Appeal No. UKEAT/0385/14/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 31 March 2015
Judgment handed down on 12 May 2015

Before

THE HONOURABLE MRS JUSTICE SIMLER

SITTING ALONE

BRITISH BROADCASTING CORPORATION APPELLANT

MR D RODEN RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS DINAH ROSE QC (of Counsel) and MR THOMAS KIBLING (of Counsel) Instructed by: BBC Employment Law Department Area B3, Floor 2 Broadcast Centre 201 Wood Lane London W12 7TP
For the Respondent	MR JOHN BOWERS QC (of Counsel) and MS LAURA McNAIR-WILSON (of Counsel) Instructed by: Penningtons Manches LLP Abacus House 33 Gutter Lane London EC2V 8AR

SUMMARY

PRACTICE AND PROCEDURE

Claim of unfair dismissal (among other claims) where allegations of serious sexual assaults had been made which were not directly in issue in the proceedings but would be canvassed in evidence. The Judge made an order that the Claimant's identity should be anonymised throughout the hearing under Rule 50. After promulgation of the substantive judgment (also anonymised) the Judge ordered permanent anonymity and the BBC appealed.

The appeal was allowed. The Judge erred in law in making the order. He failed to carry out a proper balancing exercise or to take account of relevant considerations in doing so, and relied on an invalid reason for granting the order, namely the risk of public misunderstanding that the allegations had not been investigated or proven and the devastating consequences for the Claimant that would flow from that.

Once the only factor relied on by the Judge as outweighing the principle of open justice and freedom of expression was disregarded as invalid, there was no rational basis for anonymity and no reason to remit the matter to the Judge. On the facts of this case, anonymity would constitute a disproportionate and unlawful interference with the paramount principle of open justice and the strong public interest in full publication.

THE HONOURABLE MRS JUSTICE SIMLER

1. This is an appeal by the BBC against a decision of Judge Glennie, promulgated with Reasons on 26 August 2014 ("the Privacy Judgment"), in which he refused to vary or set aside an order made by him on 6 February 2014, granting anonymity to the Respondent, G ("the Anonymity Order"). The question raised by this appeal is whether the Judge erred in law in concluding that the Anonymity Order should continue even after the Judgment had been promulgated dismissing G's complaint of unfair dismissal ("the First Judgment").

2. The BBC submits that the Judge made a number of errors of law in concluding that G's right to respect for his private and family life under Article 8 of the Convention outweighed the public interest in the open administration of justice and freedom of expression in this case, including errors of law in his application of the legal principles to the assessment or balancing exercise he conducted so that the Anonymity Order he made constitutes a disproportionate and unlawful interference with those competing rights. The BBC further contends that the Judge failed to take account of relevant considerations and took account of irrelevant ones in his assessment. This was a case in which the Judge ought to have found that G's Article 8 rights carried little weight, and in which, by contrast, there were strong public interest reasons for permitting him to be named. It could not rationally or lawfully be concluded that this was the type of exceptional case in which G's Article 8 rights should take precedence over open justice and the right to freedom of expression.

3. G submits that the Judge correctly directed himself as to the relevant legal principles recognising the need for a balancing exercise, that derogations from the principle of open justice could be justified only in exceptional circumstances and then no more than strictly

necessary, and that anonymity will only be granted where it is strictly necessary and only to that extent. G contends accordingly that the Judge reached a conclusion that was manifestly sustainable on the facts and correct as a matter of law. It is not for the EAT to rehear the case and no different principles apply in an appeal against the exercise of a judicial discretion in a case dealing with human rights than in any other case.

4. The BBC was represented on this appeal by Dinah Rose QC and Thomas Kibling and G by John Bowers QC and Laura McNair-Wilson. I have been considerably assisted by cogent, focussed submissions in writing and orally on both sides.

The Facts

5. G worked for the BBC as a Development Producer. His fixed term contract came to an end in May 2013. By then the BBC had been informed by a third party that serious allegations of a sexual nature had been made against G in Glasgow. Subsequently, the BBC was informed by the police that they had information concerning G and a young person which suggested that G posed a risk to young men with whom he came into contact in the course of his work with the BBC, which included the promotion of new writing talent.

6. The background facts, the nature of the allegations, and the way in which they came to light and were investigated by the BBC, are dealt with in the First Judgment at paragraphs 22 to 54. In summary the Judge found:

a) By email dated 27 March 2013 information was provided to the BBC about allegations relating to a writing course at which G was a tutor in Glasgow. The information was notified by the BBC to Operation Yewtree, and subsequently the BBC was told that police held information about a separate incident involving G

and a young person that suggested he posed a risk, but they were unable to provide further details.

b) The Glasgow matters concerned three students (on a course for adults over the age of 18) who made allegations about G, all three wishing to remain anonymous. Two involved unwanted or inappropriate attention from G; the third involved an allegation that the student who missed his transport link after an evening of drinking with G, and stayed with him, awoke to find G kissing him, then went back to sleep and woke again to find that G was committing oral sex on him and had penetrated him with his fingers: [25].

c) These matters were raised with G by the BBC in a meeting on 1 May 2013 in a broad and general way only, referring to unwanted advances, sexual innuendo and sexual comments to avoid identifying the students. G denied these allegations: [39]. He was asked whether anyone at the BBC or outside had previously raised similar issues and said "No, no one has even taken me to one side to say that I shouldn't say these things." He described his relationship with students as purely professional, denied that his behaviour was or had ever been described as inappropriate and denied being predatory: [40]. He was asked at the end of the meeting if there was anything else the BBC should be aware of and replied "no": [41].

d) At a further meeting on 23 July 2013 G was told that the BBC had received serious allegations from reliable sources and that given the nature of these allegations they did not feel able to re-employ him: [51].

e) G then gave an account of a previous incident at a college in Cornwall which he thought might be behind the current issue with the BBC: [51]. He stated that he had worked in a theatre company attached to a college ten years earlier and one

year, came to suspect two work experience students were taking money but could not prove which one, and asked the college to remove them from the placement. Having done so, the students (males) alleged that G touched them inappropriately (the inference being that this was why he was asking for them to be removed). There was an investigation, and he was cleared in the internal process but a complaint was made to the police. After a long period he was told that no further proceedings would be taken and he returned to work but left soon after.

7. Following the decision not to renew his contract, G brought claims of unfair dismissal, wrongful dismissal, a failure to provide written reasons for dismissal and unlawful deduction from wages in respect of holiday pay/breach of the **Working Time Regulations 1998** on 16 August 2013.

8. In advance of the substantive hearing, as a result of a successful specific disclosure application made by the BBC in relation to the Cornwall allegations (which had been resisted as irrelevant to the substantive issues in the case by G) documents were obtained and disclosed. From these it emerged that G had been summarily dismissed from his employment in Cornwall on 13 July 2005 for gross misconduct following the distribution of a photograph that showed him simulating oral sex with a student dressed as a children's television character in the presence of another dressed as a different character (identified as persons D and E). G's application form for employment with the BBC incorrectly showed the Cornwall employment continuing until December 2005; and his witness statement in the Tribunal proceedings incorrectly stated that the Cornwall employment was terminated because of concern about potential bad publicity arising from allegations made by two students.

9. The allegations that had caused concern on the part of police in Operation Yewtree were summarised by the Judge at [54.5] as follows:

> **"… two allegations (which the Claimant denies now and denied at the time) also made by persons D and E, who were male students aged 17 and 19 respectively. As the Claimant agreed, the allegations were very similar to those made by person A, in that they both involved a complaint that in early 2005 the student concerned had gone to the Claimant's accommodation, had consumed a considerable amount of alcohol, and had then discovered the Claimant performing oral sex on him and penetrating him at the same time. These complaints had been investigated by the police, and the Claimant had been arrested and bailed in respect of them, but ultimately had not faced any charges arising from them."**

10. The Judge found that G's account of the Cornwall allegations at the meeting on 23 July 2013 was accordingly not a full and frank description of events. He put the sequence of events the wrong way round in that he raised the allegation that money was going missing only after the allegations of assault were made. He did not mention that he was dismissed for gross misconduct, nor the separate matter of the photograph. The Judge recorded G as having conceded in cross-examination that "ultimately in the grand scheme of things you could argue that I misled the BBC over the Cornwall allegations": [54.8].

11. G's claim for unfair dismissal, wrongful dismissal and failure to provide written reasons for dismissal were dismissed. The Judge found that the BBC's decision to dismiss G against the background facts set out above was reasonable despite the Judge's observation at [59] that:

> **"It is of course a serious matter to dismiss an employee from his employment, especially under circumstances where he has not had the opportunity of contesting the allegations against him that lay behind the dismissal. …"**

12. The Judge further found that G's misleading of the BBC amounted to a fundamental breach of his employment contract. However, an unconnected claim of unlawful deduction from wages arising from the terms on which G was suspended was upheld.

13. In the First Judgment the Judge set out his approach to the grant of the Anonymity Order he made before the substantive hearing under Rule 50(1) and (3)(b) of the **Employment Tribunal Rules of Procedure 2013**. He identified the need to carry out a balancing exercise in relation to the competing Article 8 and 10 rights engaged, and the important principle of open justice. He referred to the **Practice Guidance (Interim Non-disclosure Orders)** given by Lord Neuberger ([2012] 1 WLR 1003) and the principle that derogations from open justice can be justified only in exceptional circumstances and should be no more than strictly necessary to achieve their purpose.

14. At paragraphs 13 to 15 of the First Judgment he concluded that G's identity should be anonymised throughout the hearing (but that a restricted reporting order was not necessary). He did so because allegations of serious sexual assaults had been made against G which were not directly in issue in the proceedings but the hearing would include evidence about the allegations. If the allegations were reported outside the Tribunal, there would be no subsequent report as to whether they had been upheld or dismissed, and G would not have any opportunity of obtaining a finding that the allegations against him had not been proved. He distinguished the circumstances in the present case from those in **Guardian News and Media Ltd v City of Westminster Magistrates' Court (United States Government, interested party)** [2010] UKSC 1, [2010] 2 AC 697, finding:

> **"The public reaction to allegations of sexual offences, particularly where it is suggested (as here) that an individual may be a danger to young persons, can be particularly virulent. It can be difficult for an individual to shake off such allegations once they have been made public."**

15. The Judge indicated in making the order that he would be open to further submissions in relation to anonymity in the judgment, but said in the First Judgment that no further

submissions had been made. Accordingly the judgment was promulgated on an anonymised basis. The Anonymity Order made by the Judge provides that:

> **"… there shall be omitted or deleted from any document entered on the Register, or which otherwise forms part of the public record, including the Tribunal's hearing lists, any identifying matter which is likely to lead members of the public to identify any of the persons specified below as being either a party to or otherwise involved with these proceedings …"**

G is identified as the person to whom the order applies.

The Privacy Judgment

16. In correspondence shortly after promulgation of the First Judgment, the BBC notified its intention to inform interested parties of G's identity, and to provide them with a copy. It explained that it was giving the Tribunal notice of its intention to do so to avoid subsequent criticism. The letter identified its concerns as follows:

> **"… the BBC should be able to discharge its responsibilities to those with a proper interest in the contents of the judgment, particularly where these contents give rise to a very real concern that failure to inform relevant bodies or people may potentially put other individuals at risk. Further the provision of partial information could lead to the charge that the information was misleading as a result of being incomplete.**
>
> **By way of example, such interested parties would include the Police, the Disclosure and Barring Service, interested parties to the litigation (such as the Safeguarding Children Standards Unit in Cornwall, the organisation Shed Productions, Mr Brian Park and the complainants), as well as G's present employers (and future employers - for example, should a reference be sought from the BBC)."**

17. By letter dated 29 April 2014, G's solicitors wrote objecting to this course. They expressed concern that the course proposed by the BBC was "maliciously done in order to unlawfully victimise" G, and made the point that the fact the judgment was anonymised did not prevent the BBC sending it to interested parties or answering truthfully in response to requests for references (should they materialise) about G. In light of this dispute, a hearing was convened on 6 June 2014 at which the BBC invited the Judge to set aside the Anonymity Order or alternatively, to clarify its scope.

18. By the Privacy Judgment Judge Glennie refused that application. His reasons, in summary, were as follows:

a) He concluded that the Tribunal had power to vary or set aside the order under Rule 29 (headed Case Management Orders) if satisfied that it was necessary in the interests of justice to do so. He said that the test of necessity sets a high standard which reflects the general principle that orders once made should stand: [9] and [10].

b) Nevertheless, he held that the approach to be adopted involved a balancing exercise to be performed, balancing G's Article 8 rights against the principle of open justice and freedom of expression: [10].

c) He accepted that the position was different following promulgation of the First Judgment. He accepted that there were adverse findings against G, including G's failure to give a full and frank account of events to the BBC and his failure to reveal that he had been dismissed for gross misconduct in Cornwall and the basis for that dismissal: [11].

d) He accepted that there can be circumstances where a private hearing is justified for reasons that would not justify a private judgment: [12].

e) In relation to the position of G, he held:

> **"… that there would be a risk that the public would conclude that the Claimant had actually committed those offences or those acts when the situation is that those matters have not been the subject of any trial, they have not been the subject of any decision by this or by any other court and may never be the subject of any such decision. Anyone reading the reasons would learn the nature of the allegations and would observe the similarity between those from Cornwall and Glasgow respectively." [14]**

f) The Judge held:

> **"I accept that those matters becoming available to the public in circumstances where the Claimant's name was placed on the reasons could have devastating consequences for him which he would have little hope or prospect of overcoming." [15]**

g) The Judge found that the test of necessity is not satisfied so as to justify varying or revoking the order previously made. He went on to hold that G's Article 8 rights:

> **"… weigh more heavily in the balance in this case than the public interest in open justice and freedom of expression." [16]**

The Applicable Legal Principles

19. The legal principles that apply to privacy restrictions of the kind ordered by the Judge are not in dispute. It is their application to the particular facts of the present case that is disputed and gives rise to controversy.

20. The statutory provisions relating to the anonymisation of parties or witnesses in Employment Tribunal proceedings are set out in Rule 50 of the **Tribunal Rules of Procedure 2013**. Rule 50 provides as follows:

> **"50.** ***Privacy and restrictions on disclosure***
>
> **(1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person …**
>
> **(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.**
>
> **(3) Such orders may include -**
>
> **…**
>
> **(b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record."**

21. An order under Rule 50 interferes both with the principle of open justice and the right to freedom of expression. The principle of open justice was considered recently by the Supreme Court in **A v British Broadcasting Corporation** [2014] 2 WLR 1243 in which Lord Reed said at [23]:

> **"It is a general principle of our constitutional law that justice is administered by the courts in public, and is therefore open to public scrutiny. The principle is an aspect of the rule of law in a democracy. As Toulson LJ explained in *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)* [2012] EWCA Civ 420; [2013] QB 618, para 1, society depends on the courts to act as guardians of the rule of law. … In a democracy, where the exercise of public authority depends on the consent of the people governed, the answer must lie in the openness of the courts to public scrutiny."**

22. The principle of open justice is accordingly of paramount importance and derogations from it can only be justified when strictly necessary as measured to secure the proper administration of justice.

23. Where anonymity orders are made, three Convention rights are engaged and have to be reconciled. First, Article 6 which guarantees the right to a fair hearing in public with a publicly pronounced judgment except where to the extent strictly necessary publicity would prejudice the interests of justice. Secondly, Article 8 which provides the qualified right to respect for private and family life. Thirdly, Article 10 which provides the right to freedom of expression, and again is qualified.

24. Lord Steyn described the balancing exercise to be conducted in a case involving these conflicting rights in **In re S (A Child) (identification: Restrictions on Publication)** [2004] 3 WLR 1129 (at paragraph 17) as follows:

> **"… What does, however, emerge clearly from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience, I will call this the ultimate balancing test. …"**

25. The paramountcy of the common law principle of open justice was emphasised and explained in **Global Torch Ltd v Apex Global Management Ltd** [2013] EWCA Civ 819 where Maurice Kay LJ referred to **R v Legal Aid Board, ex parte Kaim Todner** [1999] QB

966 at 977 and Lord Woolf MR's holding that the object of securing that justice is administered impartially, fairly and in a way that maintains public confidence is put in jeopardy if secrecy is ordered because (among other things):

> **"… It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely. … Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it."**

26. Having referred to the question to be asked when seeking to reconcile these different rights as affirmed by the Supreme Court in **Guardian News and Media Ltd** at [52] (Lord Rodger) as "whether there is sufficient general, public interest in publishing a report of the proceedings which identifies M to justify any resulting curtailment of his right and his family's right to respect for their private and family life", Maurice Kay LJ set out the relevant passages from the **Practice Guidance (interim Non-disclosure Orders)** given by Lord Neuberger including as follows:

> **"The grant of derogations is not a question of discretion. It is a matter of obligation …" (paragraph 11);**

> **"The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence …" (paragraph 13)**

27. In answering the question in **Global Torch** Maurice Kay LJ rejected the proposition that there should be a lower threshold for interference with the open justice principle at an interlocutory stage, at least in an arguable case. Rather, he held that outside the statutory or established exceptions it has universal application except where strictly necessary to depart from it in the interests of justice. He recognised that sometimes a degree of protection is arguably necessary, for example to protect against blackmail where on the particular facts there may be a need for protection so as to avoid the full application of the open justice principle exposing a victim to the very detriment which this cause of action is designed to prevent. But

in a case where an individual's rights are liable to be vindicated in the trial process, he held (at [34]):

> **"… If such an approach were to be extended to a case such as the present one, it could equally be applied to countless commercial and other cases in which allegations of serious misconduct are made. That would result in a significant erosion of the open justice principle. …"**

It follows that the position must be even stronger once judgment has been delivered.

28. For a case where the relevant rights are not likely to be vindicated in the trial process because they are not directly relevant (the present case being an example), the position was addressed by the Supreme Court in **Guardian News and Media Ltd**. The case concerned a challenge to anonymity orders granted where three individuals had challenged action taken against them under terrorism legislation to freeze their assets in circumstances where terrorism charges could never be brought against them. The press successfully challenged the grant of anonymity. One of the three (M) argued that his identity should be anonymised, because if named he would be identified as a person whom the Treasury had reasonable grounds to suspect of facilitating terrorism. The Supreme Court expressed scepticism about the extent of any such reputational damage suggesting that the evidence provided by M about this was speculative: [58].

29. Significantly, M contended "however accurate the reporting, members of the public would simply proceed on the basis that he is a terrorist" so that the ban on publishing his name should remain in place to avoid this: [59]. The Supreme Court rejected that argument, stating at [60]:

> **"That argument raises an important point of principle. It really amounts to saying that the press must be prevented from printing what is true as a matter of fact, for fear that some of those reading the reports may misinterpret them and act inappropriately. Doubtless, some may indeed draw the unjustified inference that M fears. But the public are by now very familiar with the argument that various measures, including control orders, have been taken against people who are merely suspected of involvement in terrorism, precisely because the authorities cannot prove that they are actually involved. Politicians and the press have**

> **frequently debated the merits of that approach, the debates presupposing that members of the public … are more than capable of drawing the distinction between mere suspicion and sufficient evidence to prove guilt. Any other assumption would make public discussion of these and similar serious matters impossible. …"**

30. Miss Rose QC contends that the same analysis applies in the present case in the wake of "Jimmy Savile" in circumstances where the public has become used to individuals being named when investigated for sex abuse allegations in cases where they are subsequently not charged, or charges are laid but subsequently not proceeded with or they are acquitted. Whilst the identification of those individuals may be controversial, it is nevertheless done at an early stage on the premise that the public can be trusted to distinguish between an allegation and a finding of guilt, and because there is a public interest in naming them so that other victims might come forward.

31. In **R v Legal Aid Board, ex parte Kaim Todner** the Court of Appeal observed that where the interference is for a limited period that is less objectionable than a restriction on disclosure that is permanent. Moreover, it held that it is not unreasonable to regard the person who initiates proceedings as having accepted the normal incidence of the public nature of court proceedings so that in general such a party has to accept the embarrassment and reputational damage inherent in being involved in litigation and is in a different position to a witness who has no interest in the proceedings and so has a stronger claim to be protected by the courts if liable to be prejudiced by publicity (at 978F).

The Appeal

32. Miss Rose on behalf of the BBC accepts that the Judge gave himself a correct direction in law in the First Judgment. However, when he came to apply the law and the approach he had identified, both at that stage and in the subsequent Privacy Judgment, his assessment was wrong

as a matter of law and cannot stand. She submits that only one reason was given for the Anonymity Order, namely the risk that the public would assume that G is guilty of the serious sexual assaults identified in the First Judgment, and would not be able to recover from the opprobrium liable to follow. In her submission the underlying premise that the public cannot distinguish between allegations and proven charges is unwarranted and wrong in principle in light of **Guardian News and Media Ltd**. The Judge should have started with the paramountcy of open justice and proceeded on the basis that any derogation could be allowed only if the administration of justice required it. Moreover, in considering whether a derogation was strictly necessary after promulgation of the First Judgment, she submits that the Judge should have concluded that the weight of G's Article 8 rights in the present case is low and outweighed by the public interest in open justice so that any derogation from open justice would inevitably be disproportionate and an error of law.

33. Against that Mr Bowers QC first contends that the Judge's decision was essentially a discretionary case management decision that cannot be interfered with absent an error of law or perversity. Further, having correctly directed himself in law, he submits that the Judge took full account of the competing rights and weighed them having regard to the evidence, reaching a conclusion that was manifestly sustainable on the facts and correct as a matter of law. It is not for the Appeal Tribunal to rehear the case and no different principles apply in an appeal against the exercise of a judicial discretion in a case dealing with human rights than in any other case. He relies on **Transport for London v O'Cathail** [2013] ICR 614, an appeal concerning an adjournment application where Article 6 was involved and the Court of Appeal held that Article 6 compelled no particular conclusion and the question remained one of discretion for the first instance tribunal, not to be interfered with on appeal absent an error of law.

34. I do not agree that the making of an anonymity order is to be seen as a case management decision involving the wide discretionary powers generally attributed to such decisions. Although there are conflicting dicta in the authorities, in my judgment the making of such an order upon reconciling the competing human rights engaged, is not an exercise of discretion at all. There is a right or wrong answer to the question in each particular case. However, in case I am wrong about this I have in any event considered the Judge's decision on the basis of an exercise of discretion.

35. Separately I do not consider that the source of the Judge's jurisdiction to consider the Anonymity Order following the First Judgment was Rule 29, as he identified. His original order was made under Rule 50 but was limited to the substantive hearing. Any extension to that order should have been considered pursuant to Rule 50 (and he had himself indicated that such further consideration might be required). However, although there are passages in the Privacy Judgment that suggest the Judge might have adopted the wrong approach by reference to Rule 29, these are ambiguous, and I do not proceed on that basis.

36. I accept as Mr Bowers contends, that Employment Judge Glennie was well placed to assess the factual sensitivity of the case and the extent to which Article 8 was or was not engaged having dealt with the substantive claims in a hearing that lasted four days. His assessment is to be accorded deference in those circumstances. I can only interfere with the decision he reached if he has made an error of law. If I am satisfied that he carried out the requisite balancing exercise correctly, concluding without error of law that publication of the First Judgment without anonymity would interfere with G's Article 8 rights to an extent that would justify interference with the public interest in open justice and the BBC's Article 10 rights to freedom of expression, then his order should be upheld.

37. In seeking to support the Anonymity Order, Mr Bowers contends that in a case involving unsubstantiated allegations of serious sexual assaults, the Judge was entitled to conclude that the public would be likely to misunderstand these with devastating consequences for G. That conclusion is entirely consistent with **A v B** [2010] ICR 849 in which a similar conclusion was described as "self-evident" by Underhill P. These were, he submits, findings open to the Judge who was particularly well placed to make that assessment, and absent perversity cannot be challenged. Moreover, this case had none of the features of public interest identified in **Guardian News and Media Ltd**: this is an individual employment case with no public interest beyond the prurient interest the public might have in sexual matters. Accordingly, the Judge was correct to conclude that G's strong Article 8 rights in context, outweighed the limited competing rights on the other side of the balance.

38. I do not accept these contentions and have come to the conclusion that the Judge erred in law and reached the wrong conclusion in the present case for the reasons that follow. I am also satisfied in any event, that if this decision involved the exercise of discretion, in exercising his discretion as he did, the Judge erred in law (for the same reasons that follow) and reached a conclusion that must accordingly be set aside.

39. First, I consider that the Judge erred in his approach to the balancing exercise that was necessary. Although the Judge identified the need for a balancing exercise, and that such an exercise might be different following the promulgation of his judgment ([11] and [12] Privacy Judgment), it is not apparent in the Privacy Judgment that he actually carried out the balancing exercise required, still less on the different factual basis that applied after promulgation of the First Judgment. Instead, at paragraphs 13 to 15 of the Privacy Judgment, he singled out one factor (the risk of public misunderstanding and its consequences for G) and concluded that it

outweighed any other factor. There was no fact specific assessment by him of the public or other interest in full publication in the present case, nor the intense focus on the comparative importance of the specific rights being claimed, or the justifications for interfering with or restricting them.

40. Secondly, the sole reason why the Judge held that the Anonymity Order should continue was an invalid one. The reason relied on was his acceptance that there was a risk that the public would conclude that G had actually committed the offences which had been alleged against him, but never established, because of the similarity between the Cornwall and Glasgow allegations, and that this could have "devastating consequences for which he would have little hope or prospect of overcoming". I do not accept Mr Bowers' submission that this was a finding of fact that is binding on the Appeal Tribunal subject only to perversity. Rather, this is a point of general principle of open justice. Although the subject matter and context is different, the decision in **Guardian News and Media Ltd** cannot be distinguished in the way the Judge sought to distinguish it at [14] of the First Judgment. Both cases involve the most serious unsubstantiated allegations carrying the potential for particularly strong public disapproval with potentially serious personal consequences for the suspected individual. If there was no warrant for concluding that the public might be incapable of drawing the distinction between mere suspicion and sufficient evidence to prove guilt in relation to terrorism offences, it is difficult to see what makes the difference in the present case. Just as with control orders, in the context of criminal investigations into sex abuse allegations, the public interest in open justice is regarded as outweighing the Article 8 rights of a person suspected of these serious criminal offences, and the public has accordingly become accustomed to the early identification of such persons (even before charge in many cases) and is trusted to distinguish between an allegation and a finding of guilt.

41. Mr Bowers' reference to the protection that would have been available to G under the **Rehabilitation of Offenders Act 1974** if he had a spent criminal conviction for the offences alleged takes the matter no further. The situations are different, and the consequences of a spent conviction are irrelevant to the question whether G's Article 8 rights exceptionally require protection by way of derogation from open justice or the Article 10 considerations in the case.

42. The answer to the concern about public misunderstanding lay in the Judge's own hands in the sense that a public judgment could (and did in fact) make clear that the allegations had not been proved against G; that he denied them and that he had not yet been afforded any opportunity to contest them, not least in the tribunal proceedings themselves: see [13] and [59] First Judgment, [14] Privacy Judgment. Moreover, a stricter approach should have been adopted by the Judge in this respect in considering the question of permanent anonymity in relation to the First Judgment, than had been adopted at the earlier stage at the outset of the substantive hearing.

43. Moreover, the finding that there would be devastating consequences for G as a result of public misunderstanding is a finding that was unsupported by any evidence. Nor is there any factual foundation for the assertion in writing (G's Skeleton paragraph 7b) that the Judge was "no doubt thinking about examples of 'vigilante' justice being meted out". He made no finding to this effect, nor was there evidence to support it. Clear and cogent evidence was required to establish a basis for derogating from the public interest in full publication of the First Judgment. Unlike in **Guardian News and Media Ltd** where there was evidence about the potential reputational damage for M and his family if his identity were revealed (described as "very general" and "not particularly compelling" by the Supreme Court) there was no such evidence at all in the present case.

44. Accordingly, for all these reasons the Judge erred in concluding that members of the public would be unable to distinguish between mere suspicion and a proven finding of guilt with devastating consequences for G.

45. Thirdly, I agree with Miss Rose that the Judge erred in his assessment of the weight to be attached to G's Article 8 right. In the present case, the weight of G's Article 8 right was low:

a) G chose to bring proceedings against the BBC in a public tribunal (unlike M in **Guardian News and Media Ltd** who was on the receiving end of proceedings) knowing that he had not been honest with the BBC about the circumstances of his earlier dismissal for gross misconduct and the allegations that had previously been made against him. He must have known that the facts about D and E might come to light, and must be taken to have appreciated the attendant risk of publicity in bringing public proceedings. He does not forfeit his right to privacy by doing so, but it is a significant factor that should have been considered by the Judge but was not.

b) G was found by the Judge to have made material false statements to the BBC, both at the time he was first employed and during the disciplinary investigation which only came to light in the course of the proceedings. G was also found to have made a false statement in his evidence to the Tribunal whilst seeking compensation against the BBC. These are fully explained in the First Judgment. Again, although the Judge acknowledged this, he did not weigh it in assessing the strength of G's Article 8 rights. The effect of the Anonymity Order is to shield G against publication of the true facts that he misled his employer and the Tribunal, and committed a fundamental breach of his employment contract, in circumstances

where he has no common law or Article 8 right to have these facts concealed. The Tribunal's function was to adjudicate on the fairness of the disciplinary process that led to G's dismissal, and having done so, it is inimical to the court process, for him to be shielded from full publication of the judgment that adjudicated on these matters.

46. Fourthly, against the Article 8 arguments in favour of anonymity, after promulgation of the First Judgment there were particularly strong countervailing reasons in the public interest, protected by Article 10, why the BBC ought not to be inhibited by the Anonymity Order from identifying G as the Claimant in the present proceedings, but the Judge failed to take account of these. First, as the BBC explained in correspondence, there were a number of relevant bodies or people with a strong interest in knowing the outcome of the proceedings brought by G, particularly given the concern that G might pose a risk to young men in future. Secondly, future employers of G's services would have an interest in knowing that he had been dishonest and had misled the BBC (and might not be referred by G to the BBC for a reference). Thirdly, the BBC's rights had been vindicated and its wish to have full publication without constraint was a factor that required consideration.

47. So far as the interests of open justice are concerned, I do not accept Mr Bowers' submission in reliance on **A v B** that in the present case there is no public interest in full publication of what is essentially a private employment claim (particularly given the potentially devastating consequences for G in being identified). This was addressed by Underhill P in **F v G** [2012] ICR 246 at [49] as follows:

> **"I turn, therefore, to the second question, namely whether the injury to the article 8 rights of the students and staff concerned outweighs the interests of open justice. I do not find that easy. As Tugendhat J makes clear in *Gray v UVW* [2012] EWHC 2367 (QB), the default position in English law is and should be that it is in the public interest that the full decisions of courts and tribunals, including the names of the parties, should be published. I need not elaborate the reasons for that view, which simply reflects what has been said by numerous**

> **courts and tribunals ever since the decision of the House of Lords in *Scott v Scott* [1913] AC 417, and indeed before. It is not a right specifically of the press but reflects the public interest generally. It applies irrespective of the subject-matter of the case. (I do not suppose that the judge's observation at para 19 of the reasons that this was "an individual employment claim" which did not "raise issues of public interest in the wider sense" meant that she believed that there was only a public interest in full publication in cases where the subject matter of the claim itself happened to involve issues of general public importance; but I should make it clear that if that was what she meant, I cannot agree.) In addition to that public interest, weight must also be given to the claimant's wish for the judgment to be published in a form which names herself and the college. It is entirely legitimate that someone who has had their rights vindicated after a hard-fought piece of litigation should wish to be able to report, and produce the evidence of, that victory without constraint."**

These considerations apply with even more force in the present case. In **F v G** the privacy interests at stake were those of highly vulnerable third parties who had not chosen to become involved in proceedings and had no interest in doing so. There was therefore a significantly stronger case for anonymity, and yet despite that, Underhill P held that the balancing exercise was not an easy one.

48. For all the reasons set out above, the Judge erred in his application of the legal principles to the question whether anonymity should be ordered on a permanent basis after promulgation of the First Judgment. He failed to carry out a proper balancing exercise or to take account of relevant considerations in doing so, and relied on an invalid reason for granting the Anonymity Order which must accordingly be set aside.

Disposal

49. The parties do not agree about the consequences of that conclusion. Mr Bowers submits that the question of anonymity ought to be remitted for reconsideration in these circumstances because this is not a case where only one outcome is possible, and the Judge is in the best position to assess and weigh the competing interests in the present case.

50. I disagree. The default position in the public interest is that judgments of Tribunals should be published in full, including the names of parties. That principle promotes confidence in the administration of justice and the rule of law. The reporting of court proceedings in full without restriction is a particularly important aspect of the principle and withholding a party's name is an obvious derogation from it, requiring cogent justification for its restriction. Even in **In re S**, where the Article 8 rights of an innocent 10 year old were engaged, anonymity for his mother, charged with murdering one of her other children, was refused by the House of Lords as not outweighing the public interest in open justice. The mere publication of embarrassing or damaging material is not a good reason for restricting the reporting of a judgment, as the authorities make clear.

51. The only factor identified by the Judge as outweighing the principle of open justice and freedom of expression was the risk of reputational damage to G based on public misunderstanding of the sexual allegations. Once that is disregarded, as it must be for the reasons given above, there is no rational basis for the Anonymity Order, and nothing to remit to the Tribunal. On the facts of the present case, anonymity for G would constitute a disproportionate and unlawful interference with the paramount principle of open justice and the strong public interest in full publication protected by Article 10 (discussed at paragraph 46 above).

52. Accordingly, the appeal is allowed. The Anonymity Order is set aside, and in exercise of powers under section 35(1)(a) **Employment Tribunals Act 1996**, no order for anonymity for G is granted in relation to either the First Judgment or the Privacy Judgment, and he is to be identified by name in both.