to agree own method for exchange of relevant information

Employment—Industrial Tribunal—procedure—discovery—by Industrial Tribunal Rules, r.16(1), Tribunal may regulate own procedure, including adoption of appropriate sanction for failure to comply with discovery order, e.g. striking out party's notice of appearance—fine on summary conviction under r.10(4) not only available sanction

The appellant sought to contest the scope of a discovery order made in proceedings before the Industrial Tribunal.

The respondent was dismissed from his employment with the appellant company in what he alleged was an unfair manner. Before the Industrial Tribunal, the respondent obtained discovery of a number of documents which he alleged were relevant to the proceedings. It was not clear from the terms of the order made by the Tribunal's Chairman precisely what procedure was to be adopted. By error, the appellant took no action within the time specified in the order and subsequently applied for an extension of time within which to comply. The respondent opposed that application and sought the striking out of the appellant's notice of appearance before the Tribunal.

Shortly after ordering discovery, the Tribunal's Chairman had left Gibraltar and his successor refused the appellant's application, on the ground that he could not "revoke the decision" of his predecessor, and instructed the appellant to make immediate discovery. On the strength of the respondent's submission that his predecessor had intended a formal procedure for discovery of documents, involving the production of lists of documents which were to be copied to the opposing party, the new Chairman found that the appellant had breached the discovery order and accordingly struck out the appellant's notice of appearance.

On appeal to the Supreme Court, the appellant submitted that (a) the previous Chairman's order for discovery had merely required that the appellant make the documents available for the respondent to inspect and in these circumstances, it had not breached the order; and (b) in any case, even if the order had had the wide effect contended for by the respondent, the breach of such an order, made under r.10(1) of the Industrial Tribunal Rules, was not punishable by striking out its notice of appearance; rather,

the only available sanction was a fine of £10 on summary conviction for failing to comply with such an order without reasonable excuse under r.10(4).

The respondent submitted in reply that (a) by r.10(1)(*b*) of the Rules, the Tribunal had all the powers of the Supreme Court regarding discovery and the former Chairman had therefore properly required the formal exchange of copies of all relevant documents from lists provided by each party, which the appellant had failed to do and the Tribunal had therefore had the power to apply appropriate sanctions; and (b) r.16(1) of the Rules allowed the Tribunal to regulate its own procedure and it had accordingly been justified in striking out the appellant's notice of appearance rather than applying the limited and inappropriate sanction available under r.10(4).

Held, allowing the appeal:

(1) Rule 10(1)(*b*) of the Industrial Tribunal Rules gave the Tribunal the powers of the Supreme Court regarding discovery and inspection of documents; however, automatic discovery was not mandatory and the Tribunal was not bound to adopt the strict procedures of the Supreme Court. Rather, it would often be preferable for the parties to come to a mutually acceptable arrangement and not to invoke the powers of the Tribunal at all (page 34, lines 14–45).

(2) It followed that in the present case, the Tribunal had clearly had the power to make the order it did. It could not be said that the only available punishment for the appellant's failure to comply was a fine of £10 on summary conviction under r.10(4), since that would allow a person to avoid disclosing information simply by paying that sum—a result clearly never intended when the Rules were made. It was therefore necessary that under the power to regulate its own procedure given by r.16(1), the Tribunal possess sanctions similar to those possessed by the Supreme Court, including the power to exclude from further participation in its process a party who had failed to comply with its orders (page 35, lines 1–31).

(3) However, the court would only strike out the Tribunal's decision if it amounted to a miscarriage of justice and not merely because it would have exercised its discretion differently. In the present case, the Chairman had been wrong to assume that he could not alter the order made by his predecessor and because the precise effect of the former Chairman's order had been unclear (although it was now clear that it had only been necessary for the appellant to make the documents available for inspection by the respondent), it was possible that the new Chairman would have taken a less serious view of the appellant's non-compliance had the procedure for inspection been made more explicit and the court would therefore set aside his finding and remit the matter to the Tribunal for it to consider afresh (page 35, lines 32–39; page 36, line 21 – page 37, line 30; page 38, lines 15–37).

Legislation construed:
Industrial Tribunal Rules (1984 Edition), r.10(1): The relevant terms of this rule are set out at page 33, line 43– page 34, line 11.
r.10(4): The relevant terms of this sub-rule are set out at page 35, lines 10–13.
r.16(1): The relevant terms of this sub-rule are set out at page 34, lines 12–13.

H.K. Budhrani and *R. Pilley* for the appellant;
G. Licudi for the respondent.

SCHOFIELD, C.J.: On June 27th, 1996, Mr. H.M. Murphy, Chairman of the Industrial Tribunal, awarded Peter Salmon a total of £27,852.80 against his former employer, Barwil Agencies Ltd. Barwil has appealed against that decision.

In June 1988, Salmon commenced employment with Barwil and in November 1994 was its Operations Manager, earning a salary of £27,455 per annum together with certain allowances. On November 1st, 1994, Salmon was given notice of termination of employment, which took effect on November 30th, 1994. His termination was, says Salmon, unfair. He was purportedly dismissed from employment on the grounds of redundancy when, he claims, no redundancy situation existed. Furthermore, he claims, in any event, he was given no warning of his dismissal and was not consulted by Barwil about his alleged redundancy. On January 13th, 1995, Salmon put these claims in an originating application filed with the Industrial Tribunal.

The Tribunal set a hearing date for Salmon's application, October 28th, 1995. Prior to that date, Mr. Licudi, acting for Salmon, asked Mr. Pilley, Barwil's solicitor, for copies of a large number of documents. The reply came from Mr. Budhrani, who had been briefed by Mr. Pilley as counsel in the matter. He objected to discovery of the documents, maintaining that the documents were irrelevant to the issues before the Tribunal. Whether it was because the Chairman wished to hear the parties on the question of discovery before the substantive hearing date I know not, but the first hearing, which was Mr. Licudi's discovery application, was on October 19th, 1995. The transcript of the proceedings before the Tribunal is incomplete and does not contain any dates, but it seems that the application for discovery spilled over until October 24th, 1995. I should make the point here that it would be more helpful if the transcript of the proceedings of the Tribunal contained details of the date and the quorum. It makes the proceedings so much easier to follow on appeal.

The hearing was conducted by a former Chairman, Mr. Blackburn-Gittings, who soon thereafter left the jurisdiction. I shall refer to Mr. Blackburn-Gittings as "the former Chairman." He delivered his decision on October 31st, 1995, ordering discovery of all the documents requested

by Mr. Licudi save for one category of documents which were to be presented to the Chairman of the Tribunal for his perusal rather than to Salmon or his advisers, because such documents might contain information confidential to Barwil about its trading relationships. Although in his ruling the former chairman uses the words "discovery," "inspection" and "production" interchangeably, it is clear to me, reading the transcript of the proceedings as a whole, that he was ordering Barwil to make the documents available for inspection by Salmon, except of course for the one class of documents which were to be produced to the Chairman of the Tribunal. This is an important aspect of the appeal and one with which I shall deal more fully later in my judgment.

The decision of the former Chairman was communicated to Mr. Budhrani, counsel for Barwil, on November 6th, 1995. Mr. Budhrani was out of Gibraltar and it was only upon his return that he saw the ruling. By r.18(1) of the Industrial Tribunal Rules, a notice or document of the Tribunal must be served at the address specified by a party for service which, in Barwil's case, was at Mr. Pilley's office. In the circumstances, Mr. Budhrani thought that the ruling had been sent to him out of courtesy only and took no action on it. Mr. Pilley had not received notification of the former Chairman's ruling. It was only on December 12th, 1995, when Messrs. Budhrani and Pilley were in conversation, that this error became known to them. By that date they were already almost three weeks late in complying with the order for discovery. Also on December 12th, 1995, Mr. Licudi, acting for Salmon, wrote to the secretary of the Tribunal seeking an order that Barwil's notice of appearance be struck out. Mr. Licudi did not see fit to copy that letter to Mr. Pilley.

The next document on record, although I would have expected some communication to have passed between Mr. Pilley and Mr. Licudi after December 12th, 1995, was an application to the Tribunal, filed by Mr. Budhrani on December 28th, 1995, seeking an extension of time until February 15th, 1996 in which to comply with the order for discovery. The Tribunal had by then notified the parties that the substantive application had been set down for hearing on February 20th, 1996. Mr. Licudi wrote to the Tribunal on January 8th, 1996, opposing the application for extension of time.

The Tribunal did not respond to the application until February 9th, 1996, which letter, addressed to Mr. Budhrani, was not received at his chambers until February 14th, 1996. The letter, signed by the secretary to the Tribunal, reads:

> "I have been instructed by Mr. H. Murphy, the Chairman of the Industrial Tribunal, that he is in no position to revoke the decision taken by the then Chairman, Mr. J. Blackburn-Gittings, and therefore the application for an extension of time is refused.
>
> Mr. H. Murphy requests that the instructions set out in Mr.

Gittings' ruling of October 31st, 1995 be fully complied with, with immediate effect.

The Tribunal felt under no obligation to notify Mr. Ray Pilley of the Chairman's ruling as you were appointed by Mr. Ray Pilley himself to appear as counsel for the respondent in [this matter]."

Barwil did not comply with the order for discovery with immediate effect. Instead it filed a notice of appeal to this court against that decision and instructed Mr. Budhrani to appear at the full hearing on February 20th, 1996. At the hearing, conducted over two days, the new Chairman of the Tribunal, Mr. H. Murphy ("the Chairman"), heard lengthy arguments from Mr. Licudi on why he should strike out Barwil's notice of appearance for non-compliance with the order for discovery, and lengthy replies from Mr. Budhrani in opposition to that application. The Chairman indicated on the first day of the hearing that he was unwilling to strike out Barwil's notice of appearance and the matter was adjourned to the next day for the witnesses to be heard. Unfortunately, Barwil's main witness was out of the jurisdiction and Mr. Budhrani sought a short adjournment of the case. After much further argument, the Chairman agreed to adjourn the hearing to March 5th, 1996 and made an "unless order" for discovery of the documents by February 28th, 1996.

Mr. Budhrani understood the Chairman's order to mean that Barwil had to make the documents referred to in the order available for inspection, whereas Mr. Licudi understood the order to mean that Barwil had to furnish him with copies of the documents referred to in the order. Letters flew between the parties' legal advisers. Had they been able to compromise and reach agreement, we would not be involved in the time and expense of this appeal hearing. As it is, the parties again appeared before the Tribunal on March 5th, 1996. Mr. Licudi, firing arrows of accusation at Barwil for failing to provide Salmon with copies of the documents and Mr. Budhrani protecting himself with the shield of his understanding of the former Chairman's order of October 31st, 1995. In the event, the shield was not stout enough and the Chairman was persuaded that Barwil was in breach of his order for discovery made on February 21st and he struck out the notice of appearance. Barwil took no further part in the proceedings and Salmon secured the award he sought.

Much was said before the Tribunal, and a little before me, about the powers of and procedures to be adopted by the Tribunal on discovery. I should set out my understanding of the position in the hope that it will be helpful guidance for the Tribunal. Rule 10(1) of the Industrial Tribunal Rules provides:

"Subject to rule 6(2) a tribunal may on the application of a party to the proceedings made either by notice in writing or at the hearing of the originating application—

(*a*) require a party to furnish in writing to the person making the application further particulars of the grounds on which he or it relies and of any facts and contentions relevant thereto;

(*b*) grant to the person making the application such discovery or inspection of documents as might be granted by the Supreme Court; and

(*c*) require the attendance of any person (including a party to the proceedings) as a witness or require the production of any document relating to the matter to be determined,

and may appoint the time at or within which or the place at which any act required in pursuance of this rule is to be done."

Rule 16(1) reads: "Subject to the provisions of these rules, the tribunal may regulate its own procedure."

Rule 10(1) does not mean that the Tribunal is locked into the mandatory provisions on discovery and inspection provided for in the Rules of the Supreme Court. What it means is that once an application for discovery is made to it, the Tribunal may exercise any and all of the powers of discovery and inspection of documents as are exercised by the Supreme Court. What orders may be granted by the Supreme Court for discovery and inspection of documents? They are contained in O.24 of the Rules of the Supreme Court. They are for provision by one party to the other of a list of documents (O.24, r.3); for provision of an affidavit stating whether any documents are or have been in a party's possession, custody or power (O.24, r.7); for production for inspection (O.24, r.11); for one party to provide the other with copies of documents (O.24, r.11A); and for production of documents to the court (O.24, r.12). These are the main types of orders and O.24 contains ancillary provisions.

As I have said, there is no requirement for automatic discovery in proceedings before the Tribunal. In some cases there will be no need for any documents to be produced and in many cases the documents to be produced are obvious and readily tendered by the parties. One would expect that where the parties are legally represented, the legal representatives will work out between themselves a mutually acceptable procedure for discovery and inspection of documents. But where recourse has to be made to it, the Tribunal has all the powers of the Supreme Court as set out in O.24. In exercising its discretion, the Tribunal will take account of the convenience of the parties and the expenses involved, bearing in mind that copies of documents should only usually be ordered if the party to receive them is prepared to pay the reasonable costs of making those copies (see O.24, r.11A(2)). Usually a party need only give the other party a right to inspect and take copies of relevant documents and this must be the case where there are many documents to inspect, copies of only some of them being needed by the party seeking discovery. Where there are few documents involved, it may be more convenient and cheaper to order copies to be produced.

It follows from the above that the Tribunal had power to make those orders which one or both parties claim were made in this case: for provision of a list of documents which were then to be inspected; for provision of copies of documents by Barwil to Salmon; and for production of documents by Barwil to the Tribunal. But, says Mr. Budhrani, the Tribunal had no power to strike out the notice of appearance even if it were satisfied that its order for discovery had been breached. Mr. Budhrani points to r.10(4) of the Industrial Tribunal Rules, which reads:

> "A person who without reasonable excuse fails to comply with any requirement under subrule 1(*b*) or (*c*) is guilty of an offence and is liable on summary conviction to a fine of £10; and the requirement shall contain a reference to that fact."

He argues that where the Rules provide a sanction for non-compliance therewith then that sanction and no other may be applied. It seems odd that a criminal sanction is provided in procedural rules of this nature and Mr. Budhrani's argument has some immediate attraction. However, r.10(4) cannot be said to provide an adequate or satisfactory sanction for non-compliance with an order of the Tribunal for discovery. If it is the sole sanction, then at the expense of a £10 fine, one party may withhold from the Tribunal and his opponent documents which are necessary for a just determination of the dispute. That cannot have been the intention of the rule-making body. The Tribunal has the power to order discovery vested in the Supreme Court. By r.16(1), the Tribunal may regulate its own procedure. That must include sanctions similar to those of the Supreme Court to hold a party out of its process if that party proves himself unworthy of access to it. Again, the Tribunal should look to O.24, r.16 and the notes to it in *The Supreme Court Practice* for reference to its powers to strike out. It should be remembered that it is only where there is a real risk that justice cannot be done that a party should be excluded from the proceedings.

Having determined that the Tribunal had the powers it exercised, I now have to decide whether it exercised those powers properly. I must say at once that I accept Mr. Licudi's submission that this court should not interfere with the decision of the Tribunal merely because it would have exercised its power to strike out in another way. The exercise of the Tribunal's discretion to strike out Barwil's notice of appearance must be such as to amount to a miscarriage of justice before the court will interfere with it.

I have already said that in his order of October 31st, 1995, the former Chairman made a order for inspection of documents save for a particular class of documents which he ordered to be produced to the Tribunal. This may not be clear from the order itself, but it is clear when one reads the transcript of the proceedings before him. Starting at page 6 of the transcript, Mr. Budhrani argues against providing copies of documents

because, he estimated, the cost would come to some £500. At page 8 of the transcript, the Chairman then asks whether he has to decide that afternoon on whether copies should be provided, following which there is this note:

> "*Mr. Licudi*: Not necessarily, if we are able to get inspection of the documents . . . .
>
> *Mr. Gittings*: Then were [sic] to decide between yourselves what we want.
>
> *Mr. Licudi*: Absolutely."

Immediately afterwards, Mr. Budhrani then offers to prepare a list of documents followed by inspection and an opportunity for his opponent to decide which documents he requires copies of "the way we do it in the Supreme Court." The Chairman agreed to that. For good measure, the final words at the hearing were uttered by Mr. Licudi, who referred to the length of time it would take for the documents to be made available "for inspection." What the Chairman agreed to was the preparation of a list of documents followed by inspection of them and a demand for copies of those which were considered necessary. He left open the question of who should meet the cost of making those copies.

There followed, of course, the non-compliance with that order and Barwil's application for an extension of time in which to comply with it. I must say that the Chairman was in error when he refused the application on the ground that he was in no position to "revoke" the order of the previous Chairman. For a start he was not being asked to revoke the former Chairman's order but to vary it. Be that as it may, he had been appointed Chairman and was seised of the application. He had all the powers of the previous Chairman including power to revoke or vary the former Chairman's orders or to extend time pursuant to r.16A of the Industrial Tribunal Rules. As it was, by the time he had made his decision and in ordering immediate compliance with the former Chairman's order, the new Chairman was effectively allowing Barwil the time it needed.

Quite why Barwil chose to be inactive from December up to the hearing on February 20th, 1996 is a mystery and quite rightly the Chairman took a dim view of it. Be that as it may, it is clear from the transcript of the proceedings of February 20th, 1996 that the Chairman was not then prepared to strike out Barwil's notice of appearance, which would have the effect of barring it from any further right of audience (see page 17 of the transcript). Rather, he adjourned the hearing to the next day, only to be met by what must have been an irritating further application for adjournment, albeit one made on proper grounds. The Chairman acknowledged that the application was proper and maintained his judicial calm by further adjourning the hearing to March 5th, 1996. In so doing, he ordered discovery of the documents on an "unless" basis. Was he thereby ordering copies of the documents to be produced, or

merely inspection of them? Mr. Licudi says the former and Mr. Budhrani the latter. It must be said that it is not clear from the transcript what the Chairman was ordering and it seems that on February 21st, 1996, he never addressed his mind to the question of quite how discovery would be effected.

On March 5th, 1996, Mr. Licudi yet again argued for a strike-out on the ground of failure by Barwil to comply with the orders for discovery. He did so despite having been given a list of documents and facilities to inspect all but one class of such documents. At pages 187–188 of the transcript, Mr. Licudi argues that the former Chairman's order of October 31st, 1995 was for production of copies of the documents, not for a list followed by inspection. In making that submission, Mr. Licudi, unwittingly, I am sure, misled the Chairman, for that was not what the former Chairman had ordered. Mr. Budhrani then argued that what was relevant was not what the new Chairman had ordered (or thought he had ordered), but what the former Chairman had ordered. A full reading of the transcript convinces me that the Chairman thought that in his order of February 21st, 1996, he was giving effect to the previous Chairman's decision. This is fortified by reference to the letter of February 9th, 1996, in which the same Chairman expressed the view (albeit erroneously) that he had no power to "revoke" (by which he meant "review") the decision taken by the previous Chairman. The very least that can be said is that Mr. Licudi's erroneous submissions on the meaning of the former Chairman's decision must have affected the new Chairman's mind and influenced his decision. Had be been addressed on the proper meaning of the former Chairman's decision, the Chairman would have been likely to come to a different decision and found that Barwil had fulfilled the obligations placed upon it by the Tribunal's decision of February 21st, 1996. It would have been proper at that stage for him to order a strict timetable for inspection and for taking copies of the relevant documents.

It is argued by Mr. Licudi that Barwil did not comply with the former Chairman's order by failing to produce to the Tribunal one class of documents and preventing Salmon from inspecting another class of documents, which had been the subject of the order on the ground that they could be of benefit to a competitor of Barwil and highly prejudicial to the future conduct of its business. Mr. Budhrani has given a satisfactory response in relation to the former class of documents. Barwil had relented on its previous position that production should be made to the Tribunal's Chairman only and had offered Salmon an opportunity to inspect the documents. As far as the second class of documents is concerned, the production of which was objected to at a late stage, it may be argued that the order of October 31st, 1995 was not being complied with because arguments on relevance and admissibility had already been heard by the Tribunal. However, new facts had arisen by February 1996 which could have led to further arguments before the new Chairman,

arguments which by the order of March 5th, 1996, Barwil was unable to make.

It must be extremely irritating and perhaps distressing for Salmon to have to meet the delays he has met in this case, delays which may be placed at the door of Barwil. However, I would have more sympathy with him if his advisers had taken a less inflexible approach to Barwil's failure to comply with the order of October 31st, 1995 in the first place. A call or letter to Barwil's solicitors immediately after the November 29th deadline may have avoided all subsequent wrangles related to discovery. Instead we have Mr. Licudi's letter of December 12th, of which no copy was sent to the other side, seeking a strike-out. An application such as that made by Mr. Licudi on December 12th, 1995, if granted, is almost always met with an application to restore and almost always that application is granted. All it does is delay the final outcome and increase expense.

This case is an example of procedure overtaking and overwhelming substance. The transcript of the proceedings before the Tribunal, which is far from complete, runs to 281 pages. Very little of the time before the Tribunal and very little of the argument before me went to the merits of the case. The order I make will, I hope, get the parties to focus on the merits, but not before many hundreds and, I dare say, several thousands of pounds, and much Tribunal and court time have been expended.

One word about the award itself, which Mr. Budhrani argues is excessive and punitive. It is within the limits set for the Tribunal and cannot be said to be improper. Although the Chairman indicated that he was making the maximum award "bearing in mind the complete lack of proper response given by Barwil to the case," from the evidence before him the maximum award was in any event justified.

The upshot is that I allow the appeal and set aside the order of the Tribunal striking out the notice of appearance entered by Barwil. This means that the matter will have to be remitted to the Tribunal for a decision on the merits. Having read this judgment, I hope the parties will now be able to agree on the the procedure for discovery.

This decision, I think, also renders unnecessary a formal decision on two other appeals in connection with the same matter, namely, an appeal by Barwil against the decision of February 9th, 1996 not to allow an extension of time for discovery and an appeal against an order for terms of stay of execution pending appeal.

Appeal allowed.
