Case Number: 2501482/2018

THE EMPLOYMENT TRIBUNALS

PRIVATE PRELIMINARY HEARING

Claimant: **Mr R Kirkham**

Respondent: **United Kingdom Research & Innovation**

Heard at: **North Shields Hearing Centre** **On:** **Monday 11th March 2019**

Before: **Employment Judge Johnson sitting alone**

Representation:

Claimant: **In Person**
Respondent: **No Attendance. No Appearance**
(written submissions considered)

RESERVED JUDGMENT ON APPLICATION FOR ANONYMITY ORDER

1. The claimant's application for anonymity order pursuant to Rule 50 of the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013 is refused.

2. The claimant's application for the removal of all decisions and reasons from the Employment Tribunal website relating to his claims against the respondent is refused.

REASONS

3. This matter came before me this morning by way of a private preliminary hearing, the purpose of which was to consider the claimant's applications for an anonymity order and for an order that all decisions and reasons relating to these proceedings

be removed from the Employment Tribunal website. The claimant attended in person and brought with him an A4 ring binder containing 496 pages of "evidence" upon which the claimant relies in support of his applications. The claimant also brought two further A4 ring binders, containing copies of numerous decisions of various other courts and tribunals, upon which the claimant seeks to rely.

4. There was no attendance or appearance or behalf of the respondent. The respondent's solicitors had in correspondence confirmed that they would not be attending today's hearing, but had set out in their letters of the 7th March 2019 and 25th March 2019, their grounds for opposing the applications made by the claimant.

THE HISTORY OF THESE PROCEEDINGS

5. The claimant is a research student who in January 2018 submitted a proposal to the respondent for the funding of a fellowship, which Newcastle University had agreed to hold. The purpose of the fellowship was to develop new metrics for activity tracking or human activity recognition with the aim of measuring a person's mental health and wellbeing. As part of the respondent's decision-making process to consider the claimant's proposal, it was submitted to a selection of independent expert peer reviewers for their comments. In March 2018 the claimant was informed that his proposal was unsuccessful. The claimant alleges that the manner in which his proposal was considered and the decision to refuse the proposal, were acts of unlawful discrimination on the grounds of sex, age and/or philosophical belief. The respondent denies that the Employment Tribunal has jurisdiction to hear the claimant's complaints, asserting that the respondent is not a body against which such claims may be brought in the Employment Tribunal. Furthermore, the respondent denies any unlawful discrimination as alleged by the claimant.

6. In his original claim form ET1 at paragraphs 27 – 33 of the Appendix attached to his "Pleadings", the claimant sets out his application for an anonymity order pursuant to Rule 50 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The claimant sets out his application as follows:-

> "27 The appellant considers that anonymity is necessary in order to ensure the proper administration of justice and the efficacy of the EU law provisions that underpin the Equality Act 2010.
>
> 28 In particular, the appellant notices that no rational academic would bring a discrimination claim against the (respondent) or indeed within academia more widely, unless they expect to leave an academic career anyway.
>
> 29 At this stage, the appellant simply asks for a temporary anonymity order prohibiting his identification by name in any form of publication or report as the appellant in this case. This should run at least until there is a substantive hearing in this case. This position is taken on the basis that the appellant's case on this matter would likely benefit from argument. His present proposal is very much intended as a stop-gap measure. The reason for that is that the rationale for his anonymity application would involve making a considerable number of findings of fact that overlap with the substance of the claims and issues.

30 The appellant claims this as of right, based upon the European Union Law principles of “efficacy”, or alternatively on the basis allowed in Scott v Scott (1913 UKHL2). It is also submitted that his claim satisfies the test of British Broadcasting Corporation (BBC) v Roden – 2015 UKEAT-0385-14-120, namely that the principle of open justice is of paramount importance and derogations can only be justified when strictly necessary as measured to secure the proper administration of justice.

31 At this stage the appellant presents a summary of his arguments on this matter.

a) there is widespread discrimination and systematic non-compliance with the Equality Act 2010 within academia generally and existing research funding processes. Even (the respondent) seems to accept that.
b) however, it is very rare for the Equality Act 2010 to be enforced within academia – indeed, there has never been litigation against a research council (to the appellant’s best knowledge) and claims more generally within academia are rare.
c) this means that a fear in terms of negative consequences is preventing people from feeling able to bring forward their discrimination claims and have them adjudicated on.
d) this fear is evidently rational and is the natural effect of the existing model of how academia operates. By way of example:-

    i) the respondent themselves claim that their own peer review process is insecure in respect of outside interference
    ii) most academic decisions take place within an international academic community, which unsurprisingly has no mechanism for (or interest in) protecting against victimisation
    iii) academic careers are themselves international (they should not be, but that is the effect of the present system) which acts as a further chilling effect, because most countries do not have the European standards of protection.
    iv) academic departments when hiring new staff, have a general process where the entire academic department is invited to evaluate the candidate, or at the very least, attend a presentation. The inevitable effect – especially with the publication of Employment Tribunal decisions on line – is that this matter would be known in most hiring processes that proceed to interview. There is no way of knowing for each rejection if it was discriminatory or not.

e) accordingly, although there is a law preventing victimisation, barring a radical overhaul of how the academic system in the UK operates, this is of little or no real effect. It therefore fails to produce the necessary protection.
f) the only salve is anonymity, given the small nature of an academic community and the general lack of enforcement of discrimination law.

32 It is further submitted that anonymity should be granted by default in respect of matters concerning academia, following the EU principle of "efficacy", as this is the only way that the Equality Act 2010 (and the EU provisions it is supposed to be implementing) will have substantive effect. The failure to ensure anonymity has had the effect that virtually no-one will mount a challenge, with the absurd effect that awards – (such as Athena Swan) are being doled out for non-compliance with what the legislation requires. Anonymity would ensure appropriate behaviour in line with the Act and EU provisions going forward. It is the only solution and that makes it as of right, as the appellant would contend.

33 The appellant should therefore be grateful if a temporary anonymity order would be granted."

7. The case first came before Employment Judge Shore for a private preliminary hearing on 18th October 2018. On that occasion case management orders were made, but despite the claimant being present in person, the claimant's application for an anonymity order was overlooked. In a letter dated 11th November, the claimant asked for the application for an anonymity order to be considered by Judge Shore. In a judgment promulgated on 26th November 2018, Judge shore refused the applications, stating that:-

"The claimant's application for an anonymity order and/or an order that the judgment in this matter dated 26th October 2018 not be published is refused."

The relevant extracts from Judge Shore's reasons are as follows:-

"The claimant's application is predicated on the assertion that anonymity is necessary to ensure the proper administration of justice. His rationale is that no rational academic would bring a discrimination claim against the respondent. His argument is developed on the basis that he is bringing a discrimination claim and that it is rare for such claims to be brought against a research council. He therefore draws the conclusion that the fear of negative consequences prevents people from bringing claims. He appears to ignore the fact that such fear, if it exists, has not stopped him with bringing this case. He then makes a number of assertions regarding the unfairness/discrimination inherent in the system which, at this stage, have not been proven. It is then submitted that any case concerning "academia" should attract a grant of anonymity for the claimant, to give efficacy to the Equality Act 2010. The claimant says that his position in this case "would likely benefit from argument". I interpret that to mean that he doesn't know what his claim is and is, like Mr Macawber, hopeful that something will turn up. That was certainly the thrust of the arguments he put in person at the hearing when arguing for an extensive order for the discovery of documents".

Judge Shore made reference to the authorities quoted by the claimant, namely **Scott v Scott** and **BBC v Roden**. Judge Shore made reference to the provisions of Rule 50(2) and concluded as follows:-

"I find that the claimant has not made out a case for derogating from the principle of reporting court proceedings in full. I find that the claimant's right to privacy under Article 8 of the European Convention in Human Rights does not outweigh the public interest in the open administration of justice and freedom of expression under Article 10. The nature of the claimant's claim has a public interest element, as the respondent administers grants of approximately £6 billion. His application for an order under Rule 50 is therefore dismissed."

8. By letter dated 3rd December 2018 addressed to the Employment Tribunal, the claimant states:-

"I intend to appeal the decision to the Employment Appeal Tribunal. Accordingly I ask for an interim anonymity order (and removal of all decisions from the tribunals website and BAILII) until the later of:-

i) the 42 day deadline to apply to the Employment Appeal Tribunal (from today's date, at least according to the covering letter)
ii) the determination of any application (if made – I will send evidence to the employment tribunal when it is submitted, if directed to do so) by the Employment Appeal Tribunal

I would observe that the decision is fundamentally flawed (and thus any appeal to the Employment Appeal Tribunal should inevitably succeed).

9. The claimant goes on to state that his primary concern is not victimisation by respondent, but by other academics.

10. The matter than came before Employment Judge Garnon for a further private preliminary hearing on 17th January 2019, pursuant to the earlier orders made by Employment Judge Shore on 18th October. The purpose of the second private preliminary hearing was to make further case management orders. On the 17th January, the claimant again attended in person and the respondent was represented by its solicitor, Mr Rees. Judge Garnon recorded in the second paragraph of his Notes of Discussion, the following:-

2. "The claimant is not content with some earlier orders made by Employment Judge Shore. It was thought he might appeal, but today he said he would simply make certain applications for a second time. I would not normally depart from the decisions of another Employment Judge. I believe, on the facts known to him at the time, his decisions were ones I would have made. As Employment Judge Shore recorded, the case management discussion was listed fbeore a one-day hearing, due to start at the same time. The claim form is enormous. It is largely as a result of the orders made by Employment Judge Shore, and the claimant's response to them, I now see the applications he is making more clearly.

6. Before we get to the public preliminary hearing, the claimant has made an application, which he will refine, for an order under Rule 50 of the Employment Tribunal Rules of Procedure 2013 for an anonymity order. Today Mr Rees took a fairly neutral stance. I can see why the claimant is

making this application more clearly now than I could before he explained at this hearing. I must draw his attention to Rule 50 (2) which says the tribunal shall give full weight to the principle of open justice. In short, even if both parties agree to an anonymity order, the Tribunal has to decide whether one should be made."

11. Employment Judge Garnon went on to order the claimant to send to the tribunal and respondent his application for an anonymity order, "**concisely specifying the grounds upon which one should be made.**" The matter was then listed for a one-day hearing to consider the application for an anonymity order, on 11th March.

12. Under covering letter dated 20th February 2019, the claimant submitted, "my submission as directed by Employment Judge Garnon". That submission runs to 35 closely typed pages, with footnotes. It was that document, along with the bundle of "evidence" and the two bundles of authorities, which were produced and relied upon by the claimant before myself. The hearing on 11th March began at 10.10am and ended at 4.20, with a one-hour break for lunch. As mentioned in my case management summary from that occasion, during the lunch break I urged the claimant to distil, but not dilute, the volume of material which he wished to put before the Tribunal in support of his application for an anonymity order. Despite that request, the claimant insisted upon referring to much of the material he had collated, all of which he believed supported his application. As a result, it was impossible for me to reach a decision upon the application within the time available.

13. Having discussed these matters at length with the claimant during the hearing itself, I raised with the claimant what I considered to be the main thrust of his arguments. Those would appear to be that as a member of "academia", the claimant is far more likely to be the victim of retaliatory action for bringing these proceedings than would any other person, such as someone working on a building site or in a factory. I asked the claimant to explain why his situation was so different to the average working person, who may also feel somewhat reluctant to bring proceedings in the Employment Tribunal against their employer, in case subsequent potential employers learned of their involvement. I explained to Mr Kirkham that the myriad of arguments which he now sought to raise and in particular the manner in which he does so, is quite simply, not helping his case. I carefully explained to him that what I required was clear and cogent evidence as to why I should derogate from the basic principle of open justice. I suggested to the claimant that he should distil from the hundreds of pages of information which he has supplied, a concise summary/closing submission containing all of the matters upon which now seeks to rely, following our lengthy exchange at the hearing on 11th March. The claimant has now done so, copying the same to the respondent's solicitor. I have taken that closing submission into account in considering the claimant's applications for both an anonymity order and the removal of any judgment and decisions from the Employment Tribunal`s website.

<u>THE LAW</u>

14. **Rule 50** of the Employment Tribunal Rules provides as follows:-

(1) The Employment 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 it is 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 as 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

15. The claimant's application does not engage those restrictions on publicity which are normally imposed by virtue of Sections 11 and 12 of the Employment Tribunals Act, namely sexual misconduct allegations or disability cases. Furthermore, the claimant's is not one which could be described as a national security case.

16. The "principle of open justice" is simply that justice is administered by the courts in public and is therefore open to public scrutiny (**Scott v Scott – 1913 AC 417).** Following the implementation of the **Human Rights Act 1998**, which came into force in 2000, the House of Lords signalled a change to that approach in the case of **re S (2005-1AC 513**). In that case a mother was charged in a criminal trial with the murder of her son but she had another child, a boy aged 5, S. There was evidence from a psychiatrist before the court that if the mother was identified, the effect on S would be "significantly harmful". The judge at first instance made an order preventing publication of the name of the mother and S`s identity in the newspapers and elsewhere. The papers appealed. They lost in the Court of Appeal but were successful in the House of Lords. The decision of the House of Lords is based upon the interplay between **Article 8** of the ECHR, the right to respect for privacy and family life, and **Article 10**, the right to freedom of expression. The House of Lords identified four propositions which will apply whenever consideration is being given to questions of anonymity:-

i) first, neither article of the ECHR has precedence over the other

ii) 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
iii) the justifications for interfering with or restricting each right must be taken into account
iv) finally, a proportionality test must be applied in an ultimate balancing exercise

Adopting that approach and giving greater importance to the principle of open justice than the Court of Appeal had done below, the House of Lords decided that although S would suffer distress, the Article 10 rights at issue, particularly the freedom of the press to report criminal trials which promoted public confidence in the administration of justice, led to the conclusion that anonymity should not be granted.

17. The Employment Appeal Tribunal has provided guidance in a number of recent cases, which assist the Employment Tribunal as to how to proceed in exercising powers under Rule 50. In **F v G (2012 ICR 246**) Underhill J was considering the predecessor to Rule 50 which was promulgated under the 2004 rules. However, his approach may be helpful in understanding Rule 50 of the 2013 rules. He made the point that the default position is that it is in the public interest that the full decisions of Tribunals, including the names of parties, should be published. That followed the direction of travel set by **Re S**, but nonetheless he decided that on the facts of the **F v G** case, a restricted reporting order was appropriate.

18. A different view was taken by the Employment Appeal Tribunal in **EF v AB (2015 IRLR 619),** in overturning the decision of the Employment Tribunal and granting a permanent restricted reporting order. The claimant had made allegations of sex discrimination and harassment against the CEO (EF), which included salacious allegations against the CEO`s wife (NP). The claims were unsuccessful and Mrs Justice Slade considered the Article 8 right to privacy and the countervailing Article 10 right to freedom of expression and concluded that, save for the principle of open justice, there was no public interest in revealing the identity of NP or EF. Accordingly, the Article 8 rights outweighed those under Article 10 and the principle of open justice.

19. In **BBC v Roden (2015 ICR 985)** Mrs Justice Simler decided that the Tribunal had wrongly granted an anonymity order to the claimant. The claimant had been employed by the BBC as a development officer working with young people. He was dismissed when the BBC was told by the police that he posed a risk to young men. He had in fact been dismissed from an earlier job because of allegations of serious sexual assaults. When he applied for his job with the BBC, he had not told the BBC about this history. He nonetheless brought a claim for unfair dismissal after he was dismissed and sought and obtained anonymity at first instance. The Employment Judge granted anonymity mainly because he thought that the public would conclude that the claimant had actually committed the alleged sexual offences, when those matters had never been the subject of any trial. The truth or falsity of those allegations were not an issue before the Employment Tribunal. The judge thought that if matters became public by identification of the claimant, this could have devastating consequences for him. However, Simler J in the Employment Appeal Tribunal, allowed the BBC’s appeal from the decision. The starting point was the principle of open justice and the right to freedom of expression under Article 10

ECHR. Derogation from that principle could only be justified when it was strictly necessary in the interests of justice. The risk of the public misunderstanding that the claimant had been found to have committed the offences was not enough to justify derogation from the principle of open justice. The public could distinguish between mere suspicion and proven charges.

20. In **Fallows v NGN (2016 IRLR 827)** proceedings were brought by Sir Elton John's hairdresser, alleging sexual misconduct. The respondent sought privacy orders under S11 ETA and those applications were unsuccessful. The Employment Appeal Tribunal granted a restricted reporting order pending a full hearing, but the claim was then settled. NGN asked for the restricted reporting order to be lifted and the EAT agreed, stating that there was strong public interest in the story and the behaviour of the respondent as an employer was a legitimate subject for public scrutiny.

21. The principles which follow from those decisions may be summarised as follows;

a) The weight afforded to Article 8 rights of the claimant will be low in circumstances where the claimant has chosen to bring proceedings in a public tribunal.
b) Mere publication of embarrassing or damaging material is not a good reason for restricting the reporting of a judgment.
c) Where a claimant`s motivation in bringing proceedings has been part of a campaign of revenge or blackmail, this will be a factor in favour of granting a restriction to a respondent
d) Where publication impacts upon Article 8 rights of children or vulnerable individuals, orders will be more readily granted
e) Clear and cogent evidence is required to derogate from the public interest in full publication.

22. Those principles were revisited by the employment appeal tribunal in A v The Secretary of State for Justice (2018 UKEAT-0263-17-1303), when Her Honour Judge Tucker made the following observations:-

> "in my judgment, in order to make 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 the freedom of expression. As regards the first of these two matters, the restriction on public disclosure can only be imposed insofar as the tribunal considers that it is necessary for at least one of the three specific matters:-
>
> i) the interest of justice
> ii) in order to protect the convention rights of any person. The terms of the rule make expressly clear that those individuals are not restricted to the parties or witnesses (see rule 50(3))
> iii) the circumstances set out in section 10(A) of the Employment Tribunals Act 1996 (relating to the disclosure of confidential information). With regards to the second matter, when considering whether to make an anonymization, order the Tribunal must give full

> weight to the principle of open justice and 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 those issues requires a proper evaluation of competing rights, balancing one against the other before reaching a decision. That exercise will of course be flawed if the tribunal has not first identified why the order may be necessary.

23. In a very recent decision of the employment appeal tribunal in the case of Ameyaw v Price Waterhouse Coopers Services Limited (UKEAT/244/18), promulgated on 4th January 2019, Her Honour Judge Eady QC carried out a thorough of the case as set out above and drew attention to the provisions of Article 6(1) of the ECHR, which states:-

> "in the determination of his civil rights and obligations or of any criminal charges 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 interest of the 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."

24. Honour Judge Eady reminded the parties that 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 principle that does not simply require that judicial hearing should generally take place in public, it also requires that judgments will generally be publicly available. This is not only a consequence of the right to a fair trial under article 6, it is also an aspect of the article 10 right of freedom of expression, which encompasses the right to impart and receive information.

25. Judge Eady commented that, as well as allowing for a restriction in cases concerning confidential information, rule 50 provides that restrictions on publicity may be imposed both in the cases expressly referred to at sections 11 and 12 of the Employment Tribunals Act 2006 (Sexual Misconduct Allegations – Disability Cases) but also more generally. The wider ability to restrict publicity derives from the Secretary of State's general power to make procedural regulations for employment tribunals under section 7 of the Employment Tribunals Act, whether read by itself or construed in accordance with section 3 of the Human Rights Act 1998 (Fallows v News Group Newspapers).

26. At paragraph 48 of her judgment, Judge Eady states as follows:-

> "should the tribunal be satisfied that an article 8 right is engaged, 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 employment tribunal will be guided by the following principles derived from the case law:-

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 from open justice
iii) where full reporting of proceedings is unlikely to indicate whether a damaging allegation is true of false, the tribunal should credit the public with the ability to understand that unproven allegations and no more than that
iv) where such a case proceeds to judgment, the tribunal can mitigate the risk of misunderstanding by making clear it is not adjudicated on the truth or otherwise of the damaging allegation.

27 In addition to dealing with those principles, Judge Eady in **Ameyaw** made clear that there is no power vested in the Employment Tribunal to determine that a judgment should not be entered in the Register of judgments which employment tribunal is obliged to maintain pursuant to Regulation 14(1) of the 2013 regulations and Rule 1(1) of the Employment Tribunal Rules. Regulation 14(1) states:-

"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.

Rule 1(1) defines "register" as the:-

"register of judgments in written reasons kept in accordance with regulation 14 of the 2013 regulations.

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 if any written reasons for a judgment."

28 At paragraph 49 of her judgment, Judge Eady states, "as is apparent from the ET rules, there is no power vested in the employment tribunal 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 to only national security cases."

THE CLAIMANT'S SUBMISSIONS

29 In advance of the hearing on 11th March, the claimant submitted a thirty-five page submission, setting out in detail his grounds for the application for an anonymity order. The claimant acknowledges that the tribunal must carry out a balancing exercise between the common law principle of open justice, the article 10 rights to freedom of expression and the article 8 rights to privacy. The claimant states that, "the lack of effective protection from victimisation in EU law is a "knock-out blow" that

requires anonymisation. There is no further balancing exercise to carry out because EU law would trump any human rights act 1998 (and thus ECHR or common law type) exercise.

30 The claimant goes on to set out how “the academia problem” is such that it should be treated as something different to other areas which are entitled to the protection of the anti-discrimination legislation. The claimant make the following points:-

- This claim is very distinctive. It seeks to challenge the operation of the wider academic community as being discriminatory insofar as they are being administered by the respondent. In other words it challenges the system rather than simply individual acts by act those within it. It effectively says that the academic system is not primarily founded on merit and therefore that the senior academics (who take most decisions) are not necessarily not there on the basis of ability.

- There is a wide swathe of academic community who are effectively unprotected by discrimination law.

- This presumably is because no-one has brought a challenge of this nature before. The tribunal in this case will likely be dealing with literally dozens of novel points of law – indeed, just the jurisdictional defence of the respondent would (if successful) amount to radically reshaping the jurisdiction of the tribunal under the Equality Act 2010.

- The claimant has no doubt that if the tribunal were to name the claimant, he will be blamed by the respondent for a whole batch of decisions it would take about scientific funding going forwards.

- The claimant doubts that the mainstream press would have any interest in it. However, the academic trade press would presumably be very interested in reporting the outcome.

- Many decisions are effectively taken by “blackballing” – one critical reviewer or programme committee member is often enough to get a paper rejected. There is no accountability in respect of decision makers, as the person subject to those decisions does not know who has taken the decision, or in most cases, why.

- The academic decision making processes are well known to be biased in respect of protected characteristics. There is extensive statistical evidence in favour of that point.

- Essentially, there is no effective protection from victimisation in these peer reviews systems whatsoever.

- In practice there is no real effective protection from victimisation – discrimination law is being systematically not being complied with and that what little protection exists is populist and more realistic in nature (as one would expect with voluntary compliance).

- In short, asides anonymity, there is no way of the tribunal protecting the claimant or anyone similarly situated. The answer is therefore anonymity. The employment tribunal cannot protect anyone directly from an individual act of discrimination, because it is not presently an effective deterrent. Nor is it possible to get just satisfaction.

31 The claimant goes on to set out what he describes as “the impact of the claimant being identified”, in the following terms:-

- The action would be economically pointless. Even if the claimant won his case the overall loss he would make in the medium term would far outweigh the amount of compensation he would expect to gain from the respondent.

- The claimant’s own academic career would also have a question mark upon it. The main issue from the claimant’s point of view is the failure to award the qualification to which he was entitled.

- There would be a substantial degradation in the claimant’s ability to be critical as an academic in the future.

- The claimant has the risk of more public retaliation aimed at him.

32 The claimant defence submits that failure to grant him anonymity would adversely impact upon the effective conduct of his trial. He states that he “would still pursue the core substance of the claim even if an anonymity order were to be refused. However this would be a purely public spirited act on his part.” The claimant says that he is concerned that outside prospectives on the trial would negatively impact upon a fair hearing of his claims. He states that “making a complex case more complicated raises the risk of substantive injustice ie the case being wrongly decided either in full or in part.” The general public would not benefit from a full and complete determination of the real issues in the case.

33 The claimant adds that in this case, the public interest in the protection from victimisation (and with it the fundamental principle of equal treatment) takes centre stage in the balancing exercise, alongside the public interest in open justice. The claimant acknowledges the principles set out in the authorities referred to above and submits that, on the facts of his case, the correct implementation of the balancing exercise must inevitably result in the granting of his application for an anonymity order.

34 At the end of the hearing on 11th March the claimant agreed with me that he would prepare a closing submission, setting out in concise terms, the main points arising from his ?? application, bundle of evidence and authority. The claimant has done so in a document submitted on 22nd March. The claimant considers that there are five matters which arise:-

a) Is the claimant reasonably deterred by the atmosphere in academia and the risk of victimisation from pursing his claim if anonymisation is not granted?

b) Is it practically possible for him to bring his claim if someone in the academic community were to victimise him?

c) Without anonymity, could the tribunal offer him an effective remedy?

d) Could the claimant sue in the employment tribunal, anyone who promulgated the fact that he was involved in these proceedings?

e) What should be the outcome of the ultimate balancing exercise?

35 The claimant submits that he is reasonably deterred from continuing with his claim by the risk of victimisation. He refers to the "extensive documentary evidence" submitted to the tribunal in support of his original application. Those include "the regular collection of anonymous articles", the highly unpredictable system for younger academics, the claimant's own academic article and the forthcoming parliamentary select committee enquiry into the discriminatory practices of the respondent's distribution of funding. The claimant maintains that this all shows "the capricious nature of academic decision making". The claimant does not mention in his closing submission his earlier concession that he would "still pursue the core substance of the claim even if an anonymity order were to be refused.

36 The client asks whether there is a practical possibility of the claimant bringing further proceedings if he were to be victimised and states that "there is no practical possibility of the claimant bringing a claim if he is discriminated against by his fellow academics in a peer review or appointment process. The four core reasons for that are said to be the structure of the academic appointment model itself, "the use of effective blackballing", the international nature of decision making and that challenging individual acts of discrimination involves the disproportionate amount of work.

37 The claimant asks whether, without anonymity, there is an effective remedy for him if he succeeds before the tribunal on the substantive case. He insists that the answer to this question is "no". He states that he is "reasonably deterred" and in all probability if awarded the full outcome he expects, will make an economic loss. Therefore there is no effective remedy without anonymity. Accordingly the amount of financial loss should be viewed as a reasonable deterrent what is public interest litigation.

38 The claimant then asked whether he could sue for promulgation in the Employment Tribunal. The claimant insists that he could do so, on the basis that promulgation of the judgment in this case would amount to breach of sections 111 and 112 of the Equality Act 2010 on the basis that the tribunal and its staff would have "acted to (or attempted to) either instruct cause or induce (be it directly or indirectly) someone else to take an action which would be in breach of part 5 of the Equality Act 2010, or section 108(1) or (2) or section 112(1) against himself.

39 Finally, dealing with "the ultimate balancing exercise" the claimant states "the scales can only tip one way, namely in favour of an anonymity order for the claimant." He insists that there is no need for him to be identified as the protection from victimisation is itself a fundamental and profound provision that ensures freedom of

expression around sensitive topics and therefore is a fundamental part of article 10 and article 14 of the ECHR. The claimant submits that is far more important that people can be assured of a full protection from victimisation than it be known who the claimant is in a given set of proceedings. The claimant concludes that publishing his name would discourage other litigation, which would in turn result in fewer judicial evaluations and thus a deprivation of important information which would enable freedom of expression on this topic.

THE RESPONDENT'S CASE

40 The respondent chose not to attend the hearing on 11th March, but made written submissions for both that hearing and by way of response to the claimant's closing submissions. The respondent states that it "does not accept that the representations relied upon by the claimant as set out within his written submission, meets the requirements necessary for an anonymity order under rule 50. It submits that the claimant's narrative "includes fundamentally flawed assertions such as:-

- The inability without anonymisation to protect the claimant from inevitable and ongoing victimisation in his career going forward.
- The tribunal system has had little or no effect on the academic system in terms of dissuading discriminatory acts.
- There is a further point about academic decision-making processes – they are well known to be biased in respect of protected characteristics.
- The employment tribunal cannot protect anyone directly from an individual act of discrimination because it is not presently an effective deterrent.
- If the tribunal were to name the claimant, he would be blamed by the respondent for a whole batch of decisions it would take about scientific funding going forward.
- It is clear that the operations of an elaborate academic community mean none of the EU principles are actually enforced.

41 The respondent then submits that the tribunal should have regard to the following features arising from the authorities set out above:-

- The weight to be afforded to the article 8 rights of privacy of any party will be low in circumstances where it is that party who is chosen to bring proceedings in a public tribunal. In this case it is the claimant who is freely and voluntarily chosen to issue proceedings in the full knowledge and expectation that such proceedings would be conducted in a public forum.
- The mere publication of possibly damaging material is not a good or sufficient reason for over-riding the principle of open justice.
- The claimant is alleging that disclosing his name will lead to future damage in his career, but even if (which is not accepted) the tribunal concludes that

disclosing the identity of the claimant may have the potential to cause damage to his career prospects, it is not sufficient by itself to allow the tribunal to award the claimant anonymity and over-ride the principle or open justice.

- Building upon the points made above, the respondent contends that any party seeking anonymity put forward in support of any application compelling evidence to support the assertions being made – in this case future damage to career prospects and victimisation. The claimant has failed to provide any evidence that is sufficient to meet this standard and instead the claimant's "evidence" is limited to sweeping assertions about what he claims would be the reaction to these proceedings not only of the respondent, but also the wider academic community.

- These assertions seek to persuade the employment tribunal that anyone who is seen to be challenging the academic system will be victimised. The employment tribunal is respectively invited by the respondent to consider that such anxiety, even if genuine and real, is a sentiment that any party to legal proceedings may claim to have from time to time whereas a claimant (as in this case) or as a witness providing critical testimony against another party in proceedings. If an anonymity order were granted to the claimant on the basis of his assertions it would in effect allow other parties to seek similar anonymity and "drive a coach and horses" through the principle of open justice.

- The suggestion made by the claimant that the tribunal system fails to provide adequate protection against the potential discrimination of parties and individuals is simply incorrect. The statutory arrangements in place provide comprehensive protection against many forms of discrimination, including each of those identified by and relied upon by the claimant in these proceedings. That protection also extends to acts of victimisation and to the extent that the claimant considers that he has in future dealings been the subject of an act or acts of victimisation by the respondent and any other relevant party, the existing legal framework provided an adequate and effective process to challenge such treatment without the employment tribunal needing to take the highly unusual step of awarding the claimant anonymity.

DISCUSSION AND CONCLUSIONS

42. The material which has been submitted by the claimant in support of this application is somewhat overwhelming in its volume, but not in its decisive qualities. The claimant has clearly undertaken a considerable amount of research with a view to identifying material which he believes supports his contention that the granting of an anonymity order is the only way to ensure appropriate behaviour by the respondent and others within academia generally, as a result of his issue of these proceedings. This is not a case where there is a challenge to or comment upon the claimant's honour or reputation. Indeed, there are no allegations against him whatsoever. The basis of the claimant's application is simply that, were his name to be published, then he would inevitably be the victim of retaliatory action by the respondent and

others, simply because he has chosen to challenge the process or system by which applications for funding are considered.

43. I do not accept the claimant's argument that the lack of any earlier proceedings against the respondent must inevitably mean that those who are victims of discrimination are too frightened to present a claim in the Employment Tribunal. I consider the claimant's arguments in this regard to be esoteric and lacking in any real substance.

44. I am not satisfied that the claimant has shown that "academia generally" should be treated entirely differently to any other source of employment. There will be many employees who will be cautious, if not reluctant, to issue a claim in the Employment Tribunal against a former employer in case they are subsequently identified as a "trouble-maker" and thus less suitable for employment. The claimant tells me that he has since the issue of these proceedings, obtained a position in Australia, which somewhat dilutes his argument in this regard. I see no good reason why the claimant should be treated any differently to the person working on a building site or in a factory, who may fear retaliation as a result of bringing proceedings.

45. I do not accept that the claimant has been "reasonably deterred" from bringing these proceedings. The claimant is clearly an intelligent, educated and articulate individual who would have been well aware when he decided to bring these proceedings that the Employment Tribunal is a public forum and that judgments (with reasons) would be published in accordance with the rules. The claimant himself has conceded in his submissions that even if anonymity is not granted, he will continue with his claim.

46. I do not accept the claimant's argument that, without anonymity, the claim would be economically pointless. The claimant's assertion is that the level of any compensation which is likely to be awarded to him should his claim succeed, will be far less than the overall cost in lost opportunities and lost earnings if he is, as he puts it, "black-balled" because he is known to have brought these proceedings. The claimant will be entitled to a declaration if his claim succeeds, plus compensation if appropriate.

47. I reject wholeheartedly the claimant`s submission that he could sue in the Employment Tribunal any member of those involved in the administration of justice, by publishing his name or promulgating any judgment containing his name.

48. I have carefully considered all the arguments put forward by the claimant, together with those submitted in writing by the respondent. I am satisfied that, in carrying out the balancing exercise required of me, the claimant has not shown that his Article 8 rights to privacy and family life outweigh the principle of open justice generally and the Article 10 rights to freedom of expression. I can see no meaningful reason why an anonymity order should be granted in this case. The claimant's application for an anonymity order is refused.

49. I am satisfied from my examination of the rules and in particular from the decision of the EAT in **Ameyaw**, that the Tribunal has no power to order that any judgment should not be entered in the register, nor is this a case where the written reasons should be excluded. That application is also refused.

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EMPLOYMENT JUDGE Johnson

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
14 May 2019

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