

High Court allows late amendment to statement of case due to late disclosure (First Personnel Services v Halfords)

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Dispute Resolution analysis: Aidan Casey QC and Tom Poole, both of 3 Hare Court, London (instructed by Pinsent Masons LLP for the defendant), reflect on a recent decision which considered an application to amend consequent upon a failure to provide standard disclosure, and assess the practical implications of the case.

Original news

First Personnel Services Ltd v Halfords Ltd [2016] EWHC 2155 (Ch)

What was the background to the decision?

First Personnel Services (First Personnel) and Halfords had a long trading history which came to an end as a result of a re-tendering process carried out by Halfords in 2011 in relation to the provision of temporary workers. A number of employment agencies participated in the tender, including First Personnel as the incumbent provider of temporary workers to Halfords. Staffline Group Plc won the tender and as a result a number of temporary workers transferred from First Personnel to Staffline. It was First Personnel's case that this transfer (known as a 'temp-to-temp' transfer) triggered the payment of transfer fees by Halfords to it. First Personnel claimed in excess of £550,000 in transfer fees.

Halfords defended the claim on the basis that it had no liability to pay First Personnel any fees in relation to the temporary workers who transferred to Staffline. Halfords also counterclaimed in respect of overpayments that it claimed it had made to First Personnel as a result of First Personnel charging Halfords more than had been agreed/represented in respect of the temporary workers.

The trial of First Personnel's claim and Halfords' counterclaim was due to start on 6 June 2016. On 3 May 2016, First Personnel disclosed a significant amount of data from its payroll and invoicing system (known as Tempaid). On 25 May 2016, Halfords applied under CPR 17.1(2)(b) to amend its defence and counterclaim. Halfords contended that the need for the application and its timing was explained by the late disclosure of the Tempaid data. Halfords' application was heard on the first day of trial.

Following several days of argument, Mr Jeremy Cousins QC (sitting as a Deputy High Court Judge) granted Halfords permission to amend.

What was the basis for the decision on the breach of standard disclosure?

Part of First Personnel's objection to Halfords' application to amend was that the Tempaid data did not fall within the scope of standard disclosure. The judge rejected this argument on the basis that the Tempaid data, quite plainly, could support Halfords' case or adversely affect First Personnel's case as to whether there had been an unexplained discrepancy as to what a worker had been paid and what was charged to Halfords for that worker's services.

First Personnel's fall-back argument was that disclosure of the Tempaid data could have led to disproportionate costs. It relied on CPR 31.7(3):

'Where a party has not searched for a category or class of document on the grounds that to do so would be unreasonable, he must state this in his disclosure statement and identify the category or class of document'.

Although First Personnel accepted that it had not made such a statement, it argued that the judge should approach the issue of non-disclosure on the basis of whether an application for limiting disclosure had been made at an appropriate time the court would have been likely to accede to it. The judge proceeded on this basis and stated that he had no doubt at all that had such an application been made it would have been refused on the basis that the documents clearly fell within the scope of standard disclosure and had been used by First Personnel when preparing its own witness evidence. In the circumstances, the judge held First Personnel was in breach of its disclosure obligations 'in a significant respect'.

What was the significance of late disclosure on the court's decision to grant permission to amend Halfords' defence and counterclaim?

The judge held that his conclusion that the disclosure of the Tempaid data was late and constituted a breach of First Personnel's disclosure obligations, did not by itself operate as a licence to Halfords to seek to make major amendments to its pleadings. What had to be considered was the significance of the late disclosure for the purposes of Halfords' preparation of its case, and whether independently of the Tempaid data Halfords could and should have been able to identify the matters which it sought to introduce by amendment.

First Personnel identified many sources of information which it contended were an adequate alternative to the Tempaid data and were sources from which Halfords could have prepared its case. The judge rejected this argument and found that the shortfall in information that arose from the failure to effect proper and timely disclosure of the Tempaid data was not made good from other sources that were already available to Halfords. Taken shortly, the absence of the Tempaid data made it much more difficult for Halfords to identify claims and particularise them and to prepare and present its case even when other sources were available.

What other factors were considered?

As well as unsuccessfully arguing that First Personnel was not at fault in effecting disclosure of the Tempaid data on 3 May 2016 and that Halfords should have identified the new claims set out in its amended pleading from other material, First Personnel contended:

- the proposed amendments were misconceived and were not properly pleaded
- there was no proper evidence in support of the application to amend, and
- Halfords was making a very late application to amend that should be treated as an application for relief from sanctions because it had not put in evidence which it would require to develop its amended case, and this was not a case for relief from sanctions

The judge rejected all of First Personnel's arguments, noting, in respect of the last point, that none of the numerous authorities cited by it dealing with late applications to amend addressed the situation in which the party seeking to amend was justifiably doing so, even at a very late stage, in response to very late disclosure by the opposing party. As held by the judge:

'The reason that Halfords finds itself in the position in which it finds itself is not that it failed to get on properly and timeously with the preparation of its case, but that its preparation of the case was hampered and disrupted by the late production of information which should have been provided long ago.

The whole question of whether to give permission as to the serving of additional evidence connected with the amendments has to be viewed in a context in which the amendments come to be sought. If they are sought because of late disclosure, justice, it seems to me, requires that evidence to deal with such amendments must be admitted.

I do not consider that Halfords is in effect trying to side-step rules of court for relief from sanctions, or the more rigorous approach suggested by authorities such as *Denton* [*Denton v White* [2014] EWCA Civ 906, [2015] 1 All ER 880] or *Chartwell* [*Chartwell v Fergies* [2014] EWCA Civ 506, [2014] All ER (D) 04 (May)] in relation to late amendment or late evidence. Its application for the amendments and the need to put in further evidence, and its suggestion of a split trial, stem from the late disclosure'.

What were the court's findings in relation to the application for a split trial?

The court did not have to determine whether a split trial was necessary, as the parties agreed what issues could and could not be determined in the existing trial period.

What are the practical implications of this case?

The two main practice points to take from this case are:

- an application to restrict the scope of a search for disclosable documents needs to be properly evidenced and is unlikely to succeed if the document(s) in question are readily available and have been used by the party making the application in the course of preparing its case
- permission to amend, even at a very late stage in proceedings, is likely to be given if the reason for and timing of the application is late disclosure by the opposing party

Interviewed by Susan Ghaiwal.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor



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