Appeal No. UKEAT/0525/13/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 November 2014
Judgment handed down on 25 March 2015

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

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(1) EF
(2) NP

APPELLANTS

(1) AB (DEBARRED)
(2) CD (DEBARRED)
(3) JK (DEBARRED)
(4) QR (DEBARRED)
(5) ASSOCIATED NEWSPAPERS LTD (DEBARRED)

RESPONDENTS

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellants	MR PETER WALLINGTON QC (of Counsel) and MR MATTHEW NICKLIN QC (of Counsel) and MR JULIAN MILFORD (of Counsel) Instructed by: Eversheds LLP 1 Callaghan Square Cardiff CF10 5BT
For the Respondents	All Respondents debarred from taking part in this appeal

SUMMARY

PRACTICE AND PROCEDURE

Restricted order reporting

Disposal of appeal including remission

The Employment Tribunal erred in refusing to extend Restricted Reporting Orders in respect of a Respondent to Employment Tribunal proceedings and a non-party. They failed to carry out the assessment of comparative importance of the Article 8 and Article 10 rights engaged in respect of each of the Appellants. Further, the matters the Employment Tribunal took into account in negating continuing the Restricted Reporting Order were not properly categorised as matters of public interest. **In re S(A Child) (Identification: Restrictions on Publication)** [2005] 1 AC 593 and **F v G Publication** [2012] ICR 246 applied. A Restricted Reporting Order made under Section 35(1)(a) **Employment Tribunals Act 1996**. **Jafri v Lincoln College** [2014] ICR 920 and **Burrell v Micheldever Tyre Services Ltd** [2014] ICR 935 considered.

THE HONOURABLE MRS JUSTICE SLADE

1. EF and NP appeal against the refusal by a Judgment with Reasons sent to the parties on 14 August 2013 of an Employment Tribunal (the "ET"), Employment Judge Twiss and members, to include them within the terms of a permanent Restricted Reporting Order ("RRO") made in relation to and following their determination of claims made by AB. A permanent RRO was made in respect of four individuals.

2. EF was an individual Respondent to the ET proceedings brought by AB. NP is his wife. She was not a party to the proceedings nor did she give evidence at the hearing of the claims. EF and NP were represented before me by Mr Peter Wallington QC, Mr Matthew Nicklin QC and Mr Julian Milford. The Respondents failed to lodge Answers in the Employment Appeal Tribunal ("EAT") and are debarred from taking part in the appeal.

3. By a separate Judgment sent to the parties on 18 August 2013 ("the Liability Judgment") the ET dismissed claims by AB against EF and others of unfair constructive dismissal, automatically unfair dismissal, detriment pursuant to Section 48 **Employment Rights Act 1996**, sexual harassment / sexual orientation / sex discrimination, victimisation and of unlawful deduction from pay and for holiday pay. The Liability Hearing lasted for three weeks between March and June 2013. The claims made by AB included lurid allegations of sexual harassment and abuse by EF in some of which his wife, NP, was said to have been involved. The allegations covered a period from 2001 to 2011.

4. As a result of AB's threats to publish and promulgate allegations, text messages and photographs regarding sexual activities alleged to have been engaged in by EF and NP, in

March 2012 EF sought and obtained an injunction in the High Court restraining such publication save as to enable AB to commence proceedings in the ET. The hearings of the High Court proceedings took place in private, the parties were anonymised, access to the court file was restricted and orders preventing the identification of the parties were made.

5. AB commenced ET proceedings on 3 May 2012.

6. The ET made a temporary RRO on 16 May 2012 under Rule 50 of the **Employment Tribunals Rules of Procedure 2004** ("the 2004 ET Rules") on application by EF. That temporary RRO was converted into a full RRO by Order of the ET on 13 August 2012 lasting until the determination of liability and remedy. The RRO prevented the identification of persons listed in the second paragraph of the Order including AB, EF and NP. The ET also made a Register Deletion Order ("RDO") under Rule 49 of the **2004 ET Rules** on application by EF because the proceedings involved allegations of the commission of sexual offences.

7. AB served his Defence in the High Court proceedings on 16 April 2012. The Defence alleged that there could be no reasonable expectation of privacy in texts and emails asserted by EF to be private as it was said *inter alia* that they were acts of sexual harassment. It is said on behalf of EF that the Defence is based on the allegation that he sexually harassed AB.

8. EF made an application on 27 September 2012 to stay the High Court proceedings pending the decision of the ET given the overlap of the issues in the two sets of proceedings. In October 2012 the High Court proceedings were stayed pending the outcome of the ET claims. It is said that the Judge in the High Court proceedings considered that the outcome in the ET was likely to determine the privacy proceedings.

9. The hearing in the ET commenced on 7 March 2013. It lasted three weeks.

10. Despite the RRO, articles appeared which contained materials from which it was possible to identify EF. A member of his family asked him whether the articles were about him. EF was informed by former work colleagues that the press coverage was being discussed.

11. A complaint was made to the Employment Judge on 8 April 2013 by counsel for EF about the breach of the RRO, as a result of which the police investigated. By the time the investigation had concluded no prosecution could be brought under Section 11 of the **Employment Tribunals Act 1996** as the time limit for doing so had expired.

12. The ET sent the liability judgment to the parties on 14 August 2013. They dismissed all claims made by AB.

Liability Judgment: relevant findings

13. In 1999 AB's business was acquired by the CD group of companies and operated as a semi-autonomous company within the group. AB was its managing director and EF the group CEO.

14. AB alleged that EF had encouraged him to attend sex parties with him and that EF and NP had sexually abused him for almost 13 years. A sexual photograph of NP had been sent by EF to AB.

15. The ET found that sex parties took place between AB, EF and various women in the period between 2001 and 2009. These were less frequent than AB had alleged and petered out

long before AB resigned on 14 February 2012. The ET did not accept a claim by AB that EF engaged in unwanted sexual activity with him at a party in 2001. The ET held at paragraph 86:

> **"We find the claimant's evidence about sexual encounters involving [EF] very unreliable. We nevertheless find [EF's] evidence also to be untrue in material respects."**

16. The ET had no hesitation in concluding in paragraph 147 that AB was not subjected by EF to sexual harassment related to sexual orientation and sex discrimination.

17. On 8 February 2012 EF received a letter from an anonymous employee raising concerns about AB's conduct in running JK. It contained serious allegations of dishonesty. EF met AB and showed him the whistle blowing document. EF recorded what happened in a note to his solicitors. He said that AB wanted £10 million to leave and sign a three year non-compete contract, the company to forgive his debt and to pay his daughters who were employed by JK £100,000 each to leave. AB said that if this was not forthcoming he would "see the Respondents [who included EF] in court and take others down with him." An investigation commenced into the allegations by the whistle blower.

18. Two days later on 10 February 2012 AB sent an email to EF entitled "Notification of intention to make public and to shareholders of GH." The document contained five allegations of impropriety against various individuals and organisations and threatened to make this information public. One was:

> **"Abuse of powers of a sexual nature by CEO [EF]."**

The ET held at paragraph 195:

> **"… we find that the contacts between [AB] and [EF] at this time were all part of a scheme of [AB's] part to exact revenge for the perceived failure of[EF] to protect him from the consequences of the whistle blowing letter and also to extract monies from the companies."**

19. AB was suspended and then resigned on 14 February 2012. Shortly after that he sent an email attaching a sexual photograph of NP to partners in one of the Respondents. AB sent an email to their general counsel threatening to:

> **"Take this to the next level via all different media available to me to exposed (sic) [EF]."**

20. In their decision on the protected disclosure claim, the ET held at paragraph 242 that AB also "knew the statements in the Notification Document to be false and his motivation in making them was dishonest." In paragraph 244 the ET held of the other alleged disclosures:

> **"We find that the Claimant's motives with regard to all of those alleged disclosures was revenge and blackmail and that he did not have any genuine belief in the truth of the disclosures at the time he made them."**

21. The ET considered and dismissed the allegations AB made of repudiatory breach of his contract of employment. They found the decision to suspend AB was appropriate, justified and in accordance with his contract of employment. In paragraph 295 the ET held that AB resigned because:

> **"he knew the game was up and that his wrongdoing, as set out in the whistle-blowing letter would be discovered, which would result in his summary dismissal. The CCTV evidence demonstrates that the Claimant took his decision to leave before he was suspended …"**

CCTV footage showed AB removing boxes of his belongings from his office before he resigned. In paragraph 296 the ET found that AB had not been constructively dismissed and dismissed his claim of unfair dismissal.

22. The ET concluded by holding at paragraph 304:

> **"This is a claim which should never have been brought and begun should not have been continued. It is wholly without any justification or merit at all. We consider that the claimant's motivation in bringing the proceedings and continuing with them was not to bring before the tribunal a legitimate claim for compensation but as a part of his campaign of revenge against the 2nd respondent and to blackmail the corporate respondents into paying him a very large sum of money to which he had no legitimate claim at all. Having regard to the evidence that has been presented throughout the case, from the initial reading of the statements presented as the claimant's evidence in chief to the end, it has been clear that the claim was wholly devoid of any merit whatsoever."**

The RRO Judgment

23. The ET ordered that the RRO remain in force in respect of four individuals. In respect of AB, EF, NP and the corporate respondents the RRO was to remain in force until the end of 21 days from 14 August 2013 or, if there were an appeal, until the determination of such appeal without further appeal.

24. The ET referred to the **2013 ET Rules** Rule 50 which provides:

> **"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 or in the circumstances identified in section 10A of the Employment Tribunals Act.**
>
> **(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—**
>
> > **(a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;**
> >
> > **(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;**
> >
> > **(c) an order for measures preventing witnesses at a public hearing being identifiable by members of the public;**
> >
> > **(d) a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act."**

25. As for AB, the ET held:

> **"We can see no reason to provide any anonymity for AB. He embarked on abusive proceedings as an act of revenge and in hope of extracting money. We can see no possible argument in favour of extending reporting restrictions in his favour. Any damage to his reputation and standing in the community has been brought about by his own actions."**

26. The ET observed that EF's activities were not illegal and were conducted in private. His actions had only come to public notice because of abusive tribunal proceedings brought by a bitter and vengeful man, AB.

27. The factors which the ET considered militated against making the RRO in respect of EF permanent were as follows. It considered that embarking on a course of conduct with a fellow employee must be regarded as risky. In paragraph 30 the ET held that much more important was what they described as "the substantial public interest in the issues raised in this case". The first element of what they considered to be of public interest was:

> **"The general human interest in sex and money involving relatively rich people."**

The ET recognised at paragraph 31 that this interest was more or less prurient.

28. The ET considered at paragraph 32 that there was:

> **"a public interest in the details of the case (including the identity of those involved) which carries much more force in determining whether or not the details of the case should be made public."**

29. The public which the ET had in mind were about 500 employees of the subsidiary of which AB was the managing director. The ET considered that it was clear from the evidence that JK under the regime of AB must have been an extremely unpleasant place to work. The ET held at paragraph 35:

> **"The lives of many employees of JK and particularly those in lower and middle management positions – must, during those years, have been miserable. They are, we believe entitled to know why. We believe also that their family and friends are entitled to know why."**

The ET considered that this had a bearing on the position of EF because he was responsible for JK as Group CEO at all relevant times. EF and the Group Finance Director permitted scrutiny of what happened in JK to be slack, and let AB run the business in the way he did. The ET held at paragraph 37:

> **"We consider it is important that the full story be told so that the employees of JK may know just why it was and how it came about that their lives over a period of 10 years or so were so unpleasant. This involves disclosing the name of the person involved- EF. We consider that the interests of the employees of JK, in knowing the full story, outweigh EF's Article 8 rights to privacy."**

30. The ET observed that "similar considerations apply to the rights of other employees of the group," parts of which "were clearly much better managed than JK." An example was given of a managing director of another division who did not go on expensive business trips.

31. The ET also appear to have taken into account as a factor weighing against extending the RRO that EF had been informed that the press coverage had been widely discussed in CD. The ET held at paragraph 39:

> **"We consider that those employees have the right to know just what has been happening in the company for which they work."**

32. Another consideration which in the view of the ET militated against continuing the RRO in respect of EF, was:

> **"EF's attitude to the rights to privacy of others. In the course of giving evidence, he disclosed the name of a person prominent in the world of football in connection with prostitution. This was a gratuitous reference with no relevance to the issues being examined in cross-examination at the time."**

33. The ET correctly stated that as NP is EF's wife it would be impossible to identify him without her being identified as well. The ET stated that it was difficult to assess NP's rights as they had not heard evidence from her. They did not know whether she was aware that pornographic photographs of her body would be exchanged by email and text between EF and AB.

34. The ET considered that:

> **"The maintenance of anonymity for NP hangs together with that of her husband EF."**

The ET stated that they had weighed the Article 8 rights of EF and NP, taken together, against the competing interest of open justice. They decided on balance not to extend the RRO in respect of NP.

35. After reaching the conclusion that the RRO should not be extended indefinitely in respect of NP, the ET observed that in respect of the immediate acquaintances and family of EF and NP and employees of CD plc the "cat [was] already out of the bag." The ET said:

> **"It may conceivably be helpful to EF and NP if the true story is told, rather than people's views being based on rumour."**

Submissions on behalf of EF and NP

36. The **Employment Tribunals Act 1996** ("ETA") section 11(1)(b) enables rules to be made allowing an ET to make a RRO having effect "until the promulgation of the decision of the Tribunal" if not revoked earlier. A RDO which was made in this case, requiring omission from any judgment, document or record of the proceedings of anything which is likely to lead a member of the public to identify any person affected by or making an allegation of a sexual offence, is not limited in time. However a RDO does not prevent any person from publishing information derived from the hearing or the judgment if an RRO is not in place.

37. Although **ETA** sections 11(1)(b) and **ET Rule** 50 provide for the making of an RRO only until the promulgation of the decision of the Tribunal, counsel for EF and NP contended that it is well established in the authorities including **F v G** [2012] ICR 246 that an ET should be able to make whatever order restricting public disclosure it considers necessary in order to protect any person's Convention rights. This includes the power to make an RRO preventing or restricting public disclosure as is necessary to protect Convention rights. The power is one of general case management to safeguard Convention rights.

38. Mr Nicklin QC submitted that as in **F v G** as well as those of the parties, the interests of non-parties, in this case NP, must be balanced against the public interest in publication of the names or facts identifying those who are not the beneficiaries of the extended RRO.

39. Mr Nicklin QC contended that the ET erred in their approach to balancing the respect for the private and family life under Article 8 **European Convention on Human Rights** ("ECHR") of EF and NP with the right of individuals and the press to report proceedings as they wish under Article 10 **ECHR**.

40. Mr Nicklin QC contended that the ET erred by considering first whether the RRO should be extended in respect of AB. Refusing to extend the RRO in respect of AB may have been justified if he stood alone. However the ET failed to consider the effect of identifying AB on EF and NP and the child of NP.

41. Counsel contended that the ET had failed to carry out the balancing test in respect of EF and NP separately required as explained by Lord Steyn in **Re S (a child) (Identification: Restrictions on Publication)** [2005] 1 AC 593 at paragraph 17.

42. Mr Nicklin QC pointed out that the general principles of the engagement in the balancing exercise and importance of Article 8 **ECHR** are the same, whether they arise in the context of attempts to restrain publication by way of an injunction or in the context of anonymity orders or other restraints upon the identification of parties to court proceedings. These have been summarised by the Court of Appeal in **K v News Group Newspapers Ltd** [2011] 1WLR 127**.** These are: whether the individual seeking to restrain publication has a reasonable expectation of privacy so as to engage Article 8. The court will take into account the relevant circumstances, including the attributes of the individual, the nature of the activity, where it was happening, the purpose of the intrusion on privacy and the effect on the individual. The test is to ask whether a reasonable person of ordinary sensibilities, if placed in the same situation as the subject of the disclosure, would find it offensive. In general, anyone engaging

in sexual activity is entitled to a high degree of respect for his or her privacy rights, especially if the activity takes place on private property between consenting adults. The protection may be lost if the information has been disclosed to the public at large. Whether this has occurred is a matter of fact and degree.

43. Mr Nicklin QC contended that the ET erred in their approach to Article 10. He submitted that as explained by the Supreme Court in **In Re Guardian News and Media Ltd** [2010] 2 AC 697 at paragraph 52:

> **"The fundamental question for the Tribunal was whether there is sufficient public interest in publishing a report of the proceedings which identifies [the person] to justify any resulting curtailment of his right and his family's right to respect for their private and family life."**

44. In understanding the necessary balancing exercise between Article 8 and Article 10 rights Mr Nicklin QC contended that the ET failed to consider the effect on the High Court proceedings of lifting the RRO thus enabling EF and NP to be identified. The parties in the High Court proceedings have been anonymised. This enabled two public judgments to be given in those proceedings. Mr Nicklin QC contended that the effect of not continuing the RRO would be to defeat the protection conferred by the terms of the Order in the High Court. The Defence of AB in the privacy proceedings was that there could be no privacy in otherwise private sexual matters if they were sexual harassment. Mr Nicklin QC contended that had the ET upheld AB's claims of sexual harassment the High Court would have been able to determine that EF's privacy rights were outweighed by the public interest in disclosure of abusive sexual harassment. However the ET dismissed AB's claims which it found to be without foundation and pursued in execution of a plan of blackmail.

45. Further, it was contended that the ET erred in law in failing to attach any, or any sufficient weight to their conclusion that AB had attempted to blackmail EF over his alleged sexual harassment of AB and had pursued proceedings in furtherance of that attempt.

NP

46. Mr Nicklin QC contended that the ET erred in their approach to the question of whether the RRO in respect of NP should have been extended without limitation of time. It was wrong to observe as the ET did in paragraph 42 that it was difficult to assess the rights of NP as they had not heard from her. **K** shows that the right to privacy of non parties and those who are not witnesses can be assessed by the courts. Further the ET erred in paragraph 43 by failing to undertake the necessary balancing exercise between Articles 8 and 10 in respect of NP and EF separately. Finally it was wrong for the ET to place any weight on their observation at paragraph 44 that it may be "helpful to EF and NP if the true story is told rather than people's views being based on rumour."

47. Mr Nicklin QC contended that the material before the ET concerning NP was plainly private. AB alleged that EF's wife, NP, was involved in sexual activity with him. He alleged that this was against his will and that he had been sent an unwanted pornographic photograph of her by text or email. Article 8 was clearly engaged. Whilst the ET referred to open justice they gave no explanation why that outweighed privacy considerations so that the RRO was not continued in relation to NP.

48. Mr Nicklin QC contended that the private and family life of NP and her child would clearly be infringed by the termination of the RRO. He contended that there is no public interest in knowing that it had been alleged that NP had been involved in sexual activity with

AB or that a pornographic photograph of her had been sent to him. There is no countervailing right to outweigh NP's right to privacy. The right to privacy of her child was given no separate consideration by the ET. Mr Nicklin QC contended that it is so clear that the RRO in respect of NP should be continued that there would be no point in remitting the case to the ET for determination of this issue.

EF

49. Mr Nicklin QC contended that the decision not to extend the RRO in relation to EF cannot stand. The ET erred in conducting the balancing exercise between Article 8 and Article 10 rights and in deciding that there is a public interest in the issues raised in this case.

50. The first element of public interest identified by the ET was "general human interest in sex and money involving relatively rich people. This was more or less prurient." This clearly falls within the well known dictum in **Lion Laboratories Ltd v Evans** [1985] 1 QB 526 that there is a world of difference between what is in the public interest and what is of interest to the public.

51. As for the second element of public interest relied upon by the ET - the interest of employees of JK, their friends and families in knowing why their working lives under AB as managing director were so unpleasant - Mr Nicklin QC relied upon the judgment of Ward LJ in **K**. Ward LJ held at paragraph 23 that the decisive factor in determining the balance between Article 8 and Article 10 rights in that case was the contribution the reasons why X's employment terminated would make to a debate of general interest. Publication may satisfy public prurience but that is not a sufficient justification for interfering with the private rights of those involved.

52. Mr Nicklin QC also relied upon **In re Guardian News and Media Ltd** in which the Supreme Court referred to the guidance to the approach to be adopted when both Article 8 and Article 10 are in play, given by the European Court of Human Rights in **Von Hannover v Germany** [2004] 40 EHRR 1.

53. The Supreme Court commented at paragraph 49 on **Von Hannover** in which Princess Caroline of Hannover was complaining of press intrusion into her private life:

> **"The decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest."**

54. As for the additional matter which the ET took into account, the naming by EF of someone connected with football and sexual impropriety, Mr Nicklin QC stated that this evidence was given in an answer in cross examination. The name was not the subject of any restriction and this should not have affected the decision whether to extend the RRO in relation to EF.

Discussion and Conclusion

The Power of the Employment Tribunal to make a permanent Restricted Reporting Order

55. **ETA** Section 11 enables the **Rules of Employment Tribunals** to provide:

> **"11(1)(b) for cases involving allegations of sexual misconduct, enabling an employment tribunal on the application of any party to the proceedings before it or of its own motion, to make a restricted reporting order having effect (if not revoked earlier) until the promulgation of the decision of the tribunal."**

56. The **2013 ET Rules** provide :

> **"41. General**
>
> **The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The following rules do not restrict that general power.**
>
> **…**

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 or in the circumstances identified in section 10A of the Employment Tribunals Act.

(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—

(a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;

(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;

(c) an order for measures preventing witnesses at a public hearing being identifiable by members of the public;

(d) a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act."

57. **ETA** section 31(1) provides:

"(b)for cases involving allegations of sexual misconduct, enabling the Appeal Tribunal, on the application of any party to the proceedings before it or of its own motion, to make a restricted reporting order having effect (if not revoked earlier) until the promulgation of the decision of the Appeal Tribunal"

The **Employment Appeal Tribunal Rules 1993** provide:

"Cases involving allegations of sexual misconduct or the commission of sexual offences

23(1) This rule applies to any proceedings to which section 31 of the 1996 Act applies.

…

(3) **In any proceedings to which this rule applies where the appeal involves allegations of sexual misconduct the Appeal Tribunal may at any time before promulgation of its decision either on the application of a party or of its own motion make a restricted reporting order having effect, if not revoked earlier by the Appeal Tribunal, until the promulgation of its decision."**

The **European Convention on Human Rights** ("ECHR") provides:

"Article 6.1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

> …
>
> **Article 8.1 Everyone has the right to respect for his private and family life, his home and his correspondence.**
>
> …
>
> **Article 10.1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers …"**

58. The power of Employment Tribunals to make extended Restricted Reporting Orders extended beyond the period expressed in the **ETA** and the **ET Rules** has been authoritatively determined in **X v Commissioner of Police of the Metropolis** [2003] ICR 1031, **A v B** [2010] ICR 849 and most recently in **F v G** [2012] ICR 246. In **F v G** Underhill P, as he then was, explained:

> **"22. Neither party before me has sought to challenge the correctness of the decision in X or of the extension of its reasoning in A v B. The extent of the change effected – or, rather, recognised – by those decisions is not always sufficiently appreciated. It means that in a case where anonymisation or restricted reporting orders are sought in order to protect article 8 rights, which will in practice cover most cases caught by rules 49 and 50, the tribunal's powers do not have to be derived from those rules."**

I respectfully disagree with the ET if and insofar as they may be suggesting that the "new Rule 50" of the **2013 Rules** of itself enabled ET's to make extended RROs. The enabling legislation has not been amended. The Rules made under it cannot extend the duration of Orders whose authority derives from **ETA** section 11(1)(b). The power to make extended RROs derives from the Convention as explained by Underhill P in **F v G**.

59. The Article 8 right at issue in this case was to privacy in respect of sexual conduct: that of AB, EF and NP. Some of such conduct alleged by AB against EF included an allegation of sexual assault found by the ET to be untrue. All such alleged conduct took place in private between adults in circumstances in which there was a reasonable expectation of privacy. The observation by the ET in paragraph 29 that the course of conduct engaged in by EF with a fellow employee, AB, must be always regarded as risky does not diminish that high degree of

privacy which anyone engaging in sexual activity in private is entitled to expect. Applying the principles summarised by the Court of Appeal in **K v News Group Newspapers Ltd** [2011] 1 WLR 1827 leads to the conclusion that EF and NP are entitled to a high degree of privacy in the allegations about their sexual activities. That some of the information may be true and some false does not affect its characterisation as private (**ZAM v CFW; TFW** [2013] EMLR 27 at paragraph 40 referring to **WXY v Gewanter** [2012] EWHC 496).

60. As for Article 10, not only is a private party's right to freedom of expression engaged but also considerations of open justice. In **F v G** Underhill P held at paragraph 49:

> **"As Tugendhat J. makes clear in *Gray*, 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 was 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.)"**

61. It is worth setting out the classic expression of the exercise to be undertaken by a court faced with conflicting **ECHR** rights. Of Articles 8 and 10 in **In re S (A Child) (Identification: Restrictions on Publication)** [2005] 1AC 593 Lord Steyn held at paragraph 17 of the opinions of the House of Lords in **Campbell v MGN Ltd** [2004] 2AC 457 :

> **"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."**

NP

62. In my judgment the ET erred in law in their approach to the application by NP for an extended RRO. They held that it was difficult to assess her rights as they had not heard from

her. The ET appeared to consider it material to their decision to know whether she was aware that pornographic photographs of parts of her body would be exchanged by email and text between EF and AB. In the circumstances under consideration in this case entitlement to privacy is not lost by knowledge that such material would be exchanged between two individuals who NP knew well, her husband and AB. Even if she knew that such material would be exchanged between EF and AB, NP cannot be said to have acquiesced in publication of such breadth that the material lost its private character.

63. Further, the ET erred in failing to consider the balancing exercise of competing Convention rights in relation to NP separately from those of EF, her husband. The ET expressly did not assess NP's rights as they should. In my judgment it was apparent that NP was entitled to respect for privacy in her private sexual relations and the photographs of her body. Nor did the ET consider any countervailing Article 10 rights in her case. They simply aggregated NP's case with that of EF. The factor the ET took into account as representing the public interest which they held in EF's case carries much more force "than prurience" in determining whether or not the details of the case should be made public, information for employees of JK as to why their lives under the management of AB were "miserable" and failure of EF to scrutinise the way in which JK was run, had no relevance to NP.

64. Ward LJ in **K** observed at paragraph 20 that in **In re S** Lord Steyn confined his comments on the balancing exercise to Articles 8 and 10 "and not ranging more widely to take note of the other convention rights of children." In **K** Ward LJ held at paragraph 20 of the dictum of Lord Steyn:

> **"If, as he requires, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary, then the additional rights of children are to be placed in the scale."**

65. In this case NP has a child who was aged ten at the time of the hearing before the ET. The ET made no reference to the effect on the child of publication of sexual activities of NP. This should have been weighed in the balance.

66. The ET rightly recognised in paragraph 41 that it would be impossible to identify EF without NP being identified as well. Either both may be identified or neither. In these circumstances in my judgment it was necessary to take into account the result of the balancing exercise in the case of EF. If that weighed in favour of not extending the RRO, it would be necessary in EF's case to balance the strength of that conclusion against NP's right to privacy.

EF

67. EF had a right to privacy in alleged sexual activities whether or not the allegations were true or false. That right was not lost because of the involvement of a fellow employee, AB.

68. The ET considered that two elements of public interest were engaged. The first was described them at paragraph 31 as:

> **"… the general human interest in sex and money involving relatively rich people"**

As Ward LJ held in **K** at paragraph 23:

> **"Publication may satisfy public prurience but that is not a sufficient justification for interfering with the private rights of those involved."**

69. The ET considered the second element to carry "much more force in determining whether or not the details of the case should be made public." This was the view expressed by the ET at paragraph 35 that the lives of many of the five hundred employees of JK during the period between 2001 and February 2012 must have been miserable. The ET held that they,

their families and friends are entitled to know why. EF's position was relevant as he as the Group CEO and the Group Finance Director permitted scrutiny of what happened in JK to be slack. The ET held:

> **"37. We consider it is important that the full story be told so that the employees of JK may know just why it was and how it came about that their lives over a period of 10 years or so were so unpleasant. This involves disclosing the name of the person involved – EF. We consider that the interests of the employees of JK, in knowing the full story, outweigh EF's Article 8 rights to privacy."**

The ET held that similar considerations applied to employees of the group.

70. The only evidence the ET referred to from which they concluded that the lives of many of the five hundred employees of JK must have been miserable was set out in paragraph 34. The ET held that AB "ruled by fear." Nothing happened without the say so of AB. He maintained his position by having a cadre of favourites. If someone stepped out of line they were dealt with summarily as happened to an assistant who having been a favourite, fell from grace and was dismissed at the direction of AB.

71. The ET considered that the effect of the behaviour of AB on employees in JK affected the decision on whether there was a public interest in disclosing the name of EF as he permitted scrutiny of what happened in JK to be slack. In my judgment this basis for holding that there is a public interest in not extending the RRO to EF is tenuous. Employees in JK who had been badly treated by AB would know who was responsible for their treatment. They would also know the company structure within the group and who occupied the position of CEO. A group CEO could be said to have an effect on what happened in subsidiaries.

72. Even if not continuing the RRO would give employees of JK information they had not previously possessed, in my judgment such information would not contribute to a debate of

public interest. It may be of interest to a small number of employees or former employees of JK. Even for them it relates to events at least three years ago. Further, the matters in the judgment of the ET are not concerned with how EF ran the Group. Some findings relate to charges against AB by a whistle blower and AB's retaliatory accusations against EF when he failed to defend him. The matters in the liability judgment which are likely to attract most attention, as shown by the unlawful press reporting are the sexual allegations.

73. In my judgment the ET erred in holding that the two elements upon which they relied outweighed EF's Article 8 rights to privacy.

74. Further the ET failed to weigh in the balance their finding in paragraph 304 of the liability judgment that AB's motivation in bringing the proceedings was a part of a campaign of revenge against EF and to blackmail the Corporate Respondents into paying him a very large sum of money. **ZAM v CRW; TFW** [2013] EMLR 27 at paragraph 30 is one illustration of the grant of anonynimity on a permanent basis because of an attempt at blackmail. Mr Nicklin QC is correct to submit that not extending the RRO would be to give AB what he wanted.

75. Although the ET referred to the High Court proceedings in their judgment, they did not consider the impact of not extending the RRO on the interlocutory orders in those proceedings made to protect the disclosure of the identity of EF. If the RRO were not extended, the High Court injunctions would be rendered useless and the privacy proceedings of no effect.

Conclusion

76. In my judgment the ET erred in law in refusing the applications of EF and NP to extend the RRO. Since an RRO extends to identifying material, such an Order would also prohibit the identification of AB.

Disposal

77. Mr Wallington QC contended that had the ET directed themselves correctly they could only have concluded that the RRO should be extended. It was perverse to refuse the applications for an extension. Accordingly it was submitted that the EAT should itself substitute a decision and grant an extension of the RRO.

78. Mr Wallington QC referred to **Jafri v Lincoln College** [2014] ICR 920 in which Laws LJ said at paragraph 21:

> **"It is not the task of the EAT to decide what result is "right" on the merits. That decision is for the ET, the industrial jury. The EAT's function is (and is only) to see that the ET's decisions are lawfully made. If therefore the EAT detects a legal error by the ET, it must send the case back unless (a) it concludes that the error cannot have affected the result, for in that case the error will have been immaterial and the result as lawful as if it had not been made; or (b) without the error the result would have been different, but the EAT is able to conclude what it must have been. In neither case is the EAT to make any factual assessment for itself, nor make any judgment of its own as to the merits of the case; the result must flow from findings made by the ET, supplemented (if at all) only by undisputed or indisputable facts. Otherwise, there must be a remittal."**

In **Burrell v Micheldever Tyre Services Ltd** [2014] ICR 935 Maurice Kay LJ observed that, although left with a free hand he would have modified the conventional approach, it would be inappropriate to come to a different conclusion from that of Laws LJ in **Jafri**. The EAT may therefore only substitute its own decision if such a decision is the only one the ET could have reached.

Discussion and Conclusion

79. For the reasons set out above the ET misdirected themselves in law, took into account irrelevant factors and omitted relevant factors in refusing the applications of EF and NP for an extended RRO.

80. The ET failed to refer to the role of publication of indentifying material in the interests of open justice. In **F v G** Underhill P held at paragraph 23:

> **"It is essential that in every case appropriate weight is given to the principle of open justice, which of course exists quite independently of the Convention but also forms an aspect of Article 6."**

Reference was made to the authoritative guidance to the approach to such cases given by the Supreme Court in **In re Guardian Newspapers and Media Ltd** [2010] 2 AC 679 in which the right of the press and others under Article 10 to report judicial proceedings was referred to. It is necessary for courts to hold the balance between the right to privacy and the right to report judicial proceedings. Underhill P also referred to the recent reiteration of the importance of the principle of open justice in the judgment of Tugendhat J in **Gray v UVW** [2010] EWHC 2367 (QB) in paragraphs 1 to 9.

81. In this case the extension of the RRO would impose a partial limitation on open justice. The proceedings before the ET were held in public and a full judgment was given albeit with parties and witnesses anonymised. As in **F v G**, the present case does not, on the tribunal's findings, involve unlawful conduct or egregious wrongdoing by the applicants for the RRO, EF and NP.

82. The **Employment Tribunals Act** 1996 Section 35 provides:

> **"35(1) For the purpose of disposing of an appeal, the Appeal Tribunal may-**

(a) exercise any of the powers of the body or officer from whom the appeal was brought, or

(b) remit the case to that body or officer."

83. I have considered whether it would be appropriate, consistent with the findings on appeal and with the judgments of the Court of Appeal in **Jafri** and **Burrell** to make an extended RRO exercising the powers of the ET. In this case the undoubted right to privacy under Article 8 of NP and EF respectively is to be weighed against the Article 10 rights to freedom to receive and impart information and to the public interest in open justice.

84. In my judgment the most powerful countervailing factor to the Article 8 rights of NP and EF is the principle of open justice. However the following factors lead me to the conclusion that the Article 8 rights prevail. EF and NP have an undoubted right to privacy in the sexual allegations about their private lives. Save for the principle of open justice, there is no public interest in revealing the identity of NP. There is, in my judgment no discernable public interest, properly so categorised, in revealing that of EF. The findings of the ET do not suggest any wrongdoing on his part. Nor are there any findings of mismanagement beyond observations that as CEO EF appeared not to have put in place checks on how AB was managing JK. There are findings made about his private lawful sexual activity. The ET found that AB brought the ET proceedings as an act of revenge. He had tried to blackmail EF into having the corporate respondents pay him a large sum of money. Amongst the effects of not continuing the RRO would be to expose a child to having his mother identified as a participant in sexual activity and in a pornographic photograph. Not continuing the RRO would render useless ongoing privacy proceedings. On the findings of the ET in the liability judgment, properly directing themselves an ET would inevitably have concluded that an extended RRO

should be made. Unlike the situation explained in paragraph 61 of **F v G**, the ET had before them an application for an extended RRO and heard submissions from the interested parties.

85. In exercise of powers under **Employment Tribunals Act 1996** section 35(1)(a), an extended RRO will be made in the terms of the third confidential Annex to the Skeleton Argument on behalf of EF and NP for the appeal before the Employment Appeal Tribunal.