Appeal No. UKEAT/0244/18/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 December 2018
Judgment handed down on 4 January 2019

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MISS Y AMEYAW — APPELLANT

PRICEWATERHOUSECOOPERS SERVICES LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS YVONNE AMEYAW (The Appellant in Person)
For the Respondent	MS CLAIRE DARWIN (of Counsel) Instructed by: Pricewaterhousecoopers LLP 1 Embankment Place London WC2N 6DX

SUMMARY

PRACTICE AND PROCEDURE - Restricted reporting order

PRACTICE AND PROCEDURE - Case management

*Practice and Procedure - Case Management - Restricted Reporting Order/Anonymity - Rule 50 **ET Rules 2013***

The Appellant applied for an earlier ET Judgment in the proceedings (sent out to the parties and entered in the public Register over a year before) to be removed from the Register as she objected to the fact that it was publicly accessible on-line; alternatively, she asked for an Anonymity Order to be made under Rule 50 of the **ET Rules**. The ET refused both applications, holding that it had no power to remove a Judgment from the Register and that Rule 50 provided no basis in the present case to overrule the principle of open justice. The Appellant appealed.

Held: *dismissing the appeal*

The ET had correctly held that it had no power to exclude or remove a Judgment from the public Register. By Rule 67 of the **ET Rules**, it was required that, subject to Rules 50 and 94, every Judgment and document containing Written Reasons for a Judgment was entered on to the public Register. Although the ET could decide not to enter Written Reasons for a Judgment in a national security case (Rule 94), there was no corresponding power under Rule 50.

The real issue raised by the appeal was whether the ET had properly exercised its discretion in refusing to make an Anonymity Order under Rule 50. The Appellant had contended that such an Order was necessary to protect her Article 8 **ECHR** rights. Her application related, however, to a Judgment reached after an open Preliminary Hearing at which the ET had considered an application to strike out the Appellant's claims on the basis of her conduct at an earlier (closed) Preliminary Hearing. The matters to which the Appellant objected had, therefore, been the subject of discussion at a public trial of the strike out application; Article 8 was not engaged - the Appellant could have had no expectation of privacy in that regard.

Even if that was wrong, it was for the ET to carry out the requisite balancing exercise (see **Fallows and Others v News Group Newspapers Ltd** [2016] ICR 801 EAT) and, in the particular circumstances of this case, it had been entitled to take the view that the principles of open justice and the interests arising from Articles 6 (fair trial) and 10 (freedom of expression) were not outweighed by the Appellant's interests under Article 8 **ECHR** such that there should be any restriction on publicity under Rule 50.

In reaching its decision, as an exercise of its case management discretion, the ET had been entitled to decline to consider unsigned manuscript notes from the closed ET hearing. As for the adequacy of the reasons provided for its decision, these were proportionate to the significance of the issue to be determined: the parties were not strangers to the background to that decision and the ET had made clear (i) its view that it had no power to exclude the Judgment from the public Register, and (ii) its conclusion on the question whether the principle of open justice should be curtailed in this case.

HER HONOUR JUDGE EADY QC

Introduction

1. This is the expedited hearing of an appeal against a decision of the London South Employment Tribunal ("the ET"), refusing applications (1) to remove an earlier Judgment in these proceedings from the public Register; (2) to make a permanent Anonymity Order.

2. In giving this Judgment, I refer to the parties as the Claimant and Respondent, as below. This is the Claimant's appeal against the decision of Regional Employment Judge Hildebrand of 2 July 2018. The appeal was permitted to proceed on amended grounds after an Appellant-only Preliminary Hearing before Slade J on 5 December 2018. Given that there was a further ET hearing in this matter listed for January 2019, it was directed that the hearing of this appeal should be expedited. The Claimant has complained this has put her at a disadvantage: the counsel who represented her at the Preliminary Hearing (under the Employment Law Appeal Advice Scheme) was not available to act for her on the day listed for the appeal and she also had to prepare for another hearing before the ET (initially listed for the same time as the current appeal hearing but since moved to the afternoon). Given her complaints about the listing of the appeal, the Claimant applied for an adjournment of the hearing, but this was refused - initially by the EAT Registrar and then, on appeal, by Order of HHJ Auerbach - for reasons that have been separately provided. Considering that she was prejudiced by the refusal to adjourn the hearing, the Claimant then applied for an extension of time to lodge her skeleton argument, which was allowed, albeit not for the full period requested. Slightly after the extended time, the Claimant lodged "Draft Notes" for this hearing (comprising some 85 paragraphs), explaining that she had not been able to draft a full skeleton argument in the time available. I have, in any event, treated those notes as the Claimant's skeleton argument for the purposes of this hearing.

3. At the outset of the oral hearing of the appeal, the Claimant told me she did not feel she had been able to properly prepare such that she was able to address me on her grounds of appeal. I confirmed I had read her notes for this hearing and said I would, in any event, give the Claimant the opportunity to respond to any points made by the Respondent or to otherwise address me on any points she wished me to take into account. Although the Claimant chose not to make any further oral submissions in advance of the Respondent's submissions, she did raise points during the course of the hearing and took the opportunity to respond to certain aspects of the Respondent's case.

4. Subsequently, the Claimant has emailed me further, providing additional submissions in support of her points of reply to the Respondent.

The Background

5. The Claimant, who was previously employed by the Respondent as a Senior Manager (having started that employment in April 2014), has brought four ET claims against the Respondent. The proceedings relating to those claims have had a long and complex history and I have sought to extricate only that which is necessary for present purposes.

6. The first hearing to which I need to refer occurred on 31 January 2017, before Employment Judge Hall-Smith. This had been listed as a closed Preliminary Hearing and both parties attended, represented by counsel (the Claimant by Mr Milsom; the Respondent by Ms Bell). The Claimant was present, accompanied by two other people (one of whom was her mother) and it seems that there was a discussion at the outset regarding the nature of the hearing ('closed' or 'open') and whether it was appropriate for persons other than the parties and their representatives to be present. The Respondent contends that, during the course of the hearing,

the ET effectively went into open session and it is observed that, although the ET's directions were sent out on 21 February 2017 in the normal form of an Order made at a closed Preliminary Hearing, the Written Reasons provided for the ET's directions made clear that this had in fact been an "Open Preliminary Hearing". The Claimant strongly disagrees with that suggestion and points to references within notes taken by representatives of the Respondent at the hearing to this being a "closed hearing". EJ Hall-Smith has since retired and it is not practical to seek to obtain further clarification from him in this regard. For current purposes I am prepared to proceed on the basis that the hearing on 31 January 2017 was a closed Preliminary Hearing.

7. In any event, during the course of the hearing before EJ Hall-Smith, Mr Milsom withdrew, having ceased to act for the Claimant. Both before Mr Milsom's departure and thereafter it is apparent that EJ Hall-Smith considered the Claimant and her mother behaved in a way that was disruptive of the proceedings. The Claimant takes issue with EJ Hall-Smith's record in this regard (set out in his "Reasons for the Tribunal Order of 31 January 2017", sent to the parties on 3 March 2017) and objects that she never had the opportunity to comment on the observations made by EJ Hall-Smith or to correct the record.

8. On 6 February 2017, the Respondent made an application to strike out the Claimant's claims on the basis of what was said to have been her scandalous and vexatious conduct at the hearing on 31 January 2017. That application was considered at a hearing before EJ Morton, at what was plainly an open Preliminary Hearing, on 10 March 2017.

9. At the hearing on 10 March 2017, both parties were again represented by counsel; on this occasion the Claimant was represented by Mr Herbert, the Respondent continued to be represented by Ms Bell. Given the basis for the Respondent's application, EJ Morton first

considered how she should proceed in terms of deciding what had occurred on 31 January 2017; the Claimant sought to adduce witness evidence (relied on to counter what was characterised as EJ Hall-Smith's account of events as a witness), but the Respondent contended the ET should proceed on the basis of the record provided by EJ Hall-Smith. EJ Morton took the view that EJ Hall-Smith's Reasons amounted to findings of fact as to what had occurred at the hearing on 31 January 2017; it was wrong to see his record as tantamount to witness evidence - that would be to treat Judges as potential witnesses of fact as to what occurs at hearings over which they preside and that would impede and imperil the administration of justice: "*Tribunals are trusted to be arbiters of fact unless they reach decisions that are perverse*" (see paragraph 5 of EJ Morton's Judgment). Given that there had been no appeal against EJ Hall-Smith's rulings and no application for these to be set aside, EJ Morton considered there was no reason why she should not rely on that record as an objective account of events at the 31 January 2017 hearing. On that basis, EJ Morton refused the Claimant's application to adduce witness evidence in rebuttal. She considered, but rejected, the Claimant's arguments to the effect that this prejudiced her right to a fair trial under Article 6 of the **European Convention on Human Rights** ("ECHR").

10. Pausing in the narrative at this stage, although the Claimant's disagreement with EJ Hall-Smith's record of events on 31 January 2017 was made clear, there is no record of any objection being taken on her behalf to reference being made to that record on the basis that the Preliminary Hearing had been "closed". Although the Claimant was obviously aware of what EJ Hall-Smith had said, there was also no application for an Anonymity Order under the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("2013 Regulations"), specifically under Rule 50 of Schedule 1 of the **2013 Regulations**, where the general Rules that govern ET proceedings are to be found ("the ET Rules").

11. Returning to the hearing of 10 March 2017, after referring to the relevant authorities, EJ Morton carefully considered EJ Hall-Smith's findings relating to the earlier hearing. She observed that it was not always clear whether culpability for the behaviour described attached to the Claimant or her mother and she accepted Mr Herbert's submission that an explanation might be discerned for what could be characterised as disrespectful behaviour on the Claimant's part. On the basis of the record before her, EJ Morton concluded that:

> **"19. … the Claimant undoubtedly lost her cool at times during the hearing and behaved reprehensively but did not do so without justification. …"**

Although seeing the Claimant's conduct at the earlier hearing as, at times, "*uncontrolled and unacceptable*", EJ Morton did not consider it had endangered the possibility of a future fair hearing and duly dismissed the Respondent's application.

12. EJ Morton's reasoned Judgment ("the Morton Judgment") was subsequently sent out to the parties on 24 March 2017. At the same time - as also recorded at the end of that document - the Morton Judgment was entered in the Register.

13. For completeness, I also record that the Full Merits Hearing of the Claimant's first three claims then took place over some 17 days in April and May 2017 (heard by a three-member ET, presided over by EJ Baron). All the Claimant's claims were dismissed, for Reasons provided in a Reserved Judgment sent to the parties on 14 March 2018 ("the Final Judgment").

14. Thereafter, in correspondence with the ET on 19 March 2018 and 16 April 2018, the Claimant raised concerns about the on-line publication of the Morton Judgment and the Final Judgment on the public Register. As a matter of background, since February 2017, Her Majesty's Courts and Tribunals Service ("HMCTS") has published on-line all ET Judgments

and Written Reasons entered into the public Register (at www.gov.uk/employment-tribunal-decisions). I understand that this has had the effect that all Judgments and Written Reasons issued after February 2017, and some issued before, can now be found on-line (albeit that, for reasons that are unclear, it seems that in fact the Final Judgment in this case is not in fact available on-line). In any event, in her letters to the ET, the Claimant applied for an Order that (1) the Final Judgment was not entered in the Register; (2) the Morton Judgment was removed from the Register; and/or (3) her name should be anonymised in both Judgments. For the purposes of this appeal, the only challenge pursued relates to the Morton Judgment; accordingly, I will not refer to those aspects of the Claimant's earlier correspondence that reference the Final Judgment.

15. In her letter of 19 March 2018, the Claimant stated her objections as follows:

> **"I object to the processing of my personal data on the World Wide Web (including www.gov.uk and any connected third party websites) and write to ask that HMCTS stop processing my personal data online. I am aware that processing of my personal data by HMCTS may be based on legitimate interests or on the performance of a task in the public interest/exercise of official authority, however I do not accept that these grounds override my interests, rights and freedoms as data subject and do not give my consent for this purpose.**
>
> **…**
>
> **(1) Take Down Request for [the Morton Judgment] … published on the World Wide Web**
>
> > **I have reasonable grounds to believe that publication of the [Morton Judgment] … on the World Wide Web does not safeguard my fundamental rights and interests as the data subject and further that it has caused serious damage to my personal and professional life. Specifically, I have not been able to find new employment despite a year long search during which I have applied for dozens of roles at various levels and have not been invited to attend a single job interview during this period. This implies that as a senior professional with more than 13 years of relevant experience, I have not been shortlisted for roles for which I have requisite skills and experience. I have not experienced great difficulty in finding employment before 2017. In addition, discussions with my professional contacts indicate that the published judgment will adversely affect my prospects of finding employment if not cured.**
> >
> > **The continued publication of the Tribunal judgment infringes on my Article 23.1 right of the Universal Declaration of Human Rights being "the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment." I request that the judgment is removed from the public domain on the World Wide Web."**

In her subsequent letter of 16 April 2018, the Claimant made what she said was an application under Rule 50 of the **ET Rules**, arguing as follows:

"… It is my reasonable belief that publication of the judgments conflict with three human rights: Article 6 (the right to a fair trial); Article 10 (the right to freedom of expression) under which open justice is of paramount importance and Article 8 (the rights to respect of privacy and family life). And whilst it may be easier to see the public interest in making the content of the tribunal judgments readily available to demonstrate the law in practice, it is more difficult to see the public interest in publicising my name in circumstances where I did not have a reasonable opportunity to present my case before that tribunal.

1. [The Morton Judgment]

It has been brought to my attention recently that an earlier judgment on an application made by the Respondent to strike out my claims was published online at www.gov.uk on 31 March 2017. The facts of the strike out application arise from a disputed and unclear account by the tribunal of what occurred at a preliminary hearing on 31 January 2017. At the strike out hearing in March 2017, an application to adduce witness evidence from myself and another witness was refused which once again meant that I was denied the right to defend myself against the allegations made against me.

The judgment recorded and now publicly available was based on Judge Hall-Smith's notes and reasons dated 3 March 2017. The notes conflate the actions of myself and my mother which it describes as being described [as] "disgraceful" without identify what specific action by me could be reasonably described as "disgraceful". The judgment records that a full trial of facts would be necessary to determine culpability. I believe that the tribunal has acted in breach of my Article 6 (the right to a fair trial) and Article 8 (the rights to respect of privacy and family life) by making judgment publicly available without protecting my identity. The judgment as recorded leaves a reader to form opinions on my conduct based on individual speculation.

This is mainly because it relied upon a non contemporaneous account of what occurred at the PHR and which does not provide a chronological or accurate record of events. This is evidenced by the fact that at the strike out hearing the presiding judge found it difficult to determine the sequence of events or indeed culpability i.e. what, how, when and by whom. …

The judgment has already been public for over a year nonetheless I ask that the Tribunal should not be influenced by the fact that it has already been so public but rather consider carefully whether it is appropriate to remove or replace it with anonymised version. This is because the continued publication of the judgment online without granting anonymity would not safeguard my fundamental rights and interests as the data subject and will cause long lasting damage to my personal and professional reputation resulting in significant losses.

…

In this case the principle of open and transparent justice must be balanced against the principle of corrective justice. Whilst the tribunal must give full weight to the principle of open justice and to the right to freedom of expression, it must ensure that justice is done, and it may not be where publication of the judgment unfairly causes damage to reputation, becomes a deterrent for seeking redress and may well have interfered with a fair trial."

16. On 2 July 2018 REJ Hildebrand refused the Claimant's applications, explaining:

"The Judgments of the Tribunal are published online as an administrative function of the Tribunal pursuant to the statute. The judiciary have no discretion not to publish. Rule 50 does not indicate any basis in the present case to overrule the principle of open justice.

The application is refused. It is noted the Claimant has supplied manuscript notes. That material is not capable of consideration unless transcribed and approved by the authors."

17. I have been told that the manuscript notes relied on by the Claimant had been prepared by the Respondent's representatives, taken at the hearing before EJ Hall-Smith on 31 January 2017. The Claimant does not accept that those notes are necessarily an accurate record of what took place but she relies on them to the extent that they provide a different account to that given in the ET's summary of the proceedings on that occasion.

The Grounds of Appeal and the Claimant's Arguments in Support

18. Pursuant to the leave given by Slade J at the Preliminary Hearing in this appeal, the Claimant's appeal is pursued on amended grounds, which narrow down the points made. The Claimant's notes for this hearing largely follow (and develop) the amended grounds of appeal but in certain respects she seeks to go beyond those grounds and raise points for which no permission was granted (see my observations below).

19. By her first ground of appeal, the Claimant contends that the ET misdirected itself that the judiciary has no discretion not to publish a Judgment. On the contrary, she says the ET has a wide discretion to make (or not make) such Orders as it sees fit in the interests of justice and expressly has the power to make an Order to prevent or restrict the public disclosure of any aspect of legal proceedings under Rule 50 of the **ET Rules**. In exercising its discretion, the ET was bound to have regard to the protection of rights under the **ECHR**; here, the Claimant had identified an infringement of her **ECHR** rights and provided evidence in support; in accordance with the overriding objective, the ET was not disabled from dealing with her application in a manner that was proportionate to the protection of her **ECHR** rights and Rule 50 provided the means whereby that might be done. Although Regulation 14(1) of the **2013 Regulations** provided for the maintenance of a Register of all Judgments and Written Reasons, it did not require that Register to be maintained electronically and it was noted that section 10A of the

Employment Tribunals Act 1996 ("ETA") permitted ET Rules to be made to provide for various forms of limitation on the principle of open justice in appropriate circumstances.

20. Secondly, the Claimant argues that, in refusing her application under Rule 50 of the **ET Rules**, the ET erred in law by failing to undertake a fact-specific assessment of her application; wrongly holding that Rule 50 does not indicate any basis to overrule the principle of open justice. Specifically, (i) the Claimant had identified an infringement of her Article 8 rights and produced evidence in support of her application; (ii) she had, further, provided clear and cogent evidence to derogate from the public interest in full publication - exceptional circumstances had been established; (iii) in accordance with the overriding objective, the ET was not disabled from dealing with the application in a way which was proportionate to protect the right to private life when damaging information had been unlawfully published and there is a need to swiftly vindicate a person's reputation; (iv) here, the ET had failed to conduct an assessment of the public or other interest in full publication and had failed to focus on the comparative importance of the specific rights being claimed and the justification for interfering with or restricting them; (v) it had further failed to take into account - when balancing the competing rights in issue (which included the Claimant's own rights under Article 6 **ECHR**) - that the Claimant had not been given a fair opportunity to challenge the facts as to what occurred - which was a procedural irregularity - and that there had been potential damage to the Claimant's reputation as a result.

21. In her notes for this hearing, the Claimant has gone on to complain that EJ Morton had demonstrated the appearance of bias in concluding that the Claimant had "*undoubtedly lost her cool at times during the hearing and behaved reprehensively*" (and the Claimant relies on the well-known cases on bias and the test laid down in **Porter v Magill** [2001] UKHL 67 in this

A regard). She further argues that it was not sufficient to say that EJ Hall-Smith's record was contained within a Judgment and thus had to be accepted: the use of notes from a non-public hearing in a public Judgment was an open issue and gave rise to a properly arguable point of law. Moreover, as part of the relevant context, it was important to note that the on-line publication of the Morton Judgment gave rise to breaches of the **Data Protection Act 1998**, the **General Data Protection Regulation** and the **Data Protection Act 2018**.

22. I note that the amended grounds of appeal contain no allegation of bias. "Bias" is a serious allegation and would need to be properly raised within the grounds of an appeal and pursued only to the extent that permission was given. No permission has been given for the pursuit of an allegation of bias in this case and there is no basis for such a point to be taken at this stage of this appeal. As for complaints of breaches of data protection legislation, earlier iterations of the grounds of appeal included various challenges based on alleged breaches of the data protection legislation but all were struck through in the amended grounds: again, no permission has been given for these complaints to proceed.

23. Pursuant to her third ground of appeal, the Claimant submits that the ET erred in refusing her application without considering the evidence on which she relied, namely the manuscript notes that provided a different record from that contained within the ET's earlier summary (the ET's summary having been referenced in the Morton Judgment).

24. Fourth, and more generally, the Claimant objects that the reasons given by the ET were inadequate. REJ Hildebrand had been required to conduct a balancing exercise under Rule 50 **ET Rules** and the **ECHR** and in accordance with the principle of open justice. The reasons provided failed to evidence that he had done so and were inadequate to the task required.

The Respondent's Case and Submissions in Reply

25. Resisting the appeal, the Respondent relies on the reasons provided by REJ Hildebrand and the additional reasons set out in its Answer to the appeal.

26. First, the Respondent notes that Rule 67 of the **ET Rules** requires that a copy of any Judgment, and any Written Reasons, shall be entered in the Register, subject only to Rules 50 (anonymity) and 94 (national security). Rule 50 only allows an ET to enter an anonymised or redacted version of a Judgment or Written Reasons in the Register: in contrast to Rule 94 (which itself only allows the exclusion of the Written Reasons from the Register), Rule 50 does not empower an ET to decide that there should be *no* entry in the Register. Furthermore, it was not possible to interpret Rule 50 so as to allow the ET to enter no Judgment at all in the Register - that would be incompatible with Articles 6 and 10 of the **ECHR** and would contradict the open justice principle (see **R (Guardian News & Media Ltd) v Westminster Magistrates Court and Another** [2012] EWCA Civ 420, per Toulson LJ at paragraph 73).

27. Turning to ground 2, whether or not the hearing of 31 January 2017 was open or closed, it was apparent that the hearing before EJ Morton was open and the Claimant could not complain of any breach of her Article 8 rights in such circumstances. Even if that was wrong, none of the complaints made by the Claimant outweighed the Article 6 (fair trial) and Article 10 (freedom of expression) rights that justified the publication of the Morton Judgment. Specifically, public confidence in the administration of justice outweighed the stress the Claimant said she suffered and the potential risk to her reputation (see per Lord Atkinson at page 463 **Scott v Scott** [1913] AC 417 HL, cited by Lord Sumption at paragraph 12 **Khuja v Times Newspapers Ltd** [2017] UKSC 49). And although the Claimant contested EJ Hall-Smith's record of proceedings, the public were to be credited with the ability to understand that

unproven allegations were no more than that, see **Fallows and Others v News Group Newspapers Ltd** [2016] ICR 801 EAT per Simler P at paragraph 48(ii). EJ Morton had been correct to accept the record provided by EJ Hall-Smith and not to allow the Claimant to adduce evidence to go behind that account: Judgments are public transactions of a solemn nature and, as such, are presumed to be faithfully recorded (see *Phipson on Evidence*, 19th edition, at [43-02] and *Halsbury's Laws Civil Procedure* at [1591]; also, by analogy, **Dobson v Pricewaterhousecoopers LLP** UKEAT/0022/18, per Mr John Cavanagh QC at paragraph 42). Ultimately, the question for the EAT was whether REJ Hildebrand had erred in law in his exercise of a case management discretion (see **Fallows**, at paragraph 51).

28. And this fed into the third ground of appeal: it could not be said that REJ Hildebrand had erred in his exercise of case management discretion in refusing to consider the manuscript notes in circumstances in which the Claimant had failed to transcribe them or obtain the authors' approval. In any event, the manuscript notes could have made no difference to the outcome of the Claimant's applications.

29. Finally, on the fourth ground of appeal and the suggestion that REJ Hildebrand had provided inadequate reasons, it was to be noted that Rule 62(4) of the **ET Rules** allows that reasons for decisions other than Judgments may be very short; the reasons provided by REJ Hildebrand in this instance were proportionate to the significance of the issue.

The ET's Power to Restrict Publication of a Judgment and Written Reasons: the Legal Principles

30. The starting point is the common law principle of open justice. In **R (Guardian News & Media Ltd) v Westminster Magistrates Court and Another** [2012] EWCA Civ 420,

[2013] QB 618 CA, Toulson LJ (as he then was) described this principle, and its origins, as follows:

> **"1. Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed? … In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse. Jeremy Bentham said … "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial".**
>
> **2. This a constitutional principle which has been recognised by the common law since the fall of the Stuart dynasty … It is not only the individual judge who is open to scrutiny but the process of justice. …**
>
> **…**
>
> **4. There are exceptions to the principle of open justice but, as Viscount Haldane LC explained in *Scott v Scott*, they have to be justified by some even more important principle. The most common example occurs where the circumstances are such that openness would put at risk the achievement of justice which is the very purpose of the proceedings."**

31. In **Scott v Scott** [1913] AC 417 HL, Lord Atkinson acknowledged the importance of the principle in the following terms:

> **"… The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect. …"**

32. This principle can also be seen as an aspect of what is commonly known as the right to a fair trial, provided by Article 6 of the **ECHR**. By Article 6(1), it is provided:

> **"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."**

33. The principle of open justice - whether derived from common law or from the **ECHR** - is, therefore, a fundamental aspect of the rule of law, which can only be curtailed where other competing rights are engaged such as to effectively mean that, in that case, justice would

otherwise be denied. It is a principle that does not simply require that judicial hearings should generally take place in public; it also requires that Judgments will generally be publicly available (see, e.g., **Pretto v Italy** [1984] 6 EHRR 182 at paragraphs 21 to 23). This is not only a consequence of the right to a fair trial under Article 6 **ECHR**, it is also an aspect of the Article 10 right of freedom of expression, which encompasses the right to impart and receive information (see per Lord Judge CJ at paragraphs 37 to 42, **R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No. 2) (Guardian News & Media Ltd and Others intervening)** [2011] QB 218 CA.

34. That is not to say that the fair trial principles of Article 6 or the right to freedom of expression under Article 10 will always outweigh other rights under the **ECHR**. Both Articles 6 and 10 allow that the rights in question may need to be qualified so as to respect other Convention rights. Where such rights give rise to competing interests:

> **"… neither article has as such precedence over the other. … 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. … the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. …"**

See **In re S (A Child) (Identification: Restrictions on Publication)** [2005] 1 AC 593 per Lord Steyn at paragraph 17.

35. Within the jurisdiction of the ET, these principles can be seen in play in the **2013 Regulations** and the **ET Rules**, made pursuant to the powers afforded to the Secretary of State under sections 7, 10B, 11 and 12 of the **ETA**. Section 7 provides for the general power to make procedural regulations; sections 10A, 10B, 11 and 12 provide for restrictions to be made in respect of publicity in cases involving (respectively) confidential information, national security,

A allegations of sexual misconduct, and evidence of a personal nature where the complaint relates to disability.

B 36. The principle of open justice is thus acknowledged by Regulation 14(1) of the **2013 Regulations**, which provides that:

> **"The Lord Chancellor shall maintain a register containing a copy of all judgments and written reasons issued by a Tribunal which are required to be entered in the register under Schedules 1 to 3."**

C 37. Rule 1(1) of the **ET Rules** defines "register" as the:

> **"register of judgments and written reasons kept in accordance with regulation 14 [of the 2013 Regulations]"**

D 38. By Rule 67, it is provided that:

> **"Subject to rules 50 and 94, a copy shall be entered in the Register of any judgment and of any written reasons for a judgment."**

E And a document purporting to be certified by a member of staff of a tribunal to be a true copy of an entry of a Judgment in the Register is, unless the contrary is proved, sufficient evidence of the document and its contents (see Regulation 14(3) of the **2013 Regulations**).

F 39. Specific provision is, however, made in respect of national security cases, whereby (pursuant to section 10B **ETA**), Rule 94(9) of the **ET Rules** provides that:

G > **"Where the Tribunal decides not to make an order under paragraph (2), rule 6 of Schedule 2 shall apply to the reasons given by the Tribunal under rule 62 for that decision, save that the reasons will not be entered on the Register."**

40. Schedule 2 of the **2013 Regulations** lays down rules of procedure in national security

H cases. Rule 6 of Schedule 2 provides as follows:

"6. *Reasons in national security proceedings*

(1) The Tribunal shall send a copy of the written reasons given under rule 62 to the Minister and allow 42 days for the Minister to make a direction under paragraph (3) below before sending them to any party or entering them onto the Register.

(2) If the Tribunal considers it expedient in the interests of national security, it may by order take steps to keep secret all or part of the written reasons.

(3) If the Minister considers it expedient in the interests of national security, the Minister may direct that the written reasons -

> **(a) shall not be disclosed to specified persons and require the Tribunal to prepare a further document which sets out the reasons for the decision, but omits specified information ("the edited reasons");**
>
> **(b) shall not be disclosed to specified persons and that no further document setting out the reasons for the decision should be prepared.**

(4) Where the Minister has directed the Tribunal to prepare edited reasons, the Employment Judge shall initial each omission.

(5) Where a direction has been made under paragraph (3)(a), the Tribunal shall -

> **(a) send the edited reasons to the specified persons;**
>
> **(b) send the edited reasons and the written reasons to the relevant persons listed in paragraph (7); and**
>
> **(c) where the written reasons relate to a judgment, enter the edited reasons on the Register but not enter the written reasons on the Register.**

(6) Where a direction has been made under paragraph (3)(b), the Tribunal shall send the written reasons to the relevant persons listed in paragraph (7), but not enter the written reasons on the Register.

(7) The relevant persons are -

> **(a) the respondent or the respondent's representative, provided that they were not specified in the direction made under paragraph (3);**
>
> **(b) the claimant or the claimant's representative, provided that they were not specified in the direction made under paragraph (3);**
>
> **(c) any special advocate appointed in the proceedings; and**
>
> **(d) where the proceedings were referred to the Tribunal by a court, to that court.**

(8) Where written reasons or edited reasons are corrected under rule 69, the Tribunal shall send a copy of the corrected reasons to the same persons who had been sent the reasons."

41. In national security cases, the ET may thus determine that the Written Reasons for a Judgment will not be entered on the Register (see Rule 94(9) of the **ET Rules**, read together with Rule 6(6) Schedule 2 of the **2013 Regulations**); a power that contrasts with that afforded by Rule 50 of the **ET Rules**.

A

42. Turning then to Rule 50 of the **ET Rules**, this (relevantly) provides that an ET:

> **"(1) … 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 …**
>
> **(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 …**
>
> **…"**

B

C

D

E

43. As well as allowing for a restriction in cases concerning confidential information (as provided by section 10A **ETA**), Rule 50 thus provides that restrictions on publicity may be imposed both in the cases expressly referenced at sections 11 and 12 **ETA** (sexual misconduct allegations; disability cases) but also more generally. This wider ability to restrict publicity derives from the Secretary of State's general power to make procedural regulations for ETs, under section 7 **ETA**, whether read by itself or construed in accordance with section 3 of the **Human Rights Act 1998** (see **Fallows v News Group Newspapers**, per Simler P at paragraph 43). It is apparent, however, that the Secretary of State has chosen to exercise that power in a different way to that allowed in national security cases.

F

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H

44. Taken at face value, the power to restrict publicity, whether for reasons of national security or otherwise, stands in contrast to the transparency that would otherwise be required by

the principle of open justice. As already stated, it is a power, however, that acknowledges the fact that other competing rights and interests may sometimes require that transparency is curtailed. The rights provided by both Articles 6 and 10 **ECHR** are qualified and allow that interests of national security or other Convention rights (including the right to respect for a private life under Article 8) may outweigh the requirement for public access to judicial proceedings or pronouncements. In proceedings before the ET, the balancing out of these competing interests or rights is governed by the **2013 Regulations** and the **ET Rules**, which provide (to summarise):

44.1 That the Lord Chancellor is required to maintain a public Register of all ET Judgments and Written Reasons (Regulation 14 **2013 Regulations**).

44.2 Subject to Rules 50 and 94, the ET is required to enter on to the Register a copy of every Judgment and document containing Written Reasons for a Judgment (Rule 67 **ET Rules**).

44.3 In national security cases, Rule 94 **ET Rules** permits the ET to make certain redactions from the Judgment and Written Reasons and - significantly - to determine that the Written Reasons will not be entered on to the Register in some cases.

44.4 In cases involving confidential information or where required by the interests of justice or in order to protect rights under the **ECHR**, Rule 50 **ET Rules** permits the ET to make certain redactions from the Judgment and Written Reasons (including the anonymisation of the parties) but makes no provision for the ET to do other than enter the Judgment and Written Reasons on to the Register.

45. Although an ET's power to restrict the publication of Judgments and Written Reasons is thus not unlimited, there is a broad discretion vested in the ET under Rule 50, which is not

limited in time (see **Fallows** per Simler P at paragraphs 38 to 44). That said, it is likely to be a rare case where other rights (including those derived from Article 8 **ECHR**) are so strong as to grant an indefinite restriction on publicity (**Fallows**, paragraph 42): the requisite balancing exercise in each case is for the ET (see the discussion of this exercise and the respective roles of the first instance and appellate tribunals in **Fallows** at paragraphs 49 to 52).

46. Thus far in this analysis, I have assumed that a competing right (relevantly, under Article 8 of the **ECHR**) is engaged. In determining whether that is in fact so, the ET will, however, first need to determine:

> **"… is the information private in the sense that it is in principle protected by Article 8? If no, that is the end of the case. …"**

See **McKennitt v Ash** [2008] QB 73 per Buxton LJ at paragraph 11.

47. Where information is revealed in the course of discussion in a public trial, there can be no expectation of privacy (see the observation made by Lord Sumption at paragraph 34(1), **Khuja v Times Newspapers Ltd** [2017] UKSC 49). As for what the ET should take to be the record of what took place in a public judicial hearing, an earlier Judgment provides conclusive evidence of its own existence (as distinguished from the accuracy of the decision rendered): "*Judgments being public transactions of a solemn nature are presumed to be faithfully recorded*", see *Phipson on Evidence* (19th edition) at [43-02] (and see, to like effect, *Halsbury's Laws of England* Volume 12A (2015) at [1591]).

48. Should the ET be satisfied that an Article 8 right is engaged, however, in exercising its discretion under Rule 50 it will need to consider whether the interests of the owner of that right should yield to the broader interests established by the rights afforded by Articles 6 and 10. In

carrying out the balancing exercise thus required, the ET will be guided by the following principles derived from the case-law (helpfully summarised by Simler P at paragraph 48, **Fallows**): (i) the burden of establishing any derogation from the fundamental principle of open justice or full reporting lies on the person seeking that derogation; (ii) it must be established by clear and cogent evidence that harm will be done by reporting to the privacy rights of the person seeking the restriction on full reporting so as to make it necessary to derogate from the principle of open justice; (iii) where full reporting of proceedings is unlikely to indicate whether a damaging allegation is true or false, the ET should credit the public with the ability to understand that unproven allegations are no more than that; and (iv) where such a case proceeds to judgment, the ET can mitigate the risk of misunderstanding by making clear it has not adjudicated on the truth or otherwise of the damaging allegations.

Grounds 1 and 2: Discussion and Conclusions

49. By her first ground of appeal, the Claimant contends that the ET erred in concluding that it had no discretion to prevent the on-line publication of the Morton Judgment. This, however, arises from the general requirement that all ET Judgments and Written Reasons are entered in the public Register (the content of the Register being accessible on-line). As is apparent from the **ET Rules**, there is no power vested in the ET to determine that a Judgment should not be entered in the Register and the limited power that exists to exclude Written Reasons from the Register relates only to national security cases. The simple answer to ground 1 is thus that REJ Hildebrand was correct: the ET had no power to exclude the Morton Judgment from the Register.

50. The real focus of the Claimant's appeal is the question identified at ground 2: whether the ET failed to properly exercise its discretion under Rule 50 **ET Rules**? Accepting that the

ET was required to enter the Morton Judgment on to the public Register, it had a discretion under Rule 50 to provide the Claimant with anonymity. Given that the Judgment would - by virtue of HMCTS' decision to publish the Register on-line - be readily accessible, did the ET err by failing to exercise this discretion so as to afford protection for the Claimant's Article 8 right to a private life?

51. The first question that thus arises under ground 2 is whether Article 8 of the **ECHR** was engaged in this case?

52. The Claimant contends that it was. She points to the distress she has suffered as a result of the very public nature of this record, which publishes an account of the closed proceedings of 31 January 2017. That is a record, moreover, with which she disagrees and in respect of which she says she has been denied an opportunity of providing her own account. The Claimant observes that EJ Hall-Smith's account is plainly very damaging to her reputation. While she acknowledges that publication of judicial decisions is an aspect of the right to fair trial under Article 6, she further objects that EJ Hall-Smith's account adversely impacts upon her own right to a fair determination of her claims.

53. I pause in my consideration of the Article 8 issue to observe that, although the Claimant's second ground of appeal also references her own rights under Article 6, it is hard to see how these give rise to any basis for restricting publicity in this case. Providing the Claimant with anonymity in these proceedings would not prevent the Respondent referring to what had taken place at the hearing on 31 January 2017; Rule 50 does not provide a means by which events in the proceedings can be excised altogether. I understand that the Claimant objects to the decision taken by EJ Morton to treat EJ Hall-Smith's Reasons as providing a reliable record

of what took place at that hearing but: (i) that is not the decision that is presently before me (I am concerned only with the subsequent decision of REJ Hildebrand); (ii) it was a decision that fell within EJ Morton's case management discretion in terms of determining how to proceed on the Respondent's strike out application; and (iii) it was an approach that accords with that suggested by the relevant texts (see *Phipson* and *Halsbury's Laws*, supra).

54. Returning to the question whether Article 8 **ECHR** was engaged in this case, I find it hard to see that it was. Although the Claimant may have considered the hearing before EJ Hall-Smith on 31 January 2017 was "closed", she can have had no expectation of privacy in respect of what took place on that occasion when it came to the hearing before EJ Morton. EJ Morton was expressly concerned with a strike out application based on what was said to have been the Claimant's behaviour on 31 January 2017. Even if the Claimant objected to EJ Hall-Smith's record of what had taken place, she knew that events at that hearing were to be examined by EJ Morton: what had occurred during the "closed" hearing was to be made public by its discussion at the public trial of the Respondent's application. The fact that no expectation of privacy could arise in those circumstances may explain why no application was made by the Claimant's counsel for an Anonymity Order at that stage.

55. Even if I am wrong on this point and the Claimant's rights under Article 8 were engaged, the question would then arise as to whether her interest in the protection of those rights outweighed the broader interests arising in the principle of open justice and the protection of the rights afforded by Articles 6 and 10 **ECHR**. In balancing those interests, REJ Hildebrand would have been entitled to have regard to the timing of the Claimant's application (not the swift vindication of her reputation, suggested in the second ground of appeal, but an application made over a year after the Claimant had been told that EJ Morton's Judgment had

been entered in the Register) and to the fact that no previous application had been made for anonymity in the proceedings. He would also have been entitled to have regard to the content of the Judgment in issue, specifically: to the references made by EJ Morton to the Claimant's disagreement with EJ Hall-Smith's record (and the ability of the public to keep this in mind when reading the Morton Judgment); to the submissions made on the Claimant's behalf as to the difficulty in distinguishing between her conduct and that of her mother; and to EJ Morton's acceptance of that point and acknowledgement that there may have been some explanation for the Claimant's behaviour on that occasion.

56. REJ Hildebrand was plainly aware that the Morton Judgment - having been entered into the Register - would be accessible on-line. That, however, did not mean that the Claimant's interest in respect for her private life inevitably outweighed any broader interests in the publication of her identity as a party to the proceedings. By analogy with the observations made by Lord Atkinson in **Scott v Scott**, the fact that the record of the proceedings, published without restriction, might be "*painful, humiliating, or deterrent*" would not, of itself, mean that it should not be made public. Having had regard to the matters set out in the Claimant's correspondence, REJ Hildebrand concluded that Rule 50 disclosed no basis for overruling the principle of open justice in the present case. Exercising the jurisdiction of the EAT as an appellate Tribunal, the question is whether the view formed by the ET demonstrated an error of law. Given the circumstances of this case, I am unable to see that it did.

Ground 3: Discussion and Conclusion

57. Although the subject of some heat at the oral hearing of this appeal, I can address this ground relatively shortly. The Claimant objects that REJ Hildebrand failed to engage with relevant evidence, in the form of notes from the hearing of 31 January 2017, which contradicted

EJ Hall-Smith's account. This was, however, a matter for the ET's case management discretion. The Claimant had supplied (not all at the same time) different notes from the hearing and had asked that the ET read through manuscript transcripts (unsigned by their respective authors) to form a view as to whether or not the record contained in EJ Hall-Smith's Written Reasons was correct. The question as to how to approach EJ Hall-Smith's Written Reasons had, however, already been addressed by EJ Morton; REJ Hildebrand was not determining an appeal from her decision and was entitled to proceed on the basis that she had been entitled to accept that record. That, moreover, was an approach that respected the conventional presumption that a Judgment is to be accepted as conclusive evidence of that which it records (as opposed to the accuracy of the actual decision). Even if there was any question as to whether that was the correct approach in this case, REJ Hildebrand - as a matter of case management discretion - was entitled to decline to consider manuscript notes for which there was no formal ownership by the relevant authors.

Ground 4: Discussion and Conclusions

58. The last ground of appeal is put on the basis that REJ Hildebrand's decision was inadequately reasoned. I have recorded the explanation provided for this decision at paragraph 16 above; it is readily apparent that the reasons provided are brief. That said, it is expressly recognised by Rule 62(4) of the **ET Rules** that:

> **"The reasons given for any decision shall be proportionate to the significance of the issue and for decisions other than judgments may be very short."**

59. This was not the determination of the Claimant's claims after a Full Merits Hearing (and may be contrasted with the very much longer Final Judgment that had followed the hearing in April and May 2017). It was a response to an application under Rule 50 made over a year after the Claimant had been told that the Judgment in issue had been entered on to the public

Register. It was, moreover, an application that could have been made at the hearing before EJ Morton but was not. Although the Claimant had a right to understand why her applications had been declined, REJ Hildebrand was not required to explain the background as though she was reading his decision as a stranger to the case (see, by analogy, the observations of Keene J in **Derby Specialist Fabrication Ltd v Burton** [2001] ICR 833 EAT). The circumstances that were relevant to his assessment were well known to the parties; he was entitled to express the conclusion he had reached with some concision. In context, the reasons provided were proportionate to the issue REJ Hildebrand had to determine.

Disposal

60. For all the above reasons, the Claimant's appeal is dismissed.