IN THE HIGH COURT OF JUSTICE
ROYAL COURTS OF JUSTICE
Queen's Bench Division
Neutral Citation Number: [2021] EWHC 3502 (QB)

QB-2021-003756

17 December 2021

Before

MR JUSTICE LINDEN
BETWEEN:

RED BULL TECHNOLOGY LIMITED
Claimant

-v-

DAN FALLOWS
Defendant

SIMON DEVONSHIRE QC AND MICHAEL WHITE (Instructed by **Macfarlanes LLP**) appeared on behalf of the Claimant

JAMES LADDIE QC (Instructed by **Wallace LLP)** appeared on behalf of the Defendant

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APPROVED JUDGMENT

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(Official Shorthand Writers to the Court)

MR JUSTICE LINDEN:

Introduction

1. There are two applications before the Court:

    a. The first in time is an application by the defendant for specific disclosure, made on 6 December 2021. Part of that application is no longer live because the disclosure sought has been, or is in the course of being, provided. The second part of the application has been narrowed significantly and I will return to the details of what is now sought.

    b. The second application was made by the claimant on 13 December 2021 and it is to amend the Particulars of Claim. This application is not opposed, although there is disagreement as to the consequential directions which I should make.

Relevant background

2. The defendant was employed by the claimant from 6 February 2006 and, on the claimant's case, he remains its employee. At all material times he was employed as "Chief Engineer-Aerodynamics". In this capacity, he had overall responsibility for the aerodynamic development of Red Bull racing cars and was responsible directly or indirectly for a team of around a hundred aerodynamics professionals. His case is that throughout his employment he worked on the Formula 1 side of the claimant's business.

3. The defendant's most recent contract, which is dated 7 October 2020, provides that he will serve as "Chief Engineer-Aerodynamics, reporting to Technical Director or in such other equivalent role as the Company considers appropriate from time to time". It also contains other clauses which, the claimant says, entitle it to alter his duties. The Contract also provides that it is terminable by the defendant on 6 months' notice but that such notice may not be given before 31 December 2022. It is therefore, in effect,

for a minimum term of approximately 2 years and 9 months which will expire no earlier than 30 June 2023.

4. On or about 10 May 2021, the defendant informed the claimant that he had been offered a position as a Technical Director at Aston Martin and there were various discussions thereafter, the detail of which it is unnecessary to relate for the purposes of the issues which I have to decide. Suffice it to say that the defendant's position was that he wished to leave and take up his new post before 30 June 2023 and the claimant's position was that it would not permit him to do so.

5. In correspondence from his solicitors, beginning on 5 July 2021, it was asserted on the defendant's behalf that the minimum term of his contract is unenforceable because it is in restraint of trade. The letter of 5 July 2021 also purported to give 6 months' notice of termination of the Contract.

6. On 28 July 2021, the claimant notified the defendant of changes in his duties which, in summary, were that with effect from 2 August 2021 he would work principally on the development of the Red Bull racing road car within Red Bull Advanced Technologies, reporting to a Mr Adrian Newey, the claimant's Chief Technical Officer. He would therefore cease to be working on the Formula 1 side of the business unless his assistance was specifically required.

7. The defendant protested about these changes to his duties and about the fact that the claimant was seeking to hold him to the minimum term of the Contract, including in a grievance which he raised by letter dated 2 August 2021. A hearing of that grievance was held on 24 August 2021 and, by letter dated 10 September 2021, the grievance was rejected. There was no appeal from that decision.

8. On 28 September 2021, however, the defendant purported to resign with immediate effect, alleging that he had been constructively dismissed and that the minimum term was, in any event, unenforceable as it was in restraint of trade. Letters from the claimant and its solicitors dated 29 September 2021 then rejected the claimant's arguments that he was constructively dismissed, and his purported resignation, and

stated that he was required to comply with the terms of his Contract which, it was contended, remained in effect and enforceable.

9. On 6 October 2021, the claimant issued proceedings in which it sought a declaration that the defendant was not constructively dismissed and that the contract remained and remains in full force and effect, together with such further or consequential relief as the Court thinks fit. The Particulars of Claim are dated 12 October 2021.

10. On 15 October 2021, Mrs Justice Stacey directed a speedy trial, upon the defendant undertaking not to start work at Aston Martin pending the resolution of the issues at trial. That trial is listed on 25 to 28 January 2022, with one day set aside for pre-reading on 24 January 2022.

11. The defendant then filed a Defence and Counterclaim dated 27 October 2021, in which he pleaded that he had been constructively dismissed and, in the alternative, that the minimum term of the Contract was unenforceable because it was in restraint of trade or "quasi-restraint of trade" and because it is more restrictive than is reasonably necessary to protect the claimant's legitimate interests.

12. The defendant's constructive dismissal case is based on alleged breaches of, firstly, the implied duty of mutual trust and confidence, and then the following implied terms of the Contract which are pleaded at paragraph 9 of the Defence and Counterclaim:

> "a. The duty to exercise any discretion in good faith, for a proper purpose rationally, without perversity or caprice, taking into account only relevant matters, and not taking into account irrelevant matters.
>
> b. The duty to conduct a proper grievance process."

13. I will refer to the term pleaded at paragraph 9(a) as the "Braganza term", and Mr Laddie QC confirmed in oral submissions that it is indeed a pleading of that term. I note that, essentially, this term requires that the exercise by the claimant of its contractual discretion must be in good faith and for proper purposes, and in a way which is rational, in terms of both reasoning and outcome.

14. The breaches of contract alleged by the defendant include complaints about the way in which the internal announcement of his proposed move to Aston Martin and the change in his duties was made, as well as about the change in his duties itself and the handling of his grievance. One of the points pleaded seeks to make a comparison between the treatment of the defendant and the treatment of other employees. At paragraph 30(d) of the Defence and Counterclaim, the defendant pleads that during the course of the grievance hearing on 24 August 2021:

> "d. Mr Fallows stated that in other cases where RBTL employees with minimum terms had sought to leave their employment before the expiry of those minimum terms, RBTL had consulted with those employees and treated them fairly. Mr Fallows was referring to cases where employees with minimum terms had been permitted to leave to join competitors prior to the expiry of their minimum term and/or had been retained in their existing roles throughout the remainder of their employment. Indeed, since 2013, Mr Fallows had had a number of discussions with both Mr Horner and, more often, Ms Poole about employee retention. He was repeatedly told that RBTL had received legal advice to the effect that it would struggle to keep an employee away from a competitor for more than six months should they decide to leave prior to the expiry of their minimum terms."

15. At paragraph 42(i), the defendant pleads that one of the particulars of the repudiatory breach of contract alleged by him is:

> "i. The inconsistent treatment of Mr Fallows compared to other employees as pleaded at paragraph 30(d) above."

16. It is notable that the defendant's pleaded case falls short of any contention that there is an invariable practice on the part of the claimant. No doubt this is because the evidence shows that there is no invariable practice. Nor does the defendant's pleaded case identify any particular employee or employees as comparators. There is no pleaded limitation in terms of when the comparator employees were employed, in which department or in what roles. The class of employee referred to appears to be any person employed under a contract with a minimum term of whatever length, and there

is no attempt to plead that the circumstances of any employee which the defendant may have had in mind were the same, as or at least comparable to, those of the defendant. The more favourable treatment alleged appears to be that the employee was either released from their contract or continued to carry out their existing duties during the remainder of the contract.

17. I also note that, apparently contrary to the thrust of the defendant's case on this point, at paragraph 36(e), the defendant complains that the work which he was asked to do on 17 September 2021, "was the same work that had been assigned to a colleague, Peter Machin, in approximately 2017, when he was serving his notice period, albeit that work was on a different project". I understand that Mr Machin was formerly the claimant's Chief Aerodynamicist and that he gave notice in January 2017. The defendant's own case is that he was redeployed during his notice period.

18. A Reply and Defence to Counterclaim was filed on 8 November 2021. In it, the claimant contests all of the bases on which the defendant asserts that it acted in breach of contract, and the claimant maintains its position that there was no constructive dismissal and that the Contract is enforceable and remains in force. For present purposes I note that in addressing the defendant's case based on restraint of trade, the claimant pleads, at paragraph 3.2, that he:

> "... is engaged by RBTL under a contract which provides for a 26 month minimum term, and a 6 month notice period. Such minimum terms and notice periods are commonplace in Formula ('F1'). They provide necessary protection inter alia for RBTL's confidential and sensitive information. Mr Fallows' considered view, when he agreed to that contract, was that the minimum term and notice were 'fine overall', as set out below." (emphasis added)

19. At paragraphs 5.1 and 5.2 the claimant pleads that:

> "5.1 Express minimum terms and notice periods are commonplace in employment contracts generally and in the motor racing industry in particular."

5.2 The restraint of trade doctrine does not apply to such minimum terms and notice periods, or to negative obligations during the currency of an employment contract."

20. The following is pleaded at paragraph 8:

"Without prejudice to that position, and as to paragraphs 47 to 49:

8.1 The minimum term goes no further than is reasonably necessary to protect RBTL's legitimate interests, including its confidential information and workforce stability."

8.2 It is precisely for that reason that Mr Fallows has required that other aerodynamicists in his division should sign contracts with minimum terms and notice."

21. In relation to paragraph 30(d) of the Defence and Counterclaim, the claimant pleads at paragraph 19.17(a):

"Mr Fallows does not identify the alleged 'employees with minimum terms referred to. RBTL cannot sensibly respond to such a case. In any event, no employee in a position comparable to Mr Fallows has ever been released prior to the end of their contractual term and/or remained in an F1 role for the remainder of their employment." (emphasis added)

22. Paragraph 42 of the defence and counterclaim is then denied at paragraph 20 of the Reply.

23. On 12 November 2021, the defendant then provided a non-exhaustive list of comparators for the purposes of paragraph 30(d) in correspondence. At this stage, he named Mr Robinson and Mr Sordo (both Team Leaders in aerodynamics), Mr Alessi (Design, Production and Operations Manager), and Mr Prodromou (the defendant's predecessor). Mr Robinson and Mr Alessi resigned to join Aston Martin in or about January 2021.

24. In the materials before the court, and indeed in Mr Laddie's oral submissions, reference has also been made to a Mr Sykes, whose contract dated December 2014 was shown to me by Mr Laddie, for reasons that I will come back to.

25. Standard disclosure took place on 30 November 2021. Witness statements are due to be exchanged on 23 December 2021 and any evidence in reply is due to be served on 7 January 2021.

26. I understand that the disclosure in relation to the defendant's four named comparators shows that:

    a. In the case of Mr Robinson, he indicated an intention to leave in January 2021. His contract does not permit him to give notice until 31 December 2021, and then he is required to give six months' notice, so his minimum term expires on 30 June 2022. I understand that he has been held to his contract and was, indeed, moved to Red Bull Advanced Technologies.

    b. Mr Alessi gave notice in December 2020 and was required to work his 6 month notice period. He was also moved to Red Bull Alternative Technologies during his notice period.

    c. Mr Sordo informed the claimant that he intended to move to McLaren in or about February 2016. He apparently spent 8 months on garden leave and was then released 10 weeks before the end of his minimum term and without having to serve notice. Ms Horne, the partner acting for the claimant's, evidence, is that this was part of a broader commercial deal with McLaren which also involved employees moving from McLaren to Red Bull.

    d. In the case of Mr Prodromou, it is said by the claimant that he gave notice in December 2013 and was placed on garden leave in April 2014. Ms Horne's witness statement states that this was until December 2014, but there is evidence that he had joined McLaren by 15 September 2014.

27. The disclosure also suggests that the defendant himself was a supporter of moving Mr Alessi and Mr Robinson to Advanced Technologies or, at the very least, was aware of the practice of moving people out of Formula 1 where they were intending to leave to join a rival Formula 1 team. For example, there is an email dated 8 February 2020, in which the defendant noted that Mr Alessi had signed for Aston Martin the day before and said: "I'd like him out of the department as soon as possible, if that's possible.".

28. Pausing there, it was not clear where these materials left either parties' pleaded cases given that they are not necessarily consistent with the thrust of the defendant's case and they suggest that paragraph 19.17(a) of the Reply and Defence to Counterclaim may not be correct assuming that the four individuals are comparable employees which, I accept, is open to debate. The overall impression given is that the claimant deals with each situation on a case-by-case basis.

<u>The application for specific disclosure.</u>

29. As I have noted, this application was made by the defendant on 6 December 2021. It had three main limbs. The first sought orders for searches in relation to the comparator issues and the second for further electronic searches in relation to a Mr Christian Horner. No orders are now required in respect of the second part of the application, save perhaps in relation to costs. The third limb of the application sought disclosure of the number of "hits" which had resulted from certain electronic searches undertaken by the claimant. Mr Laddie confirmed in his oral submissions that that part of the application is not pursued.

30. As far as the application in respect of comparators is concerned, on 15 December 2021 that application was narrowed, so that the draft order now provides:

> "1. By 4 pm on [22 December 2021], the Claimant shall (i) carry out a reasonable search to locate all documents in the classes/repositories listed in the Schedule annexed to this Order and make and serve on the Defendant a list of the documents found as a result of such search which fall within the scope of standard disclosure, accompanied by a Supplemental Disclosure Statement;

and (ii) provide a copy of those documents to the Defendant by way of inspection."

31. The Schedule referred to provides that the searches would cover the date range 1 January 2013 to 6 October 2021:

> "1.2 in respect of the following employees ("the Relevant Employees")
>
> 1.2.1 Mark Robinson, Andrew Alessi, Peter Prodromou, Stefano Sordo or Peter Machin; and
>
> 1.2.2 employees at the level of Group Leader or above, across the Vehicle Design, Vehicle Dynamics and Simulation, Technology and Analysis Tools, and Aerodynamics departments of the Claimant's F1 business, who have left the Claimant's employment or given notice to leave the Claimant's employment during the date range, in each case to join another F1 team."

32. The documents to be searched for would be the following:

> "1.3 for documents relating to:
>
> 1.3.1 job title;
>
> 1.3.2 length of any contractual minimum term (with relevant dates);
>
> 1.3.3 contractual notice period (with relevant dates);
>
> 1.3.4 whether, following notice of resignation (or notice of intention to resign), the Relevant Employee was required to remain in the Claimant's employment for (a) the minimum term; and/or (b) notice period (with relevant dates);
>
> 1.3.5 if not, details of the shorter period(s) applied (with relevant dates)."

33. I note that the defendant therefore no longer pursues his original application for searches for documents which would show whether a given employee was placed on garden leave, and/or redeployed to a different role after having notified the claimant of his or her departure. The materials on which the application is now focused are materials which go to the terms of the contracts of the relevant employees or categories of employee, and the question whether or not they were placed on garden leave and/or released from the minimum term of that contract, insofar as there was a minimum term.

34. Mr Laddie accepted, in answer to a question from me, that the use of "minimum terms" is commonplace in the Formula 1 sector, including in the business of the claimant and Aston Martin but, he said, not necessarily minimum terms of any particular length or, indeed, of the length of the claimant's minimum term.

35. Mr Laddie submitted that, on the claimant's own case, the question of the use of minimum terms more generally goes to the issue of whether the minimum term in the defendant's contract is enforceable and it therefore requires disclosure of documentation which bears on this point. Although the defendant himself does not plead any case in this regard, Mr Laddie also submits that the court will need to test the argument that the minimum term of the defendant's contract is necessary to protect the claimant's confidential information by looking at the contracts of other employees.

36. He submitted that comparisons of this nature would be relevant to the question whether, as contended by the claimant, the purpose of the minimum term in the present case is to protect confidential information. He foreshadowed the sort of argument that he would wish to pursue by saying that the materials produced on disclosure, thus far, indicate that there are employees who were and are junior to the defendant, and who are working under contracts with minimum terms. But in those cases, or some of those cases, the junior employees have longer minimum terms than those of the claimant. Mr Laddie indicated that his proposed argument, and one of his lines of cross-examination, would be that the court should take this point into account in deciding whether the purpose of the minimum term in the claimant's case was the protection of confidential information, and should consider a submission that it cannot be, because more junior employees are likely to have less access to confidential information and, therefore, one would expect them to be bound by shorter minimum

terms. And it was in this connection that Mr Laddie took me to Mr Sykes's contract which, as I have said, was entered into in 2014, and which appears to have been for a minimum term of three-and-a-half years. It is common ground that Mr Sykes was junior to the claimant.

37. Secondly, in relation to the restraint of trade issues, Mr Laddie submitted that the question of the claimant's practice in relation to releasing employees before the expiry of their minimum terms in circumstances where they wish to leave to work for a competitor, is relevant to the reasonableness of the minimum term in the defendant's case, assuming that it seeks to protect the claimant's legitimate interests. In this connection, it appeared that his argument would be that if, on a regular basis, comparable employees were released from their minimum terms, this would tend to suggest that the defendant's minimum term was unnecessarily lengthy and, indeed, longer than was reasonably necessary to protect the claimant's legitimate interests.

38. Mr Laddie also submits that the question whether there was a disparity between the treatment of the defendant when he sought to resign, and the treatment of other comparable employees, is directly relevant to the breach of the implied duties of mutual trust and confidence and the Braganza term on which he relies. He submits, therefore, that the disclosure which he seeks to be ordered is clearly relevant and is, indeed, sufficiently relevant for it to be necessary for the fair disposal of the issues in the case that it be disclosed.

39. In relation to the overriding objective more generally, Mr Laddie points out that a great deal is at stake for the defendant in terms of his career and his ability to avoid being deskilled through not being permitted to work in his specialised field. He contends that the Court cannot allow the fact that the trial has been expedited to undermine the fairness of the proceedings and, indeed, that this fact places a greater onus on the parties to be transparent and co-operative in preparing for a trial, whereas he complains that this has not been the approach of the claimant. He also points out that the claimant is very well resourced and is therefore, he submits, well capable of conducting the requisite searches. He says, for example, that the materials indicate that in the order of 15 people were working on the disclosure exercise for the claimant, that the total number of documents reviewed (15,000) is less than budgeted for (20,000). And he

argues by reference to passages in Ms Horne's evidence and, indeed, the claimant's pleaded case, that the claimant must have the relevant information readily available, given that it felt able to plead paragraph 19.17(a) in the terms in which it is pleaded and given, for example, that there is reference in Ms Horne's witness statement to 23 employees leaving the claimant to go to Aston Martin in the last 5 years.

40. Mr Laddie adds that there is also concern on the defendant's side in relation to the disclosure which has thus far been given on this point in relation to Mr Prodromou, who was the defendant's immediate predecessor in role. Ms Horne has emphatically denied that he was released early. Paragraph 59(c) of her witness statement says that he was put on garden leave in April 2014 and left in December 2014. This cannot be the case, submits Mr Laddie because McLaren publicly announced Mr Prodromou's arrival on 15 September 2014. Furthermore, says Mr Laddie, the claimant has not disclosed Mr Prodromou's contract.

<u>The claimant's position.</u>

41. The claimant's position in relation to the defendant's application is that:

    a. The comparators named by the defendant on 12 November 2021 have been covered in the standard disclosure provided thus far. If proportionate additional searches are proposed by the defendant, the claimant is willing to consider them.

    b. The claimant is willing to carry out a reasonable search for documents relating to Mr Sykes, and would have done so if he had been named in the 12 November 2021 list.

    c. Insofar as the defendant says that he was treated differently in 2013, the claimant is willing to carry out a reasonable search for documents going to this point.

42. In the case of the further searches in respect of Mr Sykes and the defendant that the claimant offers to carry out, they would be in accordance with the searches described at paragraph 61 of Ms Horne's witness statement dated 14 December 2021.

43. Further than this, the claimant is not prepared to go.

44. Mr Devonshire QC reminds me, by reference to what I said in *Santander UK plc v Bharaj* [2021] ICR 580 at paragraphs 23 to 26, that the onus is on the applicant for specific disclosure to show that the order sought is in accordance with the overriding objective. This entails showing that any documents sought are likely to support or adversely affect the case of one party or the other, in the sense that they 'may well' assist one party or the other. Second, it must be shown that the disclosure is necessary in order to dispose fairly of the issues in the claim or to save costs and thirdly, disclosure must be in accordance with the overriding objective when any other relevant considerations, such as confidentiality, are taken into account.

45. Next, Mr Devonshire submits that the categories of documents in respect of which the application is resisted are, at best, of marginal relevance. He points out that the defendant's constructive dismissal argument is based on the exercise of a contractual discretion which is said to have been irrational and/or in breach of the implied obligation and mutual trust and confidence. Whilst differential treatment of an employee in materially the same circumstances for no rational reason might found an arguable claim based on breach of the terms relied on by the defendant, there is no pleaded case put forward by him of any specific example of this. Subject to one case, which is disputed, the disclosure thus far has not borne his general case out either, and the exchanges between the parties do not suggest that there has been a case of irrationally different treatment of the defendant. That one case is that of Mr Prodromou, where there is material which suggests that having been placed on garden leave, he was allowed to leave three months before the end of his contract. But this case tends to illustrate the claimant's overall point. That was in 2014, whereas the defendant seeks to leave 8 years later. Mr Prodromou was apparently allowed to leave three months early, whereas the defendant seeks to leave at least 18 months early. There may have been reasons why the claimant was prepared to agree this in Mr Prodromou's case which do not apply in the defendant's case, and vice versa. The

circumstances are very unlikely to have been identical and the documents do not tell the whole story, one way or the other. So the documents disclosed thus far merely open a line of inquiry.

46. As far as the restraint trade issues are concerned, Mr Devonshire's argument is similar. He points out that this case is not concerned with the enforcement of post-termination restrictive covenants. He argues by reference, for example, to *Sunrise Brokers v Rodgers* [2015] ICR 272 at paragraph 41, that the doctrine of restraint of trade does not apply directly where what is sought to be enforced is a subsisting contract of employment, although he accepts that restraint of trade principles would arguably come into play in relation to the court's exercise of its discretion, if the court were asked to order injunctive relief. He says, however, that this is not a case in which injunctive relief is sought, at least at this stage. What the claimant seeks, he says, is that the defendant's contract is declared to be in effect and enforceable.

47. But even if this is wrong, Mr Devonshire submits that comparator evidence would be irrelevant or, at best, extremely tangential to the questions which the court has to decide in the present case. He submits that, even assuming Mr Laddie's argument that the doctrine of restraint of trade applies to minimum term contracts is correct, the analogy with restraint of trade principles would require the court to focus, if not exclusively, virtually exclusively on the contractual terms of the particular employee, applied to the circumstances of that particular employee, rather than to focus on the contractual terms of other employees and how they were applied in the circumstances of the departure of those employees. He adds that even if it might be relevant in this context to consider the contractual terms of other employees, and how they were applied, these considerations would be of no relevance unless those employees were in materially the same circumstances as the defendant, and even then, that comparison would still be tangential to the central questions which the court has to decide. He adds that there are all sorts of reasons why the claimant might take a different view about a different employee in different circumstances.

48. Mr Devonshire submits that there is therefore no warrant, based on relevance and necessity, for the wild goose chase which Mr Laddie advocates. Moreover, there are wider considerations which militate against the order sought, namely:

a. The likely lack of probative value of the documents sought, including the extent to which the documents themselves would actually shed light on what happened in a given case and why.

b. The likelihood that the documents sought under the order applied for by the defendant would not answer all of the questions that arose in the case of any particular comparator and would, as a result, require further disclosure and, indeed, evidence dealing with the circumstances of that particular comparator.

c. Following on from (b), the undesirability of trials within trials. He points to the danger that the parties will be distracted from the central issues in the case which relate to the defendant's particular contract and the claimant's treatment of him in his particular circumstances.

d. The risk of compromising the trial timetable, given the very real practical difficulties in obtaining the documents sought. Mr Devonshire draws attention to Ms Horne's evidence that the claimant does not routinely maintain human resources records over long periods. Typically, though not invariably, only limited data are retained for data protection reasons. The claimant, the evidence suggests, updated its records around 4 years ago and the records which pre-date that period are in less accessible format. In relation to emails, the evidence suggests that the claimant moved to a new email system in around 2014 and the retrieval of emails prior to 2015 will therefore depend on the archiving and data storage habits of individual employees.

Decision

49. I prefer Mr Devonshire's submissions.

50. The first point is that the onus is on the applicant for specific disclosure to persuade the court to make the order sought. Importantly, in relation to the question of relevance and necessity, immediately before the lunchtime adjournment I expressed a concern to Mr Devonshire that the effect of paragraph 19.17(a) of the Reply and Defence to Counterclaim appeared to be that the claimant was advancing a positive case that its

invariable practice was to hold employees to their minimum terms. I pointed out to him that this might, subject to his submissions, make it more difficult to accept an argument that the claimant should not carry out any further searches in relation to this issue. I invited him to take instructions given that, as it appeared to me, the claimant's true case is that it approaches these issues on a case-by-case basis. After the short adjournment, Mr Devonshire had taken instructions and he confirmed to me that he applied for the third sentence in paragraph 19.17(a) to be deleted by amendment. I granted that application.

51. It followed from this that the only positive case that needed to be considered in relation to comparisons with the contracts of other employees - at least on the claimant's side - is the reference to the use of minimum terms being commonplace within the sector, which proposition is not is not in dispute, as I have noted. Mr Devonshire also confirmed that the claimant's pleaded case goes no further than this: it is not being said, for example, that minimum terms of any particular length are commonplace.

52. What follows from this is that the focus must therefore be on the defendant's pleaded case in considering the justification for the application for disclosure albeit, of course, I also take into account the claimant's pleading and the proposed lines of argument which Mr Laddie indicated he proposed to deploy. In relation to the defendant's pleaded case, the case in relation to comparators is very thin in terms of detail, as I have pointed out. I have also pointed out that the defendant has since named four comparators but I note that he has not pleaded any particular case in relation to those comparators, and the documents which have been disclosed by the claimant do not necessarily support any case which he might wish to plead.

53. I make allowances, as Mr Laddie urged me to, for the fact that the defendant does not necessarily know who had what minimum terms amongst his colleagues, and who was released from any minimum term that they may have had. But it does appear from the materials before the court that the defendant must have some awareness of who left the claimant in recent years, not least in his own team but also because it appears that there was a habit in this particular sector of making public announcements, at least in relation to significant departures of senior employees. This consideration does place a

question mark over the breadth of the pool of employees which Mr Laddie argues should be the subject of the searches advocated.

54. I am also very doubtful about the relevance of any comparison with other employees, as a matter of law, for the purposes of the restraint of trade arguments in this case, essentially for the reasons advanced by Mr Devonshire, although I do not propose to decide the application on the basis that they are irrelevant as a matter of law. Rather, I will assume that comparator materials are potentially relevant but, of course, relevance is a matter of degree. Moreover, where the arguments advanced are on the basis of a comparison, whether that be in the context of the restraint of trade issues or the constructive dismissal argument, they would only, in my view, have any real cogency if the circumstances of the comparator were materially the same as those of the defendant.

55. Now, as far as that is concerned, I will return to the terms of the order in a moment, to explain why I consider that it is far too wide to have any prospect of being granted. But looking ahead to the trial, as I have indicated, the central focus of the court will be on the circumstances of the defendant and his contractual terms. As far as any comparison is sought to be made, I would need to be persuaded that it was likely that the searches advocated on behalf of the defendant would be proportionate and, as part of the overall assessment of proportionality, that they would be likely to produce documents which show employees in materially the same circumstances as the defendant being treated differently for no rational reason. Such documents might then be relied on to say that there was a disparity in treatment as between the defendant's case and the case of the comparator.

56. When I consider that likelihood, I bear in mind that much will depend on what minimum term the particular individual had. Much will depend on the access that the particular individual had to confidential information and much will depend on how much time they were seeking to be released from, in terms of the time left to be served under their existing contract. Much would also depend on when the issue of their departure arose. That would have to be looked at in the context of a sector which is constantly developing in terms of changes in the rules of competition and in terms of technology and, for example, in terms of which teams are regarded as direct rivals to

other teams. The assessment would also need to look at what job the particular individual might be proposing to do for the rival as compared with their job for the claimant. And it would also need to take into account, potentially, whether there was a negotiated departure and whether there were any wider commercial or contextual features that meant that a rational distinction could be made between the defendant's case and the case of the comparator employee. In that connection I bear in mind, for example, the deal which apparently was reached in relation to Mr Sordo, whereby McLaren permitted certain Red Bull employees to join McLaren and vice versa. Mr Devonshire referred to this, amusingly, as an exchange of hostages.

57. In the light of these considerations, on the materials available there is no realistic basis, in my judgment, for any contention that the searches advocated by Mr Laddie are likely to produce documents which prove a case that is materially the same as the defendant's case and which therefore shed significant light on what, ultimately, is not the central issue in the case anyway.

58. Turning to Mr Laddie's argument that it might be of interest to consider the position of more junior employees and for the court to take into account that some of them have longer minimum terms, I do not agree that this is likely to shed any material light on the issues which the court is required to decide. There may be all sorts of reasons why a given more junior employee has a different contractual term or it might be that their term was, in fact, too long and unenforceable. It might be that the term was too short in the defendant's case. These sorts of arguments ultimately are going to distract the parties and the court from the main issues in the case.

59. Similar considerations apply, in my view, in relation to any comparison with equivalent or more senior employees. So I accept Mr Devonshire's submission in relation to the restraint of trade issues that these sorts of materials, if they are relevant at all, would be of marginal relevance at best. Still less do I accept Mr Laddie's submission in relation to these issues that such materials are likely to be sufficiently relevant for it to be necessary for the exercise advocated through the draft order to be undertaken, and my view is essentially the same in relation to the constructive dismissal case, where any comparator, as I have indicated, would also need to be in materially the same circumstances as the defendant.

60. Turning to the terms of the draft order, they serve to confirm my view that the application is, at best, a fishing expedition. I note that the date range applied for was 1 January 2013 to 6 October 2021, a period of nine years. When I asked Mr Laddie why the period was so long, he indicated that that was because 1 January 2013 was the point at which the defendant took up his post as Chief Engineer-Aerodynamics. There was otherwise no "science" to the date range and nor could there be. He did not adopt suggestions from me as to how the application might be narrowed. In his reply, however, Mr Laddie indicated that he was now applying for a shorter date range to be ordered, namely a period of two years. He said that that was in the light of Mr Devonshire's withdrawal of paragraph 19.7(a) of the Reply and Defence to Counterclaim. I am bound to say that I am not at all convinced that there was any rational connection between Mr Laddie's change of position and the change in Mr Devonshire's pleaded case, but nothing turns on that for the purpose of deciding whether the application should be granted because the problems with it remain, albeit they are slightly reduced by the variation in the date range.

61. In relation to the cohort of "relevant employees" in respect of which documents are sought to be disclosed, these include employees (the Group Leaders) who are two rungs below the defendant in the chain of command rather than the cohort being limited to his peers or, at least, those one rung below and/or one rung above him. I was told by Mr Devonshire, and I accept, that the current number of employees who would fall within the category identified in the draft order is 39. There were attempts in submissions to calculate how many might have left in the original 9 year date range but they were ultimately based on speculation, both on the part of the court and, indeed, Mr Laddie. No number was suggested in relation to the narrower date range which Mr Laddie proposed. And, of course, the application is made whether or not individuals had the same, similar or different minimum terms to that of the defendant and regardless of how much time there was to run on their contracts if/when they were released.

62. So I do not accept that the documents sought are sufficiently relevant for it to be necessary for specific disclosure to be ordered. But, in exercising my discretion, I also take into account and accept that significant work would be required for little, if any, advantage in terms of illuminating the issues in the case. In other words, I accept

Mr Devonshire's submission that the likelihood is that nothing will be produced of any probative value. Moreover, that which is produced is very unlikely to tell the whole story. The strong likelihood is that there would need to be wider searches in order to ensure that a fuller picture was available and there would then need to be evidence about any case which was relied on by the defendant. This, in turn, is what gives rise to the risk of trials within trials and of distraction from the particular case of the defendant.

63. As I put to Mr Devonshire, the fact that the case has been expedited cannot be a reason for failing to conduct a fair trial in relation to what is an important case for both sides. I would therefore not be willing to refuse an order for specific disclosure which was necessary for the fair disposal of the issues between the parties merely because this would potentially affect the trial timetable. But I am entirely satisfied that the issues in this case can be fairly tried without the disclosure applied for.

64. So for all of these reasons, I refuse the defendant’s application.