

Case No 25/66

THE EMPLOYMENT AND EQUALITY TRIBUNAL

BETWEEN:

Rachel Victoria Willis

Complainant

Manx Co-Operative Society Limited

First Respondent

Stefanie Faragher

Second Respondent

Samantha Jones

Third Respondent

Helen Ashcroft

Fourth Respondent

Jane Bannon

Fifth Respondent

ORDER

HEARING: 4th March 2026

The Complainant was represented by Mr Mark O'Connor of Callin Wild advocates.

The Respondents were represented by Ms Asma Bibi of Peninsula HR Consultants

1. This was a significant Pre-Hearing Review requested on behalf of the Complainant. She had worked at the Respondent's store in Ramsey. Her Complaint alleged Unfair Dismissal / Unfair Redundancy (including constructive dismissal). She also contended that she had been discriminated against on the grounds of her disability. The Complainant had begun to lose her sight in August 2015 and, having

originally been registered as partially sighted at that time, was ultimately registered blind on 5 January 2024.

2. One issue highlighted before the Hearing was that the Complainant wanted leave to re-amend the Complaint. In the event, this was agreed between the parties and the Respondent agreed to provide an appropriate Re-Amended Response within 14 days of receipt of the Re-Amended Complaint.

Disclosure

3. The main dispute concerned allegations on behalf of the Complainant of serious shortcomings in the Respondents' handling of the disclosure process. Within the ambit of this dispute, there was an additional bespoke issue relating to the role and involvement of an entity called ER Services.
4. On 12th February 2026, the Respondents requested an extension of time of seven days in which to provide their List of Documents which was due to be produced on 13th February. The Complainant did not agree and gave their reasons for this in an email dated 13th February (**C 178-180**). In addition, they summarised the categories of documents which they considered to be material to the issues which I summarise (more briefly), as follows:

- I. Internal communications
- II. Meeting Materials
- III. OH/capability/risk documents
- IV. Personnel and ER Services documents
- V. Policies and training records
- VI. IT and accessibility materials
- VII. CCTV/incident records

5. It was envisaged by the Complainant's advocate that each of the Respondents would be providing a disclosure list. The email included this:

"We have been made aware that ER Services (the Co-op's Human Resources provider) are currently undertaking an investigation into bullying and discrimination claims at the Ramsey Christian Street Co-op store. As we understand it ER Services has and continues to fulfil a human resources function to staff employed by the First Respondent. Please confirm by return and in any event by 4 PM on Wednesday 18th February 2026 the following:

- 1. The relationship between Peninsula Business Services ("Peninsula") and ER Services, including whether ER Services is operated by, or staffed by employees of Peninsula;**
- 2. Whether Peninsula or ER Services has provided any contemporaneous or historic human resources advice, documentation, or communications to any of the Respondents which may fall within the scope of their disclosure obligations; and**
- 3. Whether any such current investigation relates to the Complainant or to any factual matters set out in the Amended Particulars of Complaint or the Amended Particulars of Response."**

6. I will deal separately with the issue of ER Services and its role and involvement.
7. Because the Complainant had refused to agree the extension requested of seven days, the Respondents complied with the requirement to provide their list (**C208-209**) but it was not complete. It ran to 34 entries and was considered by the Complainant to be woefully inadequate. By email dated 17th February, Mr O'Connor explained the shortcomings. He pointed out that the 2nd to 5th Respondents were

all distinct parties and were therefore individually required to conduct their own reasonable searches and to provide their own separate disclosure rather than relying on a composite list (**C210**). Additionally, the Respondents had resisted providing clarification regarding ER Services, considering it unreasonable.

8. On behalf of the Respondents, it was pointed out that the Complainant's disclosure had been defective because the Complainant's significantly important resignation letter had not been included in the Complainant's list. Mr O'Connor accepted this had been an error (and it had been corrected) but pointed out that the Respondents had the document in any event. In a case involving alleged constructive dismissal, I accept this was a document of core importance. Mr O'Connor did not dispute that. Although Ms Bibi highlighted this shortcoming, in my opinion it did not compare with the far more significant areas of non-disclosure on behalf of the Respondents.
9. Whilst I accept that Mr O'Connor was entitled to refuse the seven-day extension requested for production of the List of Documents, in the scheme of things, it would have been pragmatic to agree to vary the timetable. That would have enabled the Respondents to have provided a more fulsome list although it is evident to me that it would still not have been sufficient to satisfy the categories of documents required on behalf of the Complainant.
10. By email dated 17th February (**C213 – 215**), Mr O'Connor wrote this:

"Our client has no confidence that the disclosure exercise undertaken by any of the Respondents was sufficient – nor do they have any confidence that Peninsula has adequately discharged its duties by ensuring that the process was properly supervised. In light of the seriousness of the apparent breach and the date for inspection being next week, we therefore require the

following information in writing from you by 1 PM today 17 February 2026:

- 1. Confirmation that each Respondent personally (or the relevant officer in the case of the First Respondent) conducted a reasonable and proportionate search for documents within their control and if this search included any of the documents within the seven categories set out in our letter of 13th February. That confirmation should set out the identity of the person who carried out the search and whether any documents had been withheld (and if so on what basis). You should provide sworn confirmation from each Respondent of this within seven days, namely by 4 PM on 24 February 2026.**
- 2. Confirmation that Peninsula understands the supervisory obligations that attach to representatives in relation to disclosure before the Isle of Man Employment & Equality Tribunal and that those obligations have been discharged in this case. In particular, we require confirmation that each Respondent was appropriately advised by a suitably qualified Advocate (or a suitably qualified registered legal practitioner in accordance with section 2 of the Legal Practitioners Registration Act 1986) as to their duties of disclosure in accordance with the laws of the Isle of Man. The composite, unattributed list provided yesterday gives no such assurance. Should you fail to**

provide the above by 1 PM today, the Complainant will apply without further notice for an urgent in-person directions hearing this week before the Chairman ...”

11. For the purposes of this Hearing, the inadequacies regarding disclosure advanced on behalf of the Complainant were summarised in the witness statement dated 2nd March 2026 of Mr James Dudley, a trainee advocate at CallinWild. These were set out at para 16 et seq. In particular, Mr Dudley highlighted:

- a. The complete failure to provide any emails at all or to explain their absence.**
- b. The absence of any formal documents of employment of the Complainant and**
- c. The failure to produce witness statements as produced by ER Services.**

12. The Complainant’s List of Documents was comprehensive {except initially for the lack of the resignation letter). It included numerous examples of emails that were considered material to the issues and yet nothing had been provided of this type on behalf of the Respondents.

13. The Complainant contended that for a business the size of the First Respondent, all documents relating to the employment of the Complainant must have existed and should have been disclosed. The failure to do so pointed to the lack of a reasonable search. The missing documents included creation, existence and operation of the employment relationship.

14. Mr Dudley highlighted the absence of documents passing between any of the Respondents and the Complainant and the lack of documents passing internally between any of the Respondents.

15. Mr Dudley also sought documents relating to any grievance, complaint, disciplinary process, investigation or related meeting notes including documents created under or bearing ER Services reference. The lack of disclosure of this type of evidence has and had the potential to be damaging to the presentation of the Complainant's case at the merits hearing.
16. By chance, during routine work on behalf of the Complainant, a witness statement came into the possession of the Complainant's advocates on 19th February. It was disclosed to the Respondents the same day (**C 159 – 163**). It was headed as being "Confidential" and identified under ER Services reference 835483. The document was headed "Meeting Notes" and involved an interview with a member of staff who I shall identify at this stage only by the anonymised initials of WN. The investigation was carried out by Ms Holly Thomas of ER Services who explained to WN from the outset that the notes arising "could be disclosed within any legal proceedings or as required in a Subject Access Request."
17. In a similar fashion, the Complainant's advocates then came across a further witness statement taken by Ms Thomas and dated 27th February 2026. I have anonymised the name of this employee to LG. The format of these notes was similar.
18. Neither of these Meeting Notes nor of any documents relating to other investigations carried out by ER Services under this reference had been disclosed. Consequent upon the Complainant coming across this evidence, the Complainant required disclosure of documents relating to ER Services Investigation reference 835483.
19. Mr Dudley pointed out in his witness statement (**para 21**) that some points made by these witnesses contradicted parts of the pleaded case advanced on behalf of the Respondents. They contained evidence adverse to the Respondents' pleaded case.

20. At **para 28 et seq** of his statement, Mr Dudley had required production of evidence regarding the relationship between Peninsula Group Limited (the HR consultants looking after the interests of the Respondents) and ER Services and also their relationship with the First Respondent. His statement set out the reasoning for this request. Additionally, Mr Dudley invited me to draw appropriate adverse inferences from the Respondents' failures in the disclosure process.
21. A suggested Order for me to approve was provided as a draft on behalf of the Complainant (**C269 – 271**). It reiterated the classes and categories of documentation still required to be disclosed and sought an *Unless Order*, which, if not complied with, would lead to the Responses being struck out.
22. The Complainant also required that I make an Order for Costs because of the alleged serious shortcomings.

Submissions on Behalf of the Respondents

23. Ms Bibi submitted that:
- a. There was no need for any Unless Order because, following the initial List of Documents, the Respondents had since provided further disclosure that complies with what is required of the Respondents by the Complainant.
 - b. The application for information regarding the commercial relationship between PBS and the Co-op was "misconceived" and that such a request amounted to a fishing expedition.
 - c. The application made for a Costs Order had not come even close to the required threshold.
24. Ms Bibi requested that in my Order I set down time for the parties to engage in dispute resolution.
25. Finally, Ms Bibi wanted an Order for production of a Joint Bundle to be completed by the Respondents and for the matter to be listed.

The Law

Employment and Equality Tribunal Rules 2018

- Rule 7
- Rule 16
- Rule 15
- Rule 20
- Rule 40

Authorities cited

- Dhanda v TSB Bank plc UKEAT/0294/17
- Buttes Gas & Oil Co v Hammer (no.3) (1981) QB 223
- Ranson v DHSC EET 21/20
- Waugh v British Railways Board (1980) AC 521
- Yerrakalva v Barnsley MPC (2012) ICR 420

DISCUSSION

26. Despite Ms Bibi's submission that the Respondents had complied with what had been required of them, I cannot agree. I consider it to be more than probable that there are material documents that remain undisclosed by the Respondents. My Order below reflects this.

27. Mr Dudley had highlighted the absence of documents passing between any of the Respondents and the Complainant and the lack of documents passing internally between any of the Respondents. In these days of widespread use of text messages and electronic communication, it is in my opinion highly likely that pertinent text messages or email messages relevant to the issues in the Complainant's litigation have been created and ought still to exist and thus must be disclosed. If such communications have been deleted, the circumstances of deletion need to be explained.

ER Services Investigation

28. The Respondents' List of Documents was silent as to this investigation, a serious omission given its materiality to the case advanced by the Complainant.
29. Understandably in my opinion, the Complainant has sought documents relating to any grievance, complaint, disciplinary process, investigation or related meeting notes including documents created under or bearing ER Services reference. The two statements of the anonymised witnesses, as put in evidence, show beyond any doubt that ER Services have been carrying out an investigation into the operation of the Ramsey store.
30. Both statements uncovered by the Complainant's advocates refer to her and her treatment whilst employed and are highly relevant. Both statements are critical of management.
31. The Respondents have not volunteered, as part of disclosure, any documents showing why it was necessary for an investigation to be made into the Ramsey store or who made the decision for there to be an investigation. Such documentation should have been disclosed.
32. Additionally, based on the two anonymised witness statements, the brief given to ER Services is disclosable together with all the evidence gathered by them so far as it touches and concerns issues in the Complainant's proceedings.
33. The advocates for the Complainant came across this significant evidence by chance. The lack of disclosure has, and had, the potential to be damaging to the presentation of the Complainant's case. All statements such as those now uncovered on behalf of the Complainant must be put in evidence together with any conclusions reached or yet to be reached by ER Services following the end of the investigation.

Peninsula / ER Services / First Respondent

34. At **para 28 et seq** of his statement, Mr Dudley had set out the reasoning for documentation to be produced as to the relationship between Peninsula and ER

Services. On the face of the documentation, it seems to me likely that the First Respondent already had some type of (possibly contractual) arrangement with ER Services or has appointed this entity directly or indirectly, to make the bespoke investigation into the Ramsey store.

35. However, it is possible, but to me seems less likely, that Peninsula had retained ER Services. Having considered the submissions and documentation available at this Hearing, I cannot say I am confident that I have evidence before me that explains in plain terms how the relationship works between Peninsula, ER Services, the First Respondent and the Co-op Group in general.

36. There is no evidence that either Peninsula or ER Services provide legal services. The First Respondent is part of the Cooperative Group Limited. The Group has its own internal legal department which is authorised and regulated by the Solicitors Regulation Authority. The legal department (listed and mentioned on pages **C33 and C34**) has not been involved in handling this litigation. To an outsider, understanding the relationship is unclear between the First Respondent and Peninsula and ER Services, both of which are in the HR sector. This needs clarification in simple terms.

Litigation Privilege

37. Ms Bibi submitted that the Respondent could rely on litigation privilege for non-disclosure of categories of documents requested on behalf of the Complainant. Litigation privilege is wider than *legal advice privilege*. It can protect communications with and documents prepared by non-legal advisers. Unlike legal advice privilege, which requires a lawyer's involvement, communications with or material produced by non-legal advisers can be privileged.

38. However, firstly, to be protected from production by such privilege, litigation must be afoot or in contemplation. Of prime relevance here, creation for such litigation must have been the dominant purpose. On the evidence before me, I do not accept

that the dominant purpose of the ER Services investigation was related to this litigation.

39. The dominant line of questioning by Ms Thomas (**pages C274 – 276**) is not related to the Complainant. The investigation seems to have been prompted “off the back of the store’s Talkback result” and reflected Ms Thomas seeking to understand issues between staff and management. In contrast investigations and gathering evidence by Peninsula to prepare for the Complainant’s claim can be privileged because that would be within the dominant purpose. However, documentation and evidence relating to the Ramsey store investigation was not, based on evidence available to me, put in train with a dominant purpose of preparation for this litigation.

Fishing Expedition

40. I do not consider that the requests for further documentation qualify to be categorised as a fishing expedition. The request for disclosure relating to the commercial relationship between Peninsula and the Co-op is too broad to be material to this litigation but it’s status as to whether it acts as agent for the Co-op in this litigation should be explained.

Unless Order

41. I consider the request for an “Unless Order” to be reasonable and well-founded. Based on the Complaint, the Complainant is advancing serious allegations. She is entitled to feel confident that all documents material to the merits of her case have been revealed. As matters stand, she can have no such confidence.
42. Because the Respondents were informed of the ambit expected by way of disclosure, I consider it is reasonable now to make an Unless Order to ensure that all the Respondents understand their obligation to reveal documents whether helpful or unhelpful to the First Respondent or to themselves.

Costs

43. I have been asked to consider the question of costs. There was an application on behalf of the Complainant on the basis that this Hearing was only needed because of the failures on the part of the Respondents. Additionally, in the run-up to the Hearing the Respondent had flagged a warning of an application for costs but this was not pursued at the Hearing.
44. The power to award costs arises under Rule 40 and making an order is an exception rather than the rule. Mr O'Connor pointed to the fundamentally defective disclosure exercise and submitted that the failure was serious, prolonged and wholly incompatible with the overriding objective.
45. Mr O'Connor relied upon the decision of this Tribunal in **Ranson** and pointed out the refusal or failure to answer repeated reasonable requests. He submitted this constituted unreasonable conduct, akin to the withholding of material information. The threshold to obtain a favourable Costs Order is high because Rule 40 points to behaviour such as a party having acted vexatiously, abusively, destructively or otherwise unreasonably (or alternatively costs can be awarded where there has been breach of an Order).
46. I am not prepared to make a Costs Order against the Respondents *at this stage*. However, I will, on further application, consider making one, depending upon what further disclosure is made on behalf of the Respondent. Following consideration of what comes to light, this will or should highlight the extent to which there has been material non-disclosure thus far.

ORDERS

47.

Disclosure Process

- a. I require that each Respondent swears an affidavit to accompany a bespoke List of Documents. In the case of the First Respondent, this must

be sworn by an officer of the company. As will be clear from below, documents in the broadest sense of the word must be disclosed as must any material held on CCTV. Searches for documentation undertaken must include personal electronic devices. Documents located as a result of the searches must be disclosed and there must be confirmation of what process was adopted for conducting the searches.

b. I set out below the requirements expected of the five Respondents. Unless this Order is complied with as to the obligations of each Respondent concerning disclosure, the Response and Amended Responses will be struck out.

- c. A director or other responsible officer of the First Respondent must, in the required affidavit as set out below, also have regard to the requirements in the draft First Schedule provided on behalf the Complainant (**C272 – 273**) to ensure complete compliance.
- d. Any documents created or emerging under the ER Services investigation reference 835483 are not privileged from production and must be disclosed. To the extent that any deponent seeks to claim litigation privilege, the affidavit must be specific as to the document (or documents) in question and must explain the provenance and as to why it is, or they are, privileged from disclosure, identifying the dominant purpose.
- e. Affidavits on behalf of each Respondent must recite the explanation of their obligation as to searches as given to them by Peninsula to ensure correct and comprehensive disclosure.
- f. Each affidavit must recite and explain material documents which have existed but which are no longer available. A full explanation of how and why they are no longer available must be included.

- g. The First Respondent's affidavit must confirm the search previously made for material documents. It must explain the circumstances in which documents relating to the Complainant's employment, from inception to termination, have thus far not been disclosed. This affidavit should lead to disclosure for inspection of all documents relating to the employment of the Complainant including the creation, existence or operation of that employee relationship.
- h. Affidavits on behalf of all Respondents must identify the searches made and provide disclosure for inspection of all material documents passing between the Complainant and the First Respondent and between the Complainant and each of the individual Respondents.
- i. Affidavits on behalf of all Respondents must identify the searches made and provide disclosure for inspection of all material documents passing internally between any of them or between any of them and any employee or manager of the First Respondent concerning the Complainant or matters in issue in these proceedings.
- j. Without prejudice to the overall duty of disclosure, specific mention must be made by each deponent of searches carried out of communications and messages made by text, email or otherwise that are material to these proceedings.
- k. Affidavits on behalf of all Respondents must identify the searches made and provide disclosure for inspection of all material documents relating to any grievance, complaint, disciplinary process, investigation or related meeting notes, including documents created and/or bearing any ER Services reference concerning the Complainant or the matters in issue.
- l. The affidavit on behalf of the First Respondent must explain the status of the Peninsula Group Limited and that of ER Services in the context of the

Complainant's proceedings – specifically including the background leading up to the need for an investigation referenced 835483 but not limited thereto.

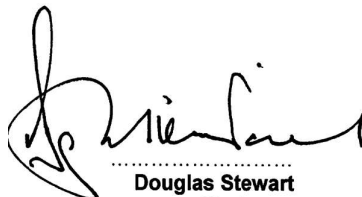
- m. The affidavits on behalf of the Respondents must identify the searches made and provide disclosure for inspection of all material documents / messages passing between any of them and any third-party concerning the Complainant and the matters in issue.

n. All affidavits and Lists of Documents must be provided on or before 4pm on Friday 17th April 2026.

Amendment

- o. The Complainant has leave (by consent) to Re-Amend the Complaint and the Respondent has leave to enter a Re-Amended Response within 14 days of receipt of it from the Complainant.
- p. Following this process, and assuming that the Complainant is satisfied with the disclosure by then made, the timetable to the Hearing should be agreed between the parties but building in 21 days for conciliation through Manx Industrial Relations Service.
- q. Liberty to Apply as to the costs situation following the end of the disclosure process.

Dated this 11th day of March 2026



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Douglas Stewart
Chairman

