Family Court

DS *v* AC

[2023] EWFC 46

2023 March 14; 29 Lieven J

Injunction — Domestic abuse — Non-molestation order — Application for without notice non-molestation order listed for on notice hearing — Applicant not attending hearing and application refused — Applicant subsequently asking for application to be reinstated — Summary of principles applicable to making of non-molestation orders particularly without notice — Whether application to be reinstated — Family Law Act 1996 (c 27), ss 42, 45

Following the breakdown of their relationship the applicant applied without notice, pursuant to Part IV of the Family Law Act 1996[1], for a non-molestation order against the respondent. The application was instead listed for an on notice hearing which the applicant failed to attend, resulting in the application being refused. On the applicant's subsequent request directions were made for the High Court to determine whether the application ought to be reinstated.

On the request for reinstatement—

Held, not reinstating the application, that (1) although there was nothing unusual about the present case, as non-molestation applications rarely came before a judge of the High Court it was likely to be helpful to set out the basic principles that applied to such applications and orders; that, extracted from the legislation and the relevant authorities, those principles were that (i) on a without notice application the court was to consider whether there was a risk of significant harm attributable to the respondent if the order were not granted immediately, (ii) the court was also to consider whether the applicant would be deterred or prevented from making the application if the order were not made immediately, (iii) a without notice order was only to be made in exceptional circumstances and with proper consideration for the rights of the absent party, (iv) the court was to use its powers under the Family Law Act 1996 with caution, particularly at a one-sided hearing, or necessarily on a paper consideration without the other party having notice, (v) "molestation" did not imply necessarily either violence or threats of violence but could cover any degree of harassment that called for the intervention of the court, (vi) the primary focus of the court was to be on the "harassment" or "alarm and distress" caused to those on the receiving end, and (vii) there did not have to be a positive intent to molest; that it was important that the principles be applied properly, and orders not simply granted by default; and that, in particular, a without notice application was only to be made in exceptional circumstances where there was a risk of significant harm and the statement in support of the application was to deal expressly with why the case was exceptional and what the significant risk alleged was (post, paras 1, 23, 24).

(2) That while there was no definition of molestation, and plainly the impact of particular conduct could be very different on different individuals, there did not have to be a threat of violence; that electronic communications could amount to harassment and cause alarm; but that orders were not to be granted where the evidence suggested only that there was some upset at the end of a relationship, and little or nothing to suggest that the conduct complained of would have amounted to "molestation"; that the law was also clear that there did not have to be a positive intent to molest; but that did not mean that the test was a wholly subjective one whereby the applicant simply had to feel distress, and such subjective distress alone did not justify the making of an order; that the conduct had to be sufficient and of a nature or degree that justified the intervention of the court; and that in the present case, although the respondent had probably sent the applicant an excessive number of text messages and e-mails at the end of the relationship, and at least one of them was angry and hurt, by the time the application was made that conduct had ceased and there was no proper basis for the intervention of the court such that the application was not to be reinstated (post, paras 26, 27, 28–29).

[1] Family Law Act 1996, s 42: see, post, para 17.
S 45: see, post, para 18.

R v R (Family Court: Procedural Fairness) [2015] 1 WLR 2743 applied.

APPLICATION for a non-molestation order

By application dated 8 November 2022 the applicant, DS, applied without notice for a non-molestation order against the respondent, AC, pursuant to sections 42 and 45 of the Family Law Act 1996 stating that the matter was urgent because the respondent's behaviour was "very unpredictable". On 8 December 2022 Judge Dickinson refused the application and set the matter down for an on notice hearing on 16 December 2022, which the applicant did not attend. Although the application was dismissed the applicant subsequently explained her non-attendance to the court and the judge ordered a directions hearing to take place on 14 March 2023 to determine whether the application ought to be reinstated and a non-molestation order made.

The judgment was delivered in private and is reported with permission of the judge on condition that the anonymity of the parties be strictly preserved.

The facts are stated in the judgment, post, paras 1–14.

The applicant in person.

Annabel Goodman (instructed by *Pearcelegal Ltd, Solihull*) for the respondent.

The court took time for consideration.

29 March 2023. **LIEVEN J** handed down the following judgment.

1 This judgment concerns an application for an order under the Family Law Act 1996 ("FLA"), commonly known as a non-molestation order. There is nothing unusual about this particular case, and such applications rarely come before a High Court judge. However, there has been no published judgment on such an application for some years, and I felt it would be helpful to set out the basic principles that apply to such applications and orders. I do this in part because there has been a significant growth in the number of such applications during the pandemic, and in many parts of the country that increased number has not fallen back to pre-pandemic levels. A large proportion of the applications are made without notice (ex parte) and it may be useful for practitioners to be reminded of the very strict criteria for the making of such orders ex parte.

2 The applicant, DS, appeared before me in person, and the respondent, AC, was represented by Ms Goodman. I am grateful for the very clear way Ms Goodman set out her case in her position statement.

3 The applicant made a without notice application to the court for a non-molestation order on 8 November 2022. In that application she filed a statement setting out her case, as I summarise below.

4 The applicant and the respondent started a relationship in October 2021 and the relationship ended by WhatsApp message on 16 September 2022. The parties had a professional relationship through a networking group. She recounts that the relationship became problematic and there were a number of arguments, but she expressly says that the respondent was not verbally (or physically) abusive to her. She felt that he was controlling towards her, frequently phoning and monitoring where she was. He became increasingly demanding of her in terms of answering his calls and being available. She also says that the respondent was controlling of her by buying her extravagant presents and then accusing her of being ungrateful.

5 In June 2022 the applicant became aware that there were a number of complaints about the respondent in the networking group, around his behaviour to women. He said these allegations were false, but the applicant became more suspicious and fearful of him. The allegations were about narcissistic behaviour and attitudes.

6 The relationship was plainly going downhill with the respondent texting her 20–30 times a day. There was an incident in August when they went away together and there was an argument over whether the respondent was flirting with a waitress.

7 I recount these details because it can be seen that this is a fairly typical account of a failing relationship, and much of the applicant's account is open to different perceptions of what was happening between the parties.

8 By September the parties were seeing each other less, albeit the applicant felt the respondent was manipulating her by encouraging her to drink too much alcohol.

9 However, from September the applicant started to work in the respondent's business part time because she needed the money. She felt that the respondent then became even more demanding. On 16 September she sent him a text ending the relationship and saying she would

pursue "formal action if he contacted [her]". She blocked the respondent after sending the message.

10 The respondent did continue to communicate with her by ringing her phone "on a few occasions". He then e-mailed her, and she says he threatened her career if she told people about his behaviour. I have read the e-mail of 18 September and it is rather sad, but in my view is in no sense controlling or threatening.

11 There was then a financial dispute within the context of the business relationship and the respondent sent the applicant an e-mail about her phone contract. The applicant then reported the respondent's behaviour to the police, and they advised her to apply for a non-molestation order.

12 14 October was the last contact from the respondent to the applicant in an e-mail where he threatened to take her to the Small Claims Court if she did not pay the money that she owed him. She then received a letter from the Small Claims Court saying that he had brought proceedings for £1,750 relating to the phone contract. She then counterclaimed for wages owed.

13 There is an e-mail from the respondent to the applicant on 3 November in which he says he has paid the wages invoice. He says he was hurt and angry, and that two close relatives had died that month and the invoice slipped his mind. This e-mail is entirely appropriate and in no sense threatening.

14 On 8 November the applicant made a without notice application for a non-molestation order saying the matter was urgent because the respondent's "behaviour is very unpredictable" and that if it was on notice the respondent might try to dissuade her from making the application.

15 On 8 December District Judge Dickinson refused the application and set the matter down for an on notice hearing on 16 December. The applicant did not attend the hearing and the application was dismissed. The applicant then e-mailed the court to explain her non-attendance. DJ Dickinson ordered a directions hearing on 14 March 2023 to consider whether the application should be reinstated.

16 The applicant appeared before me on 14 March and argued that the application should be reinstated and an order made. Ms Goodman, on behalf of the respondent, submitted that there was no basis to make the order, and that the statutory tests under section 42 of the FLA were not met.

The law

17 The power to grant a non-molestation order is set out in section 42 of the FLA, which states:

> "42 *Non-molestation orders*
>
> "(1) In this Part a 'non-molestation order' means an order containing either or both of the following provisions— (a) provision prohibiting a person ('the respondent') from molesting another person who is associated with the respondent; (b) provision prohibiting the respondent from molesting a relevant child.
>
> "(2) The court may make a non-molestation order— (a) if an application for the order has been made (whether in other family proceedings or without any other family proceedings being instituted) by a person who is associated with the respondent; or (b) if in any family proceedings to which the respondent is a party the court considers that the order should be made for the benefit of any other party to the proceedings or any relevant child even though no such application has been made."
>
> "(5) In deciding whether to exercise its powers under this section and, if so, in what manner, the court shall have regard to all the circumstances including the need to secure the health, safety and well-being— (a) of the applicant; and (b) of any relevant child.
>
> "(6) A non-molestation order may be expressed so as to refer to molestation in general, to particular acts of molestation, or to both.
>
> "(7) A non-molestation order may be made for a specified period or until further order.
>
> "(8) A non-molestation order which is made in other family proceedings ceases to have effect if those proceedings are withdrawn or dismissed."

18 The power to grant such an order on a without notice application is set out in section 45 of the FLA, which states:

"45 *Ex parte orders*

"(1) The court may, in any case where it considers that it is just and convenient to do so, make an occupation order or a non-molestation order even though the respondent has not been given such notice of the proceedings as would otherwise be required by rules of court.

"(2) In determining whether to exercise its powers under subsection (1), the court shall have regard to all the circumstances including— (a) any risk of significant harm to the applicant or a relevant child, attributable to conduct of the respondent, if the order is not made immediately; (b) whether it is likely that the applicant will be deterred or prevented from pursuing the application if an order is not made immediately; and (c) whether there is reason to believe that the respondent is aware of the proceedings but is deliberately evading service and that the applicant or a relevant child will be seriously prejudiced by the delay involved in effecting substituted service.

"(3) If the court makes an order by virtue of subsection (1) it must afford the respondent an opportunity to make representations relating to the order as soon as just and convenient at a full hearing."

19 There have been very few reported cases on the correct approach to granting a non-molestation order in recent years. There is no statutory definition of molestation". In *Horner v Horner* [1982] Fam 90 Ormerod LJ said at p 93: "any conduct which can properly be regarded as such a degree of harassment as to call for the intervention of the court."

20 In *C v C* [2001] EWCA Civ 1625 Hale LJ held that the granting of a non-molestation order was justified where the conduct completed of "was calculated to cause alarm and distress to the mother".

21 In *In re T (A Child) (Non-molestation Order)* [2017] EWCA Civ 1889; [2018] Fam 290 McFarlane LJ referred to these authorities with approval and said the courts should be very wary of offering any further precision to the definition of "molestation". He went on to say at para 42:

"When determining whether or not particular conduct is sufficient to justify granting a non-molestation order, the primary focus, as established in the consistent approach of earlier authority, is upon the 'harassment' or 'alarm and distress' caused to those on the receiving end. It must be conduct of 'such a degree of harassment as to call for the intervention of the court': *Horner v Horner* [1982] Fam 90, 93 and *C v C (Non-molestation Order: Jurisdiction)* [1998] Fam 70, 73. Although in *C v C* [2001] EWCA Civ 1625 the phrase 'was calculated to cause alarm and distress' was used, none of the authorities require that a positive intent to molest must be established."

22 In *R v R (Family Court: Procedural Fairness) (Practice Note)* [2014] EWFC 48; [2015] 1 WLR 2743 Peter Jackson J considered an appeal relating to a non-molestation order which had originally been granted at a without notice hearing. He said, at para 1:

"1. This judgment follows a hearing on 18 November 2014 at which I allowed an appeal against a case management order made by a district judge in proceedings under the Family Law Act 1996. The case highlights important principles, applicable to all such cases:

"(1) The default position of a judge faced with a without notice application should always be 'Why?', not 'Why not?'. As has been repeatedly stated, without notice orders can only be made in exceptional circumstances and with proper consideration for the rights of the absent party.

"(2) The court should use its sweeping powers under the Family Law Act 1996 with caution, particularly at a one-sided hearing. Where an order is made, it is the responsibility of the court (and, where applicable, the lawyers) to ensure that it is accurately drafted. This consideration applies with special force when a breach of the order will amount to a criminal offence.

"(3) Extra injunctive provisions such as exclusion areas and orders prohibiting any direct communication between parties should not be routinely included in non-molestation orders. They are serious infringements of a person's freedom of action and require specific evidence to justify them.

"(4) The power to penalise non-compliance with case management orders should be used firmly but fairly, in a way that supports the overriding objective rather than defeating it. The court should apply the rules (here specifically FPR r 4.6) with that aim.

"(5) The court should be on guard against the potential for unfairness arising from the Legal Aid, Sentencing and Punishment of Offenders Act 2012, whereby the applicant is entitled to legal representation as a result of unproven allegations, while the respondent is not. In this case, the fact that one party had no legal advice at any stage was critical to the outcome."

23 The following principles can be extracted from the FLA and the case law:

(a) On a without notice application the court must consider whether there is a risk of significant harm attributable to the respondent if the order is not granted immediately, section 45(2)(a);

(b) And whether the applicant would be deterred or prevented from making the application if the order is not made immediately; section 45(2)(b);

(c) A without notice order should only be made in exceptional circumstances and with proper consideration for the rights of the absent party, *R v R* at para 1;

(d) The court should use its powers under the FLA with caution, particularly at a one -sided hearing, or necessarily on a paper consideration without the other party having notice, *R v R* at para 1;

(e) "molestation" does not imply necessarily either violence or threats of violence, but can cover any degree of harassment that calls for the intervention of the court, *Horner v Horner* at p 93;

(f) The primary focus of the court should be upon the "harassment" or "alarm and distress" caused to those on the receiving end, *In re T (A Child)*;

(g) There does not have to be a positive intent to molest, *In re T* at para 42.

24 It is important that these principles are applied properly, and orders are not simply granted by default. In particular, it is important for all concerned to note that a without notice application should only be made in exceptional circumstances where there is a risk of significant harm. If a without notice application is made, then the statement in support must expressly deal with why the case is exceptional and what the significant risk alleged is. There can be no doubt that far too many such applications are made where there is no reasonable basis to grant the application without notice.

25 In the present case the district judge was entirely correct not to grant the order on the without notice application. I appreciate that the applicant was a litigant in person, and not conversant with the law. However, there was simply no basis for making a without notice order. Such an order is only appropriate where there is significant risk of immediate harm. In circumstances where there had been no contact from the respondent for at least three weeks before the application was made, a without notice order would have been wholly inappropriate on facts such as this.

26 Further, in my judgement, there was no proper basis for any order to be made. There is no definition of molestation, and plainly the impact of particular conduct can be very different on different individuals. There does not have to be a threat of violence, and electronic communications can amount to harassment and cause alarm. However, the conduct has to be sufficient to justify the intervention of the court. Orders should not be granted where the evidence suggests that there is some upset at the end of a relationship, and little or nothing to suggest the conduct complained of would amount to "molestation".

27 The law is clear that there does not have to be a positive intent to molest. However, that does not mean that the test is a wholly subjective one whereby the applicant simply has to feel distress. Such subjective distress does not alone justify the making of an order. The conduct has to be of a nature or degree that justifies the intervention of the court.

28 Here the respondent probably sent the applicant an excessive number of texts and e-mails at the end of the relationship and at least one of them was angry and hurt. However, by the time the application was made that conduct had ceased. There was in my view no proper basis for the intervention of the court.

29 I therefore refuse to reinstate the application.

Order accordingly.

THOMAS BARNES, Solicitor