

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

At the Tribunal
On 13 March 2018

Before

HER HONOUR JUDGE KATHERINE TUCKER

(SITTING ALONE)

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APPELLANT

THE SECRETARY OF STATE FOR JUSTICE

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

Written submissions

For the Respondent

No appearance or representation by
or on behalf of the Respondent

SUMMARY

UNFAIR DISMISSAL

HUMAN RIGHTS

PRACTICE AND PROCEDURE

PRACTICE AND PROCEDURE - Restricted reporting order

Appeal against a decision to revoke an Anonymisation Order made at a final hearing. The Appellant worked for and was dismissed by a Probation Trust. At an early stage of her employment she had a relationship with a young man who had been a resident in one of the (then called) Bail Hostels run by the Respondent. They had a child. Disciplinary proceedings were instigated and she was dismissed. She requested that the Tribunal make an Order for a closed hearing. That application was granted, without a hearing, by way of the making of an Anonymisation Order pursuant to Rule 50 of the **Employment Tribunal Rules 2013**. When it was challenged at the final hearing the Order was revoked and a Restricted Reporting Order was made. That ceased to be of any effect upon promulgation of the Judgment. The Tribunal Judge erred in revoking the Anonymisation Order

A **HER HONOUR JUDGE KATHERINE TUCKER**

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1. The Appellant (“the Claimant”, as she was below) seeks to appeal against the Decision of the Employment Tribunal, Employment Judge D Moore, which was sent to the parties on 17 August 2017.

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2. The Tribunal dismissed the Claimant’s claim of unfair dismissal. However, in the Reasons for that decision, Judge Moore set out his decision regarding what was described as a “preliminary point”, namely his decision to revoke an Anonymisation Order made pursuant Rules 50(1) and (3)(b) of Schedule 1 of the **Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013** (“ET Regulations 2013”). That Order had originally been made by Employment Judge Ord, without a hearing, on 1 February 2017. In the Reasons for the Judgment, Judge Moore explained why he had made a Restricted Reporting Order but revoked the earlier Anonymisation Order.

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3. Her Honour Judge Eady QC considered the prospective appeal in November 2017. She did not permit the application to appeal in respect of the unfair dismissal claim to proceed. The Claimant has not sought to challenge that decision. The appeal regarding the revocation of the Anonymisation Order has proceeded to a Full Hearing.

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4. The Appellant informed the EAT that she did not intend to attend today or to be represented. Instead, she sought to rely upon written submissions. I have read and considered her focused, well-written, and measured submissions. The Respondent informed the EAT that it did not oppose the appeal, that it did not propose to attend or to lodge written submissions.

A The Facts

5. The Claimant worked for, and was dismissed by, a Probation Trust. She had worked for the National Probation Service for some time, from approximately the mid-2000s and had worked as a Supervisor in what is now known as Approved Premises, but were previously known as Probation and Bail Hostels.

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6. In the early part of her employment, the Claimant had a short relationship with, and had a child with, a young man (“J”) who had previously been in prison and had been a resident at the Claimant’s place of work. The disciplinary proceedings which ultimately led to the Claimant’s dismissal arose out of complaints that J made about the Claimant. That led to two sets of disciplinary proceedings; one in 2013, and one in 2016. As a result of the 2016 disciplinary proceedings the Claimant was dismissed. The Tribunal held that that dismissal was fair.

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7. During the course of the disciplinary investigations, J and the Claimant gave, it is clear from the Reasons, very different accounts of their relationship and when, exactly, it occurred. In broad terms, J alleged that the Claimant had abused her position. Furthermore, that she used confidential information which she had obtained through her employment to subsequently contact him. The Claimant’s case was very different. Her case was that the relationship with J was a difficult one, that there were elements of abuse within it, and that she had been the subject of a MARAC, that is victim focused Multi-Agency Risk Assessment Conference, where different agencies share information on high risk cases of domestic abuse. The Claimant asserted that she and her child (“L”) were at risk from J. She asserted that L is autistic and suffers from anxiety. There appeared to be no dispute about L’s additional needs. The

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A Claimant also asserted that L has had a complex, and not entirely straightforward, relationship with her father.

B 8. In February 2017, the Claimant applied for what she described as a “closed hearing”,
C Employment Judge Ord made an Anonymisation Order pursuant to Rule 50(1) and (3)(b) of the
D **ET Regulations 2013**. The Claimant asserted that she had applied for the Order as she was
concerned that the case would attract publicity and that she feared, in particular, L seeing any
press reports regarding J and, in particular, hearing or seeing information about him which she
was not previously aware. The Order which Judge Ord made prohibited certain matters
(identities of certain parties) from being disclosed or entered onto any document which formed
part of the public record. Following a complaint by the Respondent regarding the Order, that
Order was further considered by the Employment Judge at the final hearing.

E **The Law**

9. Rule 50 of the **ET Regulations 2013** provides as follows:

“50. Privacy and restrictions on disclosure

F (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 -

G (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;

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

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

(4) Any party, or other person with a legitimate interest, who has not had a reasonable opportunity to make representations before an order under this rule is made may apply to the Tribunal in writing for the order to be revoked or discharged, either on the basis of written representations or, if requested, at a hearing.

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(5) Where an order is made under paragraph (3)(d) above -

(a) it shall specify the person whose identity is protected; and may specify particular matters of which publication is prohibited as likely to lead to that person's identification;

(b) it shall specify the duration of the order;

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(c) the Tribunal shall ensure that a notice of the fact that such an order has been made in relation to those proceedings is displayed on the notice board of the Tribunal with any list of the proceedings taking place before the Tribunal, and on the door of the room in which the proceedings affected by the order are taking place; and

(d) the Tribunal may order that it applies also to any other proceedings being heard as part of the same hearing.

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(6) "Convention rights" has the meaning given to it in section 1 of the Human Rights Act 1998."

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10. The power to make an Anonymisation Order is distinct to other powers of Tribunals set out in the **Employment Tribunals Act 1996**. Section 10A of the **Employment Tribunals Act 1996** provides for hearings to be held in private in certain cases where confidential information is likely to form part of the evidence. Section 10B makes provision for private hearings in cases involving issues of national security. Sections 11 and 12 of the **Employment Tribunals Act 1996** make provision for Restricted Reporting Orders to be made in cases involving allegations of sexual misconduct and disability cases. Significantly, the restrictions which are permitted by those statutory provisions will last only until promulgation of the Judgment. Thereafter the restrictions cease to apply.

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11. The scope of an Order made under Rule 50 of the **ET Regulations 2013** is much wider, although it can include a Restricted Reporting Order (Rule 50(3)(d)). A number of points are clear from the provisions of Rule 50. First, an Order may be made at any stage of the proceedings. Secondly, it can be made on an application, or of the Tribunal's own initiative.

A Thirdly, the Order may be made “with a view to” “preventing” or “restricting” the public disclosure of “any aspect” of those proceedings.

B 12. However, in my judgment, in order to make such an Order the Tribunal is required to analyse two fundamental matters. First it must consider the basis on which the Order would be made under Rule 50(1). Secondly, it must consider the importance of the principle of open justice, give full weight to it and to the right to freedom of expression.

C 13. As regards the first of these two matters, the restriction on public disclosure can only be imposed in so far as the Tribunal considers that it is necessary for at least one of three specific matters:

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- i. The interests of justice;
 - ii. In order to protect the Convention rights of any person. The terms of the Rule itself makes expressly clear that those individuals are not restricted to the parties or witnesses (see Rule 50(3));
 - iii. The circumstances set out in section 10A of the **Employment Tribunals Act 1996** (relating to disclosure of confidential information). This part of the Regulation is not relevant for this appeal.
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G 14. As to the second matter, when considering whether to make an Anonymisation Order a Tribunal must give full weight to the principle of open justice and to the right to freedom of expression. In common with many other Convention rights that principle and those rights are not absolute. The correct approach to these issues requires, in my judgment, a proper evaluation of competing rights, balancing one against the other before reaching a decision.

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A That exercise will of course be flawed if the Tribunal has not first properly identified why the Order may be necessary.

B 15. In a case such as this, in my judgment, the Tribunal was required, particularly having regard to its responsibilities as a public body, to consider whether the Order was necessary (properly taking into account the imperative connotations of that word) in the interests of justice, or to protect the Convention rights of “any person”.

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The Reasons of the Employment Judge for revoking the Anonymisation Order and making a Restricted Reporting Order

D 16. At the final hearing of the Claimant’s claim, it appears that the issue of anonymity was considered in this way: an issue was raised by the Respondent as to the legitimacy of what it described as the *ex parte* Anonymisation Order that had been made by Employment Judge Ord.

E It was contended that Judge Ord had not given appropriate weight to the principle of open justice when making that Order. Subsequently, at the final hearing, an apparently agreed way forward was reached: the legitimacy or otherwise of the grant of that Order was put to one side; the Respondent agreed that a Restricted Reporting Order (“RRO”) could be made and that the

F grounds for making such an Order were made out; the Judge explained to the Claimant, who represented herself, the difference between an Anonymisation Order and a RRO. It appears that the Judge may have considered that a Restricted Reporting Order came closer to a “closed

G hearing” than an Anonymisation Order and, ultimately, the Judge made a Restricted Reporting Order. That, of course, ensured that no details of the claim or the individuals involved in it could be published until promulgation of the Tribunal’s Decision. Absent further action,

H however, after promulgation of the Tribunal’s Decision, and after, therefore, what the Employment Judge had decided what he described as “*the rights and the wrongs of the matter*”

A (paragraph 8), that protection would cease. At that point, no restrictions would apply, and the Claimant, J and L could be identified.

B 17. Before the Tribunal, the Claimant had sought to express why she wished to have some anonymisation of the proceedings. As I have already noted, she had originally asked for a “closed hearing”. Judge Moore appeared unconvinced by the Claimant’s efforts to explain her concerns about publicity. For example, he stated:

C **“6. The Claimant has produced no evidence to support her contention that she or her child had been assessed by multiple agencies as being at risk from the child’s father. When asked to explain the basis of her application she initially said she did not want the child’s father to know she had brought this claim against her former employers. ...”**

D He also commented that this was different from that which she had advanced to Employment Judge Ord. Judge Moore also recited submissions made by counsel on behalf of the Respondent supporting the father’s assertion that it was the Claimant who had contacted him, and that what the Judge described as “*access arrangements*” had been the subject of
E proceedings in the Family Court. The Judge continued:

F **“6. ... The Claimant has not expanded upon her comment, and has not explained why this preference [that is the preference that she did not want the child’s father to know that she had brought the claim against the former employers] should override the [principle] of open justice. She has not pressed that point and has reverted to her initial point that what she seeks is to prevent publication in the press. ...”**

G 18. The Judge then went on to consider the provisions of Rule 50 and the fact that the Rules require him to give full weight to the principle of open justice and to the Convention right of
H freedom of expression (paragraph 7). He recorded that Rule 50 provides that the Judge may make an Order if the interests of justice require it or if it was necessary to protect the Convention rights of any person. The Judge reminded himself that the use of the word “*shall*” in Rule 50 makes it a mandatory requirement that he must consider the Convention right of freedom of expression. The Judge then stated:

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“7. ... I am not persuaded that the Claimant’s expressed aim of wanting to prevent her child from reading about her father is sufficient. The Claimant’s assertion that this case will involve heavy discussion of the child’s father appears to be mistaken. This is a straightforward claim of unfair dismissal; he is not called as a witness and has not made a statement in these proceedings. He made a comment to the Respondent about the Claimant and was interviewed as part of the investigations in 2013 and 2016. He has had access to the Child who has spent time with him and his family.”

At a later point he stated:

“8. ... With regard to the child and her father, neither is a party to this case and their identity is unimportant. The parties have redacted documents in the bundle to identify these persons by initial and have referred to them by initial throughout the hearing. With their agreement I have not gone behind those redactions and I have continued that practice in this Judgment.”

19. The Judge considered that the grounds for making a Restricted Reporting Order were made out as he was satisfied that the nature of the Claimant’s relationship with J came within the definition of sexual misconduct. He also stated that the making of a Restricted Reporting Order:

“8. ... does however offer protection until the rights and wrongs of the matter have been judicially determined and set out in the judgment. ...”

The Appeal

20. The Claimant states in her appeal that she did not fully understand the implications of a Restricted Reporting Order; that she did not understand the limitations of it or the difference between it and an Anonymisation Order. She asserts that she has an unusual surname and that identification of her will automatically lead to identification of her daughter. Similarly, she asserts that identification of her daughter’s father, J, would lead to identification of her daughter and that it would not be appropriate for her daughter to learn of facts surrounding her parent’s relationship, either through the press or through reading a document, or through hearing about it from others who might have read those documents.

A Discussion and Conclusions

21. The Judge clearly had in mind the provisions of Rule 50 when he made his decision. In addition, he correctly identified that the grounds on which an Anonymisation Order could be made in the case were because it was necessary in the interests of justice or to protect the Convention rights of any person. Similarly, he identified the importance of giving full weight to the principle of open justice and to the right to freedom of expression and the mandatory requirement for him to do so.

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22. Nonetheless, I consider that the Judge erred when considering whether it was necessary to make an Anonymisation Order with a view to protecting the Convention rights of any person. Whilst the Judge may have considered the balance in respect of the Convention rights of the Claimant herself, and possibly those of J, I am not satisfied that the Judge, on this occasion, came anywhere close to properly considering the Convention rights of L. Whatever, as the Judge put it, the judicial determination was in respect of the rights and wrongs of the employment relationship between the Respondent organisation and the Claimant, further, whatever the rights or wrongs of the relationship between the Claimant and J, one individual, L, their child, has her own Convention rights which the Tribunal had an obligation to consider and respect. She had, and has, a right to family life and the right to a private family life. That right is important to any child. For a child who is autistic and who suffers from anxiety, the need for respect of that right may be all the more pressing.

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23. The passing statement that “*neither [the child nor her father] is a party to the case and their identity is unimportant*” belies the error. The child’s identity, from her perspective and her family’s, is significant and important. She may have been a party to or subject of proceedings in the Family Court for a Child Arrangements Order (the terms access and custody

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A not having been used since before the passing of the **Children Act 1989**). However, in the
Family Court her identity would have been protected throughout the proceedings, and
thereafter. I struggle to see the grounds on to which it could reasonably be contended that a
B similar level of protection should not be afforded to her in the context of an employment
dispute between her mother and her employer, particularly where the circumstances in which
she was conceived and the nature of the relationship between her parents was likely to be
discussed.

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24. The basis on which the mother articulated her application was not, perhaps, as clear as it
might have been. However, it was clear from the Reasons that the underlying reason for her
D original application related to concerns about publicity and the consequences of that for her
child. That should have been sufficient in my judgment for the Judge to consider the
Convention rights of the child. Even if he had doubts about some of the things which the
E mother said, the child's right to a private family life required proper consideration.

25. I did not consider that there was any proper consideration of the Convention rights of L,
the child. In order to secure her private family life, it was necessary to ensure that she was not
F identified. I do not consider that open justice or the right to freedom of expression should
outweigh her right. There was no public interest in her being identified. Restricting reporting
of her name would not restrict reporting the facts of the case. Further, given what is said about
G her surname, which has gone unchallenged, it appears that if her parents were identified, it is
likely that she would be identified.

H 26. Do the requirements of open justice or the right to freedom of expression lead to a
conclusion that the parents' identity should be revealed, given the consequence for L? In my

A judgment, they did not. The public might have been “interested” to read about what her parents did or did not do and how that subsequently impacted upon the decision to dismiss her mother. That fact carries little weight. More importantly, however, there was, in my judgment, a
B legitimate public interest in ensuring that the facts of the case could be considered in accordance with the principles of open justice: they appear to have raised issues of whether there was an abuse of power by a supervising Probation Officer in a Bail Hostel. However, in
C my judgment, it is relatively easy to see that those issues could be aired, ventilated, and read about whilst simultaneously safeguarding the identity of the child in this case, because the individuals concerned can be referred to by an initial so that their true identity is not revealed.

D 27. I am not satisfied that there was a proper legal analysis of these issues by the Employment Judge. I consider that he erred in law. I allow the appeal. Further, I have no hesitation in this case, in view of the position taken by the Respondent (which I observe in
E passing may have and had its own obligations under the **Human Rights Act** given the functions it carries out) and in view of the seriousness of the implications for this young person, in deciding to put in place an Anonymisation Order preventing the identity of the Appellant
F being disclosed or contained in any document and preventing the identity of the witness (J) from being disclosed. That, in my judgment, is the only way in which the Tribunal can be satisfied that the child’s Convention rights will be protected, and, in my judgment, it is a necessary and proportionate means through which that can be done. That step properly in my
G judgment adheres to the principle of open justice and respects the right to freedom of expression.

H 28. I allow the appeal and made an Anonymisation Order.