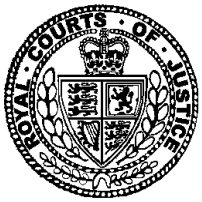

Neutral Citation Number: [2020] EWHC 2228 (QB)

Case No: QB-2020-001607

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13th August 2020

Before :

HIS HONOUR JUDGE AUERBACH
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

ADVISORY, CONCILIATION AND ARBITRATION SERVICE	**Claimant**
- and -	
JOHN WOODS	**Defendant**

- -
- -

John-Paul Waite (instructed by **the Government Legal Department**) for the **Claimant**
The Defendant in person

Hearing date: 6 August 2020

- -

JUDGMENT

His Honour Judge Auerbach:

Introduction

1. This application, made by a claim under CPR Part 8, concerns section 251B Trade Union and Labour Relations (Consolidation) Act 1992. That section was inserted into the 1992 Act by section 10 Enterprise and Regulatory Reform Act 2013. This is, so far as the parties and I know, the first occasion on which section 251B has been the subject of a judicial decision. It provides as follows.

> "251B Prohibition on disclosure of information
>
> (1) Information held by ACAS shall not be disclosed if the information—
>
> (a) relates to a worker, an employer of a worker or a trade union (a 'relevant person'), and
>
> (b) is held by ACAS in connection with the provision of a service by ACAS or its officers.
>
> This is subject to subsection (2).
>
> (2) Subsection (1) does not prohibit the disclosure of information if—
>
> (a) the disclosure is made for the purpose of enabling or assisting ACAS to carry out any of its functions under this Act,
>
> (b) the disclosure is made for the purpose of enabling or assisting an officer of ACAS to carry out the functions of a conciliation officer under any enactment,
>
> (c) the disclosure is made for the purpose of enabling or assisting—
>
> (i) a person appointed by ACAS under section 210(2), or
>
> (ii) an arbitrator or arbiter appointed by ACAS under any enactment,
>
> to carry out functions specified in the appointment,
>
> (ca) the disclosure is made for the purpose of enabling or assisting an enforcement officer within the meaning of Part 2A of the Employment Tribunals Act 1996 to carry out the officer's functions under that Part;
>
> (d) the disclosure is made for the purposes of a criminal investigation or criminal proceedings (whether or not within the United Kingdom),
>
> (e) the disclosure is made in order to comply with a court order,
>
> (f) the disclosure is made in a manner that ensures that no relevant person to whom the information relates can be identified, or

> (g) the disclosure is made with the consent of each relevant person to whom the information relates.
>
> (3) Subsection (2) does not authorise the making of a disclosure which contravenes the data protection legislation.
>
> (4) A person who discloses information in contravention of this section commits an offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale.
>
> (5) Proceedings in England and Wales for an offence under this section may be instituted only with the consent of the Director of Public Prosecutions.
>
> (6) For the purposes of this section information held by—
>
> (a) a person appointed by ACAS under section 210(2) in connection with functions specified in the appointment, or
>
> (b) an arbitrator or arbiter appointed by ACAS under any enactment in connection with functions specified in the appointment,
>
> is information that is held by ACAS in connection with the provision of a service by ACAS.
>
> (7) In this section, 'the data protection legislation' has the same meaning as in the Data Protection Act 2018 (see section 3 of that Act)."

2. This application relates to ongoing proceedings in the Employment Tribunal in which John Woods is the Claimant and ACAS is the Respondent. In the claim before me ACAS is the Claimant and Mr Woods is the Defendant. To avoid confusion I will refer to both parties by name.

3. Mr Woods is a former employee of ACAS who was dismissed for the given reason of conduct. He has presented a claim of unfair dismissal to the Tribunal which is defended. There is much in dispute. It is important to say that no findings of fact have yet been made by the Tribunal, nor have the merits of that claim been determined. Nor is it necessary or appropriate for me to opine on any such matters. However, I do need to say something about the alleged conduct and the nature of certain of the broad issues that are already apparent.

4. Mr Woods worked for ACAS for almost forty years. At the relevant times he was a Deputy Chief Conciliator and Head of Conciliation and Arbitration. In 2018 allegations were made about his conduct. This led to an initial fact-find report. He was then the subject of an investigation which led to an investigation report of May 2019. Following that there was a disciplinary process which resulted in his dismissal. Mr Woods' appeal against dismissal was unsuccessful.

5. The allegations considered in the investigation report were of broadly three kinds. The first group related to Mr Woods' alleged conduct towards, or in relation to, individual colleagues who also worked for ACAS. I will call these the allegations of personal

conduct. ACAS' case is that the investigation report found that there was evidence to support certain (but not all) of the personal conduct allegations. It is ACAS' case that the manager concerned found that certain conduct of that kind had taken place and dismissed for that reason.

6. Secondly there were allegations of unprofessional and/or inappropriate conduct in connection with certain collective conciliations. ACAS' case is that the investigators considered that there was evidence of some such conduct, but that the dismissing manager did not rely upon it. In considering and discussing these allegations, the investigation report referred to a number of particular collective disputes in which ACAS had conciliated. In relation to ACAS' involvement in certain of these disputes, the discussion, and material contained, in the report and appendices, descends into some detail.

7. There was a third, discrete, allegation, which the investigation report did not find evidence to support, and which was taken no further.

8. A proposed Case Management Preliminary Hearing in the Tribunal has been postponed pending the outcome of this claim. It is fair to assume that the Tribunal will want, in due course, to seek to clarify and confirm with the parties the specific issues that it will need to decide in order to determine whether this dismissal was or was not unfair.

9. However, ACAS' case is that certain aspects of the issues are already clear. First, there is no dispute that the investigation report was seen and considered by the dismissing officer. Secondly, in his claim form, Mr Woods is highly critical of a number of matters to do with the investigation and the report, not just in relation to the allegations of personal conduct, but also in relation to the allegations concerning his conduct in connection with collective conciliations, and how these were framed, investigated and dealt with in that report.

10. Further, although it is ACAS' case that the person who decided to dismiss did not rely on any allegations relating to conduct concerning collective conciliations, the dismissal letter does refer to them, and Mr Woods refers to what it says about them in support of his claim that his dismissal was unfair.

11. Mr Woods has confirmed during these proceedings, that the criticisms that he makes, of the handling of, and references to, the collective conciliation conduct allegations, are indeed among the matters on which he seeks to rely before the Tribunal in support of his claim that his dismissal was unfair.

12. In the Employment Tribunal disclosure obligations are not automatic. But under Rule 31 of the Employment Tribunals Rules of Procedure 2013 the Tribunal has the same power to order disclosure of documents and information, and inspection, as, in England & Wales, the County Court. Shortly after the Tribunal claim was presented, some standard directions were issued, but subsequently, because of the disruption caused by the Covid-19 pandemic, these were suspended. However, it was common ground before me (and I agree) that it is fair to assume that, at the reinstated Case Management Preliminary Hearing, or otherwise, some form of fresh general disclosure order will be made.

13. ACAS' case is that there is information, in particular within the investigation report, which it would ordinarily be obliged to disclose for the purposes of the unfair dismissal claim, because it is at least potentially relevant to the issues to which that claim gives rise. However, some of that information falls within section 251B(1). It is therefore presently prohibited from making the full disclosure that it will otherwise be required to make for the purposes of the Tribunal litigation. So is Mr Woods. So ACAS seeks an Order from this court, pursuant to section 251B(2)(e), to enable such disclosure to be made.

14. ACAS' position is that it seeks by this application merely to enable the Tribunal fairly to adjudicate the unfair dismissal claim, and the parties fairly to advance their cases, and comply with the obligations of disclosure that would ordinarily fall on them in relation to it. It is not seeking to confer an advantage, or disadvantage, on either party. It is also ACAS' position that, if the Order it seeks is granted, the Tribunal will then be invited by it to consider exercising its powers under Rule 50 of the Employment Tribunals Rules of Procedure, so as to ensure that the confidentiality of what occurred in the course of its activities in conciliating in certain collective disputes is not undermined.

15. Mr Woods opposed the application. Following a directions hearing which I recently also conducted, it came before me for a full hearing.[1] Mr Woods appeared as a litigant in person. ACAS was represented by Mr Waite of counsel. I had the benefit of reading two statements from Susan Johal of the Government Legal Department for ACAS and two statements from Mr Woods. I also read skeleton arguments and heard very full oral argument on both sides.

16. This application has, it transpires, given rise to a large number of discrete, and in some cases quite tantalising, issues. It is convenient to address the principal issues, arguments, and my conclusions, issue by issue.

Is There Relevant Information Which is Potentially Disclosable to the Tribunal?

17. First, would the investigation report, in particular, ordinarily fall to be disclosed for the purposes of the Tribunal litigation? It appears to me that it would. It is, indeed, fair to assume, that the Tribunal will in due course make a further disclosure order that will require the parties to disclose documents that are, or may be, relevant to the issues. The report would appear certainly to fall into that category at least because it considered the personal conduct allegations by reference to which, on ACAS' case, Mr Woods was dismissed.

18. But in addition, and pertinently, on Mr Woods' case, the approach of the report to the collective conciliation conduct allegations, and the observations made in the dismissal letter about them, also have a bearing on the fairness of his dismissal. How, more precisely, the parties put their cases, and what material in the report does or does not need to be referred to at trial, in order fairly to determine them, should be the subject of further examination and direction by the Tribunal in due course. But, as matters

[1] At the directions hearing, for good order, I disclosed that I was an independent member of the ACAS Council between 2001 and 2008. Neither party had any objection to me hearing this application.

presently stand, at least *some* material in the report concerning these allegations is also, at least *potentially*, relevant. That was, in fact, common ground before me.

Is Such Information Within Scope of Section 251B(1)?

19. Is such potentially disclosable information within the scope of section 251B(1)? This breaks down into a number of sub-issues.

20. First, is information held in connection with the provision of collective (as opposed to individual) conciliations within scope? The parties agreed, as do I, that it is.

21. The point was made that a catalyst for the introduction of section 251B appears to have been the introduction of mandatory early conciliation in relation to prospective employment tribunal claims, by way of amendments to the Employment Tribunals Act 1996 which were also made by the 2013 Act. I was referred to an extract from the speech made by Viscount Younger for the Government in the House of Lords, in respect of what became section 251B, which referred particularly to this aspect. However he also referred to the purpose being to ensure that information held by ACAS in the course of performing its duties was properly protected; and to ACAS performing a *range* of functions, giving specific examples, *including* collective conciliation.

22. In any event section 251B(1)(b) is not ambiguous. It refers, without limitation, to the provision of "a service" by ACAS or its officers. Section 209 give ACAS the general duty to promote the improvement of industrial relations, and section 210 gives it the power to conciliate in trade disputes. A trade dispute is defined for these purposes by section 218 as including disputes between employers and workers, about terms and conditions or other work-related matters listed there.

23. Secondly, is the information held "in connection with" the provision of that service? Ms Johal noted in one of her statements that it might be said that it was not held *in the investigation report* for the purposes of a providing a service. However, Mr Waite confirmed that he did not seek to rely on such an argument. Further, it was certainly common ground that some information in the report *was* acquired by ACAS in the course of providing collective conciliation services. Once so acquired, I think it then remains held by ACAS "in connection" with such provision, notwithstanding that it was re-compiled into the investigation report for a different immediate purpose.

24. I should note that the parties disagreed before me about whether information contained in the report about a particular allegation concerning Mr Woods' relationship with a particular individual (which he denies) was within scope of section 251B(1). Mr Woods argues not. However, I note that the allegation was said to have been raised in relation to a particular collective dispute, which at least potentially, or partly, takes it into section 231B territory. However, I do not need to come to a definitive view about it, given the common ground that there is other information within the report within scope of section 251B.

25. Finally, on this aspect, I note that the net of section 251B(1) is, potentially, very wide, as it applies to *any* information which "relates to" a relevant person, and is held by ACAS "in connection with" the provision of an ACAS service. It is not confined, for example, to notes or other information held by ACAS about the stance taken by the person concerned in the conciliation process.

26. Pausing there, I therefore conclude that the investigation report does contain information within scope of section 251B(1). Accordingly, ACAS may not disclose it unless section 251B(2) applies.

Would Disclosure in the Tribunal Litigation be Caught by section 251B(1)?

27. Mr Woods told me that he in fact has kept the copy of the report that he was given during the investigation; but, for reasons I have given, it is still going to be formally disclosable by each party to the other. Even if that would not breach section 251B(1), it will be disclosable to the Tribunal itself, in the course of the litigation, and that is a disclosure that would fall within scope of the section.

28. It is *possible* also that some information contained within it may need to be disclosed, for example, to witnesses, for the proper conduct of the litigation (more on that point later). Further, although the only document the parties have so far identified, containing information within scope of section 251B, is the investigation report (including appendices) it is not impossible that there may be other such documents that ought, in principle, to be disclosed.

Is the Tribunal itself a court for the purposes of section 251B(2)(e)?

29. If the Tribunal were itself a court for the purposes of section 251B(2)(e), then a disclosure order made by it would be an order of the court, thereby itself sanctioning the disclosure as not contravening section 251B(1). If so, there would be no need for this application. In argument, however, Mr Waite made clear that ACAS' view is that "court" in this section does *not* embrace the Tribunal. It did not seek to argue otherwise. Mr Woods said he also does not seek to argue that the Tribunal is a court for this purpose. But, as the issue was flagged and, to some extent, explored before me, I will address it.

30. Employment Tribunals have the same essential characteristics as courts. They are part of the judicial system and discharge judicial functions, by essentially the same sort of process as courts do. See the discussion in *Peach Grey & Co v Sommers* [1995] ICR 549 where it was held that Industrial Tribunals, as they were then called, were an inferior court for the purposes of the then Rules of the Supreme Court, so that the law of contempt applied to them. It was also noted that the Contempt of Court Act 1981 section 19 provides, for its purposes, that "court" includes any tribunal or body exercising the judicial power of the State.

31. However, it does not follow from this that any reference in any statute to "a court" or "the court" is to be construed as including Employment Tribunals. They are not superior courts of record. Further, many statutes draw a distinction between courts and Tribunals, or particular courts and particular Tribunals, by using their names; and, as the example of the Contempt of Court Act shows, where "court" is intended to embrace Tribunals or a particular Tribunal, Parliament tends to say so expressly.

32. Section 251B falls within Part VI of the 1992 Act. There is no definition of "court" for the purposes of that Part, nor any applicable to the whole of that statute. Section 121, which falls within Part I, provides: "In this Part 'the court' (except where the reference is expressed to be to the county court or sheriff court) means the High Court or the Court of Session." But the sense of this provision is that it is restricting the reference

to "the court" as applying only to certain named courts, as opposed to all named courts – not that "court" should otherwise be regarded as embracing Tribunals as well.

33. More generally, the 1992 Act contains provisions relating to various judicial bodies, some of which are called courts and some not, including the Employment Tribunal, the Central Arbitration Committee and the Certification Officer. Generally it refers to bodies which are not called courts, by using their respective names. I was referred to section 8(4), by way of example, which refers to "any proceedings before a court, the Employment Appeal Tribunal, the Central Arbitration Committee, ACAS or an employment tribunal". That is within Part I, but there are other examples in other Parts of the Act.

34. Nor can it be assumed that the drafter of the 2013 Act must have overlooked this feature of the 1992 Act, bearing in mind that the Part of the 2013 Act in which section 10 finds itself also contains provisions concerning Employment Tribunals. Given all of that, it seems to me that, had Parliament intended that "court order" in section 251B should embrace an order of the Employment Tribunal, it would have said so expressly, or by way of inclusion of a further definitional provision. It may be thought by some anomalous that an Employment Tribunal cannot order the disclosure of information within scope of section 251B for the purposes of Employment Tribunal proceedings; but one can envisage policy arguments both ways. I cannot say that Parliament cannot have intended this result or that this was plainly an oversight.

Do I have Jurisdiction to Entertain this Application?

35. This question logically comes first, but it is easier to address it having covered the ground so far traversed, which gives it some context. The issue is whether it is open to a party to apply for an Order under section 251B(2)(g) by way of a freestanding claim, or only as part of some existing court proceedings.

36. This issue was flagged up by the Master who first considered this claim (without deciding it), and it did give me pause, so I raised it with the parties. However, neither contended that I did not have jurisdiction to entertain this freestanding application as such. Mr Waite submitted that nothing in the wording of section 251B(2)(g) restricts the court's power to make an Order in that way; and that the Part 8 procedure was the most appropriate way to seek a freestanding Order. I agree. But the point perhaps highlights that it is unusual for a party to find itself applying for an Order directed at itself, a point to which I will return.

Against Whom Can the Order be Made?

37. Can I make an Order against Mr Woods as well as ACAS? The prohibition in section 251B(1) is in the passive tense, but the natural reading is that information *held by* ACAS, within scope of section 251B(1) shall not be *disclosed by* ACAS. On that reading, the section does not bite on disclosure by a third party, if they happen also to hold the same information. But what the parties agreed, as do I, is that, as Mr Woods, for his part, came by the information through his role in working for ACAS on the provision of its services, the prohibition does, in this case, extend to him. It follows, I think, that an Order pursuant to section 251B(2)(g) could equally extend to him.

Exercise of the Court's Discretion – Submissions and Discussion

38. I turn then to the particular considerations relevant to whether I should or should not grant the Order sought in this case.

39. As I have described, ACAS' position was that the Order is necessary in order to ensure that the parties can fairly advance their respective cases on, and the Employment Tribunal fairly adjudicate, the unfair dismissal claim. Parliament, said Mr Waite, cannot have contemplated, or intended, that section 251B should inhibit or hamper an Employment Tribunal claim of this sort from being fairly fought, managed and adjudicated.

40. The Order sought would enable the information to be disclosed and used solely for the purposes of the Tribunal litigation. It would not require, or permit, the parties to disclose or use it for any other purpose. The Tribunal has all the necessary powers to enable it to safeguard the confidentiality and sensitivity of the information, and will be invited to exercise them. It will be able to control its use by exercising its Rule 50 powers, which (among other things) include a cross-reference to section 10A Employment Tribunals Act 1996 concerning the hearing of confidential evidence.

41. Although the discussion focused on the investigation report, ACAS invited me to make an Order generally embracing disclosure of any information within scope of section 251B, solely for the purposes of the Tribunal proceedings, so that, for example, any other document, or evidence given, referring to such information, would be covered.

42. Mr Woods, in the course of his evidence, skeleton argument and oral submissions, advanced a number of contentions in opposition.

43. First, he made a group of points about the internal investigation process. He criticised the approach taken by the investigators to their task, the hostile attitude which he says they displayed towards him and how he did his job, and a number of the conclusions which they reached in their report. He also said that he had been in some difficulty defending himself on some issues, because he had felt unable to comment on aspects of what had taken place within the collective conciliation process. ACAS should also not have appointed an outsider as one of the investigators. That, he contended, itself entailed a breach of section 251B. Finally, he said that, had a different approach been taken to the consideration of these allegations, they could, and would, have been cleared up very quickly; and this application would then never have come about.

44. An overarching theme of Mr Woods' submissions was that it is vital to appreciate the wider nature, context and history of collective industrial relations in this country, the role of ACAS in relation to it, and how ACAS in practice goes about carrying out its collective conciliation function.

45. Collective bargaining is generally not legally regulated. ACAS' role sits within that culture of free collective bargaining. While it has the power to offer to collectively conciliate, whether or not the parties choose to accept such an offer is up to them. Further, how ACAS goes about its task is a matter for the judgment of its representatives. In the nature of things, ACAS' work often relates to delicate and high-profile, often national, disputes. It often involves sensitive, discrete and confidential communications, the gradual building up of trust, and immense diplomacy. The whole enterprise is dependent on the parties having faith that they can communicate

confidentially with ACAS officials. For the contents of such communications to be made public would be a breach of faith, and highly damaging to ACAS' work.

46. Mr Woods sought to draw an analogy with the obligations of professionals such as solicitors, counsellors and clinicians to their clients. He spoke of communications in collective conciliations being "privileged". I did not understand him to mean that any particular recognised category of legal privilege attached to them, as such. But if an analogy might be drawn, it strikes me that the "without prejudice" privilege would be a closer one to the point that Mr Woods was seeking to make, than, say, legal professional privilege.

47. Mr Woods also drew attention to section 238B(8) of the 1992 Act, from which, he submitted, further important insight may be gained.

48. Section 238B is part of a group of complex provisions concerning the impact of participation in industrial action on the right to claim unfair dismissal, which have been amended several times over the decades. In their current form, these include provision that an employee who is dismissed for taking what is defined as protected industrial action may be treated as unfairly dismissed if one of certain alternative conditions apply. One of these concerns a scenario in which conciliation or mediation services have been used. In such a case, the Tribunal may have regard to certain particular aspects of how the collective parties conducted themselves in the conciliation or mediation process.

49. However, section 238B provides that, in such a case, the service provider's notes are not admissible in evidence, and they must themselves refuse to give evidence if it would involve a "damaging disclosure", which includes a disclosure of information about a position on the question of settlement of the dispute, adopted by one of the parties in the process, which has not previously been disclosed, and to which disclosure they have not consented.

50. Mr Woods submitted that this is a powerful and explicit expression of the importance attached by Parliament to the confidentiality of the communications between parties and ACAS officers during the course of collective conciliations.

51. Mr Waite's position, in response to each of these points, was as follows.

52. ACAS did not accept Mr Woods' criticisms of the internal process. It specifically did not accept that using someone from outside ACAS as an investigator entailed a breach of section 251B. In order to be able to deliver its services, ACAS needed to be able to manage, in appropriate fashion, issues that might arise concerning the alleged conduct of any of its employees. In any event, Mr Woods' arguments about the handling of the internal process were not a matter for me, but for the Employment Tribunal.

53. As to the general policy approach, ACAS entirely agreed with Mr Woods about the importance of safeguarding communications that take place in the course of collective conciliations, in the expectation that they will remain confidential; and it agrees with him that maintaining confidence in the process is vital to how ACAS goes about its work. It agreed that this general approach underlies section 251B itself. That is why, said Mr Waite, ACAS proposed, if the Order sought were to be granted, to invite the

Tribunal to exercise its Rule 50 powers in an appropriate fashion in order to safeguard confidentiality, using one tool or another.

54. The information shared in the course of the collective conciliation process was not, said Mr Waite, privileged in any legal sense. But the importance to be attached to maintaining its confidentiality was common ground.

55. Mr Waite agreed that section 238B(8) is a clear expression of Parliament's approach to communications with collective conciliators in the specific context to which it applies. But it was not really relevant, he said, because it does not apply to the present context. Parliament had not made any similar provision in relation to any other type of unfair dismissal claim outside of those covered by the section 238 regime. It therefore, he said, did not undermine his general submission, that Parliament cannot have intended, by section 251B, to hamper the fair determination of an unfair dismissal claim of the present type.

56. My starting point is the clear steer that Parliament has given in the framing and content of section 251B. The default position is that information within scope of section 251B(1) shall not be disclosed. Parliament has made it a criminal offence to do so. This itself is a tangible expression of the importance it attaches to such information being kept confidential by ACAS, subject only to the exceptions provided. I agree with Mr Waite that evidence of it is not privileged in any strict legal sense; but the section is a clear expression of the importance of the policy considerations that both parties agreed apply. The court should plainly give proper weight to that general expression of Parliament's approach.

57. It seems to me that the court should also at least consider, and take into account, in a given case, whether either of the routes of sanction for a disclosure, offered by section 251B(1)(f) or (g), might be a practicable or appropriate option, and, if so, whether they have been considered or pursued. It should also have regard to whether, or to what extent, the policy considerations informing section 251B generally can be given effect by any other means, if the Order sought is made.

58. It is also, obviously, relevant to consider, in the given case, why the Order is being sought, what undesirable consequences may flow, if it is not made, and how serious they would be. In this case, it does appear to me that Mr Woods would potentially be appreciably hampered in advancing part of the case he wishes to advance before the Tribunal, and the Tribunal would be potentially hampered in fairly adjudicating that case.

59. I take into account, of course, that Mr Woods opposed this application. Yet he recognised that he would be liable to be disadvantaged were the Order not made. I was therefore faced with an application to enable evidence to be put before the Tribunal on which the applying party does not seek itself to rely (because ACAS' case is that the collective conciliation allegations and/or the investigation report's approach to them were simply irrelevant to the decision to dismiss) and which was opposed by the party who contended that such evidence *would* be relevant to the case that *he* wishes to advance.

60. It would be tempting, for that reason, to simply decline to make the Order. But I do not think that would be the right course, for the following reasons.

61. First, Mr Woods suggested in argument that, if I refused the Order, it might be inferred that this was because I considered that ACAS had acted wrongly in its approach to the internal investigation process, with respect to the impact of section 251B, which might, yet, offer him some advantage before the Tribunal. As I have said, however, it is neither necessary, nor appropriate, for me to express a view on the various issues raised about the fairness or not of the internal process. They will be for consideration by the Tribunal. I am also concerned not with whether this application would have been needed, had things gone differently; but with whether it is needed, given what in fact occurred. This is not, therefore, a good reason to decline this application.

62. Secondly, I agree with Mr Waite, that, as long as the way that the claim, at least, is advanced in the Employment Tribunal means that this material is evidence which is *potentially* relevant to the issues, then it ought, in principle, to be made available to the Tribunal, so that *it* can properly give further consideration to the extent to which it may be relevant, as and when those issues have been clarified.

63. Section 251B itself gives no specific guidance to the court as to any other circumstances which should or should not be considered as relevant (or irrelevant), when asked to make an Order under section 251B(1)(e). In terms of express provision, the section leaves the exercise of that discretion at large.

64. Does section 238B(8) offer any further insight in this case? I think that, in a general sense, it reinforces the picture of the particular importance that Parliament attaches to confidentiality of communications in the context of collective conciliations. But I also see force in Mr Waite's point that the particular statutory context for that provision is highly specific; and Parliament has not seen fit to apply the *specific* approach of that provision, to information disclosed in collective conciliations across the board.

65. More specifically, as I have explained, section 238B(8) is parasitic on a provision which marks out the impact of participation in industrial action on the right to claim unfair dismissal, in a certain type of case, by reference specifically to the approach taken by the collective parties to settlement by collective conciliation. In that very particular type of case, Parliament has then stipulated, however, the limits on the evidence which can be given.

66. The present case is not, however, one of an unusual type whether there is a peculiar issue as to whether Mr Woods has the right to claim unfair dismissal, as such. From the point of view of the Employment Tribunal this is, as it were, an ordinary, mainstream unfair dismissal claim.[2]

67. Further, section 251B only comes into play because of a particular constellation of facts in this case: the unfair dismissal claim has been brought against ACAS as the employer, *and* by an employee who was involved in collective conciliation work, *and* the conduct issues raised included matters related to his collective conciliation work. I think it fair to assume that Parliament did not have in mind such an unusual case when it introduced this section.

[2] Out of abundance of caution, I should say that I am assuming there is no jurisdictional issue. I was not told of any. If there is, it would be for the Tribunal to decide it of course; and it would not be relevant to my decision.

68. In most unfair dismissal claims (outside of those where the group of sections of which section 238B is a part are in play) the involvement of ACAS will have been solely by way of individual early conciliation and/or voluntary individual conciliation. Keeping what went on in such processes firmly off limits will not impact on the adjudication of the fairness of the dismissal. I agree with Mr Waite that a different approach is appropriate where, as here, withholding the evidence entirely from the Tribunal is liable to affect the parties' ability fairly to present, and the Tribunal's ability fairly to decide, the substantive claim.

69. Nevertheless, as I have stated, consideration needs to be given to whether an alternative route safeguarding the confidentiality of the information can or should be taken, obviating the need for any court Order, and to how, or how effectively, it might yet be safeguarded if the Order sought is made.

70. As to that, Mr Woods referred to section 251B(2)(g), which provides an exception from the prohibition in section 251B(1) in cases where the disclosure is made with the consent of each relevant person to whom the information relates. ACAS, he submitted, could approach the individuals concerned for consent; but it was safe to assume that they would not grant it. This itself pointed against the court making the Order sought.

71. However, Mr Waite submitted that this was neither a practical nor a principled solution. Not only were a number of individuals involved, but the information also related to organisations, which, if approached, would need to share it with relevant individuals to decide whether to grant consent. Further, none of them could be approached without sharing with them, information about the disciplinary process which, at this stage of the litigation, remains confidential.

72. Further, it was wrong in principle that a third party should have a veto over whether information that was relevant to the adjudication of a Tribunal dispute, is shared with the Tribunal. Of course, account should be taken of the third party interests, that they had not been heard, and the assumption that they would want confidential information to be safeguarded; but, once again, all of that could be taken into account by the Tribunal when considering whether, or how, to exercise its Rule 50 powers.

73. On this point I essentially agree with Mr Waite's submissions.

74. A different potential route to a resolution is offered by section 251B(1)(f). This exempts a disclosure made in a manner that ensures that no relevant person to whom the information relates can be identified. Accordingly, if the report, or any other relevant document, were to be redacted in a way that prevented individual identification, then the material in that redacted form could be disclosed to the Tribunal, without the need for any court Order to be made.

75. I raised with the parties whether this approach had been considered by them, and/or whether they might even like more time to consider it. However, after some discussion, I concluded that it was not a reason to put off determining this application. Nor does this aspect tip the scales against me granting the Order sought. As to the former, it became apparent to me that, though the parties might, if they applied their minds to the task, agree to a good number of redactions that could be made, they would not reach complete agreement. In particular, that was because, as noted, they disagreed about

whether the subject matter of one particular allegation fell within scope of section 251B(1).

76. Whilst I consider (and the parties agreed) that redactions might go a long way to ensuring that the individuals, unions or employers concerned could not be identified, Ms Johal submitted in evidence, in so many words, that it might not entirely do the job, because other features of the subject matter of the material might enable identification indirectly. The Tribunal might need to consider that.

77. More generally, I consider that the task of arriving at a specific solution can only be properly undertaken by the Tribunal. It will need to clarify what the issues are; then, in light of that, consider the material with the parties, and how much of it is truly relevant; and then work out what order or mixture of orders is appropriate to manage the issue. This is not a task that this court can attempt to perform. It must be carried out by the Tribunal, in the context of its ongoing management of the substantive litigation, which is proceeding before it.

78. I rather suspect that, once the issues have been clarified and confirmed, the respects in which the material relating to collective conciliations needs actually to be referred to at the hearing of the claim, will assume much more manageable proportions; and the Tribunal may well conclude that most, if not all, of the most sensitive material need not be presented or referred to at all. I am also inclined to think that, in relation to such material as remains relevant, redactions, of one sort or another, are likely to go a long way, if not the whole way, towards solving this problem. I therefore consider that the parties should turn their minds, and engage in dialogue, about the question of redactions, and come up with proposals, agreed so far as possible, for the Tribunal to consider. They have a common goal here; and it will smooth the Tribunal's path.

79. Mr Woods did express a concern about whether the Tribunal would in fact have the full range of tools that it might need. Specifically, section 10A of the 1996 Act provides that Rules of Procedure may make provision enabling Tribunals to sit in private to hear evidence of certain confidential kinds, set out at (a), (b) and (c). Sub-paragraph (c) applies to information which would "cause substantial injury to any undertaking" of the witness or in which they work, *other than* for reasons to do with its effect on negotiations with respect to matters mentioned in section 178(2) of the 1992 Act – that is to say collective bargaining. So, he said, it would appear that the Tribunal would not be able to hear information of the very sort which this case concerns, confidentially.

80. However, I drew the parties' attention to section 181 of the 1992 Act, which imposes a duty on employers which recognise independent unions to disclose certain kinds of information *for the purposes of collective bargaining*, subject to qualifications in section 182, including where such disclosure would cause substantial injury to the undertaking, for reasons other than its effect on collective bargaining. I consider, in light of the closely similar language, that the qualification in section 10A(c) was intended to dovetail with *those* provisions, relating to *that* information. I do not think that it refers to the different kind of information with which this case is concerned. Rather, section 10A(b) applies to it: information communicated or received in confidence. In any event, the Tribunal may not need to resort to hearing evidence in private.

81. The possibility was raised before me, that there might be witnesses (other than Mr Woods and ACAS witnesses' involved in the disciplinary process) who might wish to make some reference to this material. As to that, what further disclosure of this information is permitted, and in what form (in particular, whether or not redacted) and on what conditions, will, itself, be subject to the control of the Tribunal. No doubt, if asked to consider this, it will want to understand the gist of the issue on which it is said the witness could give relevant evidence, why they might need to refer to this information in order to do so, and whether they in fact need sight of it in unredacted form in order to do so.

82. In summary, having weighed up the relevant considerations, I have concluded that the Order sought should, in principle, be made. It will ensure that the fair prosecution and adjudication of the unfair dismissal claim is not hampered, by possibly relevant evidence being withheld from the Tribunal; and the Tribunal itself will be able to take appropriate steps to ensure that the material presented or referred to at trial is strictly confined to that which is relevant to the issues; and that confidentiality of any material relating to collective conciliations, to which some reference may need to be made, is duly safeguarded.

83. The task of deciding precisely how to do that, must fall to the Tribunal. I cannot undertake it for it. But I note the following summary points:

(1) The logical order of business should be, first, to clarify and confirm the precise issues; then to identify to what extent information within scope of section 251B might in fact be relevant, and need to be considered in order to fairly resolve those issues; then to consider what measures should be taken to enable that, whilst safeguarding its confidentiality.

(2) As in every case, in accordance with Rule 50(2), the Tribunal will be required to give full weight to the principle of open justice and the Convention right to freedom of expression. It should only derogate from those to the extent necessary to the purpose.

(3) The Tribunal should, however, in this case, also give proper weight to the expression by Parliament of the importance to be attached to maintaining confidentiality of communications with ACAS by parties in a collective conciliation process, embodied in section 251B. Although it is not directly in point, section 238(8) is also a clear expression of the importance which Parliament attaches to this. Due account should also be taken of the fact that the third parties concerned have not been heard, or consented.

(4) There is, therefore, in this case, an important interest to be protected, which may properly necessitate some derogation from the principle of open justice; but the Tribunal should, as always, seek to achieve this in the way that involves the least degree of derogation that is necessary to the purpose.

84. As to the form of the Order, Mr Waite had, at different points, prepared three alternative drafts, and there was some discussion of these at the hearing, against the contingency that I might decide some sort of Order should be made. I have made an Order in terms that borrows from Mr Waite's drafts, and reflects the fact that it is intended to permit,

by requiring, the disclosure of the investigation report, while enabling the Tribunal to manage matters going forward.

85. I note that Mr Waite confirmed that ACAS does not seek its costs.