Appeal No. UKEAT/0113/18/JOJ

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 9 May 2019
Judgment Hand Down on Wednesday 26 June 2019

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

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(1) A
(2) B — APPELLANTS

(1) X
(2) Y
(3) TIMES NEWSPAPERS LTD — RESPONDENTS

Transcript of Proceedings

JUDGMENT

FURTHER APPLICATION

APPEARANCES

For the Appellants	MR CHRISTOPHER MILSOM (of Counsel) Instructed by: Bindmans LLP Solicitors 236 Gray's Inn Road London WC1X 8HB
For the First and Second Respondents	MR DAVID READE (One of Her Majesty's Counsel) MR AIDAN EARDLEY (of Counsel) Instructed by: Sheridans Solicitors 76 Wardour Street London W1F 0UR
For the Third Respondent	MR ADAM WOLANKSI (One of Her Majesty's Counsel)

SUMMARY

PRACTICE AND PROCEDURE - Disclosure

This judgment is linked to the EAT judgment delivered 16 July 2018 (UKEAT/0113/18/JOJ), which remitted to a freshly-constituted ET the question of whether a Restricted Reporting Order (RRO) should be made. The judgment was anonymised in accordance with EAT Rule 23(2). In the meantime, the EAT made interim orders to continue the existing RROs in both the ET and EAT. On 3 September 2018 the ET made an Order whereby, upon their withdrawal by the Claimants, the claims were dismissed. The First and Second Respondents did not seek to continue the RRO in the ET, which duly lapsed. The Third Respondent then applied to set aside the interim RRO in the EAT, contending that the EAT had no jurisdiction to make an RRO beyond the date of promulgation of its previous judgment (s. 31 ETA 1996; EAT Rule 23(3)); alternatively, that open justice and Article 10 defeated the Second Respondent's claim to protection under Article 8. The Claimants took a neutral stance, provided that the protection of their identity afforded by the Sexual Offences (Amendment) Act 1992 was not jeopardised; which in their view removal of the RRO would not.

The EAT held that it had jurisdiction to make a post-promulgation RRO (**A v. B** [2010] ICR 849; F v. G [2012] ICR; **Fallows v. News Group Newspapers Ltd** [2016] ICR 801 considered). As to the balancing exercise, in the circumstances this fell in favour of the Second Respondent's Article 8 rights and the continuation of an RRO. Those circumstances included the fact that the EAT judgment of 16 July 2018 was by the operation of EAT Rule 23(2) permanently anonymised. The EAT also concluded, in the light of the procedural history, that there was a real risk that refusal of an RRO would jeopardise the protection of the Claimants under the 1992 Act.

THE HONOURABLE MR JUSTICE SOOLE

1. On 16 July 2018 I delivered judgment allowing the appeal by the Claimants, supported by the Third Respondent (TNL), against the Decision of the London Central Employment Tribunal (ET) sent to the parties on 15 February 2018 which had granted the First and Second Respondents a Restricted Reporting Order (RRO). By my Order of the same date the application for an RRO was remitted for rehearing by a differently constituted ET. In order to hold the ring in the meantime, my Order made continuing RROs both in the ET and the EAT. At a public hearing before the ET on 3 September 2018, the Claimants' claims against the Respondents were withdrawn and dismissed. Having been given the opportunity to consider their position, the Respondents did not apply to continue the RRO in the ET. TNL now applies to set aside the continuing RRO in the EAT.

2. TNL contends that there was and remains no jurisdiction to make a RRO beyond the date of the promulgation of my decision, 16 July 2018; alternatively, that, if there is any such continuing jurisdiction, the principles of open justice and Article 10 ECHR freedom of expression defeat any Article 8 claim of privacy on the part of the Second Respondent. Both these arguments are disputed by the Respondents. The Claimants take an essentially neutral stance, provided that any decision does not jeopardise the protection from identification afforded them by the Sexual Offences (Amendment) **Act 1992** ("**1992 Act**"). In their view, termination of the RRO would not do so.

3. For the background, my judgment of 16 July 2018 should be read together with this judgment. As its paragraph 3 records, the Claimants were each employed by the First Respondent company. The Second Respondent is a public figure with a well-known family name. In each

case the Claimants' claims of sexual harassment pursuant to s.26 **Equality Act 2010** included allegations of sexual offences committed by the Second Respondent against each Claimant. The claims and allegations are entirely denied.

Statutory Provisions

Employment Tribunals Act 1996, as amended **(ETA);** and **Employment Appeal Tribunal Rules 1993,** as amended **(EAT).**

By s.29, headed Conduct of hearings:

> **"(2) The Appeal Tribunal has in relation to – …**
>
> **(c) all other matters incidental to its jurisdiction, the same powers, rights, privileges and authority (in England and Wales) as the High Court and (in Scotland) as the Court of Session."**

By s.30, headed Appeal Tribunal procedure rules:

> **"(3) Subject to Appeal Tribunal procedure rules… the Appeal Tribunal has power to regulate its own procedure."**

By s.31, headed Restriction of publicity in cases involving sexual misconduct:

> **"(1) Appeal Tribunal procedure rules may, as respects proceedings to which this section applies, include provision –**
>
> **(a) for cases involving allegations of the commission of sexual offences[1], for securing that the registration or other making available of documents or decisions shall be so affected as to prevent the identification of any person affected by or making the allegation, and**
>
> **(b) for cases involving allegations of sexual misconduct[2], enabling the Appeal Tribunal, on the application of any party to the proceedings before it or of its own motion, to make a restricted reporting order having effect (if not revoked earlier) until the promulgation of the decision of the Appeal Tribunal.**
>
> **(2) This section applies to –**
>
> **(a) proceedings on an appeal against a decision of an employment tribunal to make, or not to make, a restricted reporting order, and**
>
> **(b) proceedings on an appeal against any interlocutory decision of an employment tribunal in proceedings in which the employment tribunal has made a restricted reporting order which it has not revoked."**

[1] It is common ground that the offences alleged against the Second Respondent fall within the definition of 'sexual offence' in s.31(8).
[2] 'Sexual misconduct' is defined to include the commission of a 'sexual offence' : s.31(8).

(3) [provides for a criminal offence if any identifying matter is published in contravention of a restricted reporting order]

…

(7) Restricted reporting order" means –

(a) in subsections (1) and (3), an order –

(i) made in exercise of a power conferred by rules made by virtue of this section, and (ii) prohibiting the publication in Great Britain of identifying matter in a written publication available to the public or its inclusion in a relevant programme for reception in Great Britain, and

(b)…in subsection (2), an order which is a restricted reporting order for the purposes of section 11[3].'

By s.35 headed 'Powers of Appeal Tribunal:

"(1) For the purpose of disposing of an appeal, the Appeal Tribunal may –

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

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

4. By EAT Rule 23, headed Cases involving allegations of sexual misconduct or the commission of sexual offences:

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

(2) In any such proceedings where the appeal appears to involve allegations of the commission of a sexual offence, the Registrar shall omit from any register kept by the Appeal Tribunal, which is available to the public, or delete from any order, judgment or other document, which is available to the public, any identifying matter which is likely to lead members of the public to identify any person affected by or making such an allegation.

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

…

…(5)(A) The Appeal Tribunal may make a temporary restricted reporting order without a hearing.

(5)(B)(5)(C) [provide for a temporary restricted reporting order to lapse if no application to convert it into a full restricted reporting order is made within 14 days; and if such an application is made for it to continue until the hearing at which the application is considered]

…

…(7) The Appeal Tribunal may revoke a restricted reporting order at any time where it thinks fit

[3] This is the enabling provision, headed 'Restriction of publicity in cases involving sexual misconduct', for making ET rules in that respect: see para.5-7 of my 16 July judgment.

> **… (9) In this rule, "promulgation of its decision" means the date recorded as being the date on which the Appeal Tribunal's order finally disposing of the appeal is sent to the parties."**

1992 Act

5. Section 1 of the 1992 Act, under the heading Anonymity of victims of certain offences includes:

> **"(1). Where an allegation has been made that an offence to which this Act applies4 has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the person against whom the offence is alleged to have been committed.**
>
> **(2). Where a person is accused of an offence to which this Act applies, no matter likely to lead members of the public to identify a person as the person against whom the offence is alleged to have been committed ("the complainant") shall during the complainant's lifetime be included in any publication."**

Procedural history

6. It is necessary to set out the procedural history in some detail. On 23 May 2018, following the presentation of the Claimants' appeal to the EAT against the ET RRO, HHJ Richardson made a temporary RRO pursuant to EAT Rule 23(5A) and (5B). The Order duly provided for its lapse within 14 days in the absence of an application to revoke it or to convert it into a full RRO. In fact, no such application was made on either side, but the parties proceeded on the pragmatic basis that it continued in force.

7. The hearing of the appeal was on 5 July 2018. Upon reserving judgment after the hearing, I made an Order by consent that HHJ Richardson's temporary RRO "be extended to the conclusion of the hearing at which the reserved Judgment is handed down, at which hearing the parties may make consequential applications if so advised/as appropriate".

[4] See footnote 1.

8. On 16 July 2018, I delivered my oral judgment. This was followed by a short discussion with Counsel about the interim position - in both the ET and EAT - pending the remitted hearing before the ET. In effect it was agreed that the RRO in each case should continue, although the jurisdictional basis for doing so was not discussed. My Order was drawn up later that day in terms which included:

> **"4. The Restricted Reporting Order of the Employment Tribunal shall continue until the conclusion of the remitted Employment Tribunal hearing when Judgment is handed down.**
>
> **5. The Order of His Honour Judge Richardson dated the 23rd day of May 2018 in relation to anonymisation shall continue until further order."**

9. The wording of paragraph 5, for which I am responsible, was apt to confuse. RROs and anonymisation orders are not the same. HHJ Richardson had made an RRO. However, the parties sensibly proceeded on the basis that the intention was to continue the Order which he had made until further order.

10. The approved transcript of my oral judgment was anonymised, as EAT rule 23(2) requires; and sent to the parties on 14 August 2018.

11. The trial of the claim was listed for 8 days commencing 3 September 2018, with the remitted application for an RRO listed for 7 September. On the morning of 3 September, there was a short case management hearing, heard in private. The matter was adjourned until a public hearing that afternoon. At that hearing, the ET (EJ Elliott and members) was advised that the Claimants' claims were withdrawn. The ET was asked and agreed to dismiss the claims, pursuant to the procedure in ET Rules 51 and 52. No more than that was said. The ET's Order dated 4 September 2018 ("The Dismissal Judgment") is headed "Dismissal judgement on withdrawal" and states "The Judgment of the Tribunal is that the claims are dismissed upon withdrawal".

12. As to the existing RRO in the ET, a private hearing immediately followed the public hearing on 3 September 2018, at which Counsel for TNL was heard. The ET ordered that, unless the Respondents applied by noon on 4 September to continue the RRO, it would stand dismissed from that time. By letter dated 4 September the Respondents' solicitors advised that they were not pursuing any such application. By letter of the same date to TNL, they stated

> **"You will know that the only actions which may be reported as having occurred before the Employment Tribunal are that the claims have been dismissed on withdrawal. No hearing of the claims has taken place, the claims themselves are not in the public domain and the Claimants have withdrawn them."**

The letter then reminded them of the continuing RRO in respect of the EAT proceedings.

13. By letter dated 6 September 2018 TNL advised the EAT of this development and applied to set aside the RRO Order of HHJ Richardson dated 23 May 2018. That Order had been made and continued:

> **"…merely to hold the ring'. Thus 'Now that the proceedings have concluded and the Respondents have confirmed they are not applying for a RRO, there is no reason for the order of HHJ Richardson, which was only ever intended to be temporary, to remain in place."**

14. By letter to the EAT dated 13 September 2018, the Respondents' solicitors opposed this application and applied for an oral hearing. The letter in particular contended that the lifting of the EAT's RRO would be a serious infringement of the Second Respondent's Article 8 rights of privacy, which included his reputation. There was no justification for TNL to be able to report more than they could have reported from the public ET hearing, merely because of the "happenstance" of the interlocutory appeal to the EAT. Furthermore, since the Dismissal Judgment had now been duly posted on the ET website (11 September) with the names of the parties, publication of the Second Respondent's name in connection with the EAT judgment would risk a link with the Dismissal Judgment and thus compromise the Claimants' statutory protection under the **1992 Act**.

15. By letter from their solicitors dated 14 September 2018, the Claimants indicated that they were neutral in respect of the application, save to confirm that they did not consent to any waiver of their rights under the **1992 Act**[5].

16. By letter dated 21 September 2018 TNL wrote to the ET (EJ Elliott) and asked for the Dismissal Judgment to be removed from the website as a matter of urgency. Whilst not accepting that there was a risk of "jigsaw identification", in the light of that argument its continued publication would prejudice TNL's position on the application to set aside the RRO in the EAT. An application to remove it from the website was made on 1 October 2018; and in due course an oral hearing fixed.

17. On 4 October 2018 I ordered that TNL's application to set aside the temporary RRO in the EAT should be adjourned until TNL's application to the ET had been determined. In the meantime, TNL had requested that my judgment of 16 July 2018 should not be posted on the EAT website, pending resolution of the RRO issues. Following further correspondence my judgment was posted without objection in April 2019.

18. By Order dated 15 November 2018, following a hearing, EJ Elliott ordered the temporary removal from the ET website of the Dismissal Judgment, pending the outcome of the application to the EAT. In its place was posted a Judgment on Reconsideration, in the same terms as the Dismissal Judgment but anonymised. The present application came before me on 9 May 2019.

[5] Section 5(2) and (3) of the 1992 Act provides a defence to the offence of publishing identifying matter where this was done with the written consent of the person against whom the sexual offence is alleged to have been committed.

Evidence

19. For the purpose of the application, each party has produced witness statements. The Second Respondent's statement dated 17 April 2019 states that he would find publication of the nature of the allegations "absolutely devastating". He points to his advanced age; distinguished business and public career and honours received; and to his philanthropic works which, in keeping with his general wish to be out of the public eye, have mostly been made anonymously. He also refers to the serious degenerative condition with which he has been diagnosed in the last few years; its effect on his conduct, powers of recall, concentration and emotions; and the need for family and professional care which these require. He states that disclosure of the allegations, which he denies, would be a public humiliation very difficult to bear. The claims have already caused a rift between him and his children. He fears that he will be ridiculed or shunned by those who know him, including friends of many years, and the many public and charitable organisations with which he has been and continues to be associated. He expresses concern that he will not be able to convince people of his innocence; and states that this will be very distressing for him.

20. The statement (18 April 2019) of his solicitor, Mr Keith Ashby exhibits a screenshot obtained on 6 February 2019 by a Google search in the name of the Second Respondent, which "shows the parties" names in the ET proceedings identified by the case numbers. A search undertaken from 7 February 2019 onwards showed initials only. However, a search on 10 April 2019 produced the names of the Second Claimant and the Respondents, but no link to the Dismissal Judgment. A search of Bailii on 12 April 2019 brought up the names and a link to the Dismissal Judgment.

21. The responsive first statement of TNL's Senior Editorial Lawyer Brid Jordan (25 April 2019) states that at its request the Dismissal Judgment on Bailii was taken down; and a further

search confirms that the names are no longer identifiable. A Google search on 18 April produced no link to the Dismissal Judgment. However, a repeat search on 23 April did produce that link. A request was made to Google to remove "the parties" details from the link as a matter of urgency. In her further statement (1 May 2019) Ms Jordan states that Google advised on 30 April that the names no longer appeared on the third party webpages; that the information was being stored in its 'cache'; that the information would update itself over time; but that a request could be made to remove it immediately. A request was made and the content removed. As of 1 May, the link no longer appeared.

22. On the wider issue, Ms Jordan states that there is a clear public interest in reporting on the Second Respondent's identity in the context of the wider public discussion about the policies in place to protect parties in respect of sexual harassment allegations, in particular those made by employees against employers. TNL has reported extensively on this since the emergence of the "MeToo" movement in late 2017. The use of Non-Disclosure Agreements (NDAs) by some employers to protect those accused of indiscretions in the workplace has become a policy issue discussed at government level. A related issue is the wish to report fully on the process of a claim before the employment tribunal and the steps which those accused can take to protect themselves from publicity, in particular through anonymity orders and RROs. The distinction between automatic reporting restrictions and those that a tribunal can impose is not always clear to a reader. Some members of the public believe that the system can be exploited by wealthy and powerful members of society who have the resources to secure an injunction and/or other restrictions to prevent reporting on allegations of wrongdoing. It is an important part of open justice, and of reporting on tribunal proceedings, to explain this process. For all these issues, the ability to identify the person against whom the allegation is made is essential if TNL and other

A newspapers are to engage their readers and provide context for stories that would otherwise appear dry and abstract.

B **TNL Submissions**

Jurisdiction

23. Adam Wolanksi QC first submits that there was and remains no jurisdiction in the EA to make any order which extends beyond the date of the promulgation of the relevant decision, i.e. in this case beyond my judgment and Order of 16 July 2018.

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24. The EAT's power to make a RRO is confined to the provisions of EAT Rule 23. The effect of s.31 ETA 1996 and the opening words of Rule 23(3) – "In proceedings to which this rule applies" - is to confine RROs to the categories of appeal limited by s.31, which include the appeal from the ET's grant of a RRO under its own Rules. As Underhill P (as he then was) observed in the supplemental judgement in A v. B [2010] ICR 849, "…the effect of subsection (2) is, quite explicitly, that section 31 only applies in the limited class of case there specified and does not apply in any case where this tribunal is considering an appeal against the substantive order of an employment tribunal.": p.875 at [6].

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25. Rule 23(3) in turn only permits an RRO in such cases "until the promulgation of its decision." Whilst no objection was in fact taken to a continuing order on 16 July, the EAT cannot be given a jurisdiction by the parties which it does not enjoy. The EAT has no inherent jurisdiction. In any event, as Lord Sumption made clear in **Khuja v. Times Newspapers Ltd** [2017] UKSC 49, "The inherent power of the court at common law to sit in private or anonymise material deployed in open court has never extended to imposing reporting restrictions on what happens in open court. Any power to do that must be found in legislation" [18].

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26. In the present case, the Judgment of 16 July recorded the fact that each of the Claimants had made claims of sexual harassment against the respondents, including allegations of sexual offences committed by the Second Respondent on each of them. The fact and nature of such allegations, albeit without any details, had been stated in the EAT's public hearing and then recorded in the judgment. Newspapers would therefore enjoy absolute privilege in making a fair and accurate contemporaneous report to that extent. This was what distinguished the position from the public hearing in the ET, where there had been no such reference to the fact of the allegations. Hence the importance of the present application.

27. Insofar as decisions of the EAT had held that there was power, whether in the ET or EAT, to make restricted reporting orders after promulgation of its decisions, they were wrongly decided; and in any event distinguishable.

28. In **A v. B** [2010] ICR 849 the EAT, in its supplemental judgment, was considering whether it had power to anonymise its judgment on an appeal from the substantive decision of an ET that there had been an unfair dismissal. Having noted that it could not do so under the limited powers in s.31 ETA and EAT rule 23, and contrasting the comparative power of the ET to make a permanent anonymity order (at the time, ET Rule 49), Underhill P described this as "a remarkable anomaly and a wholly unfair situation" [8]. Citing earlier EAT decisions by analogy, he held that, in a case where the loss of the claimant's anonymity would involve a breach of his Convention rights, it would be the duty of the EAT, pursuant to the Human Rights Act 1998, to interpret its powers, so far as possible, so as to protect that anonymity. This could be achieved through the principles which permitted the tribunal to 'read up' a domestic statute in order to achieve conformity with the requirements of the Convention. The statutory provision which could be so interpreted was the EAT's general power under s.30(3) ETA to regulate its own

procedure [10]. Having conducted the necessary balancing exercise, Underhill P concluded that the claimant's Article 8 'right to be protected in one's honour and reputation' entitled the EAT to grant an anonymity order. In the subsequent case of **F v. G** [2012] ICR 246, he concluded on the same essential basis that anonymity/RROs could be ordered by ETs in circumstances falling outside ET Rules 49 and 50.

29. Mr Wolanksi submits that these decisions do not meet the strict requirement, reaffirmed by Lord Sumption in Khuja, that the power to impose restricted reporting orders must be found in legislation [18]. He reiterated the strict approach of the law to any derogation from the principles of open justice: see the summary in paragraph 27 of my judgment of 16 July 2018. Furthermore, neither decision concerned RROs in the EAT.

30. In **Fallows v. News Group Newspapers** [2016] ICR 801, the issue of post-promulgation restrictions arose in an appeal against the ET's refusal to continue an RRO, following settlement of claims of unfair dismissal and sex discrimination which had included allegations of sexual misconduct. Section 11(1)(b) ETA authorised ET rules for RROs, in cases involving sexual misconduct, "until the promulgation of the decision of the tribunal". However, the ET Rule, as amended in 2013 (50(1)), contained no such temporal restriction. Simler P accepted that the ET had no inherent powers to make orders which restricted the report of proceedings; and that any powers must be derived from enabling legislation [35]. However, citing earlier authorities including **A v. B** and **F v. G**, she held that where Convention rights were engaged Rule 50(1) provided the jurisdiction to make a post-promulgation RRO. The statutory basis for that Rule was the ET's general rule-making power in s.7(1) ETA.

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31. Mr Wolanksi submits that **Fallows** was also wrongly decided on this point. The ET's general rule-making power, when set against the strict requirement of legislative authority reaffirmed in **Khuja,** provided no sufficient basis for post-promulgation RROs. Furthermore, the decision concerned the jurisdiction of the ET, not the EAT.

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32. Nor (as also suggested by the Respondents) did s.29(2) ETA provide such authority. In **Trinity Mirror plc** [2008] QB 770, the Court of Appeal held that a comparable provision relating to the powers of the Crown Court (s.45 Senior Courts Act 1981[6]) did not empower the Crown Court to make an order, amounting to an injunction, which restrained the media from identifying the defendant who had pleaded guilty to child pornography offences. The order was not incidental to his trial, conviction and sentence [30]; and "The court with jurisdiction to make this order, if it were ever appropriate to be made, is the High Court." [31].

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33. When pressed with the argument that the result of an appeal in respect of the grant or refusal of an RRO could be nullified if the EAT had no power to make an RRO which continued beyond the promulgation of its own decision, Mr Wolanski submitted that this risk would be avoided through the EAT's power, for the purpose of disposing an appeal, to exercise the powers of the ET: s.35(1)(a) ETA. That was the source of authority for paragraph 4 of the Order of 16 July 2018. Whilst there was no power to make a continuing RRO in respect of the EAT's decision, in practice it would not have been possible to report it with the names of the Respondents. This was because to do so would have the effect of infringing the continuing RRO in the ET.

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[6] *'… The Crown Court shall, in relation to… all other matters incidental to its jurisdiction, have the like powers, rights, privileges and authority as the High Court.'*

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Balancing exercise

34. Conversely, if there were any jurisdiction to make a continuing RRO, Mr Wolanski submitted that the evidence provided no basis to do so. He emphasised that a fair and accurate report of the EAT hearing could not go beyond the fact of the allegations and their nature, i.e. of unspecified sexual offences committed against each Claimant; and would have to state that the allegations had been denied; and that the claims had been withdrawn and dismissed.

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35. As to the principles of the public interest in open justice, Mr Solanski emphasised[7] the twin aspects which were reaffirmed in **Khuja** [16], namely (i) proceedings to be held in open court to which the press and public are admitted and (ii) publication to a wider public of fair and accurate reports of those proceedings. He further emphasised the importance of attaching a name to a story in order to attract the attention of the typical reader. He cited the observations of Lord Rodger in re **Guardian News and Media Ltd** [2010] 2 AC 697:

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> **'What's in a name? 'A lot', the press would answer. This is because stories about particular individuals are simply much more attractive to readers and stories about unidentified people… The judges [have recognised] that editors know best how to present material in a way that will interest the readers of their particular publication, and so help them to absorb the information. A requirement to report it in some austere abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.' [67]; cited also by Baroness Hale in R(C) v. Justice Secretary [2016] 1 WLR at [18].**

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36. As amplified in the first witness statement of Brid Jordan, Mr Wolanski pointed to the particular current interest in claims of sexual harassment against the wealthy and powerful; and in the associated ability of those accused to obtain protection from identification through Court/tribunal orders and provisions. Critically, any report on such matters required a name in order to attract the interest of readers.

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[7] For the fuller summary, see again para.27 of my July 16 judgment.

37. As to the weight to be given to Article 8 in post-promulgation cases, Mr Wolanksi pointed to paragraph 60(6) of my judgment of 16 July. Citing Simler P's decisions in Fallows and in **BBC v. Roden** [2105] ICR 985, I stated that these "reflect the test of strict necessity and the limited weight given to Article 8 considerations in that balancing exercise."

38. He submitted that the facts in **Fallows** had striking similarities to the present case. The claimant had made claims of unfair dismissal and sex discrimination, including a claim of sexual misconduct, against Sir John Elton and others. The claims were subsequently settled by confidential agreement and withdrawn; indeed, there was no open hearing. The employment judge's subsequent decision to revoke an existing RRO was upheld. Simler P rejected the respondents' argument that the principle of open justice could have no application in the light of the settlement and the fact that all the earlier hearings had been in private and that none of the documents were on the public record. She accepted that the ends served by open justice are also served by the ability of the press to report on other aspects of litigation, including its conduct, the tactics adopted by litigants and the fact of settlement. [60]. Sir Elton John's behaviour as an employer, including allegations of sexual misconduct, was a legitimate subject for public scrutiny. The employment judge had given appropriate weight to the Article 8 rights of Sir Elton and his family. The public was to be trusted to understand that unproven allegations, made and then withdrawn, were no more than that. The judge had rightly taken into account that, where parties choose to settle litigation before a trial has begun, they have a legitimate expectation that this will preserve "a measure of confidentiality" in the subject matter of the litigation that would otherwise be lost once matters pass into the public domain at a public hearing. He had properly weighed that factor in the balance. She concluded:

> **'There is no presumption in favour of non-reporting of settlement or settled proceedings, nor should there be. While there is a public interest in settlement of litigation which is to be encouraged, it does not outweigh the fundamental principle of open justice. In the circumstances of this case, the employment judge was entitled to find that, weighed in the balance against other factors, the existence of such legitimate expectations as the**

> **appellants had was not sufficient to justify a permanent restriction on reporting in this case.'** [74].

Mr Wolanksi submitted that this all applied to the present case.

39. As to the public's understanding of the difference between allegation and proof, Lord Rodger had observed in **Guardian News and Media Ltd** [2010] 2 AC 697 that the law proceeds on the basis that most members of the public understand that people are innocent unless and until proved guilty in a court of law [66]. Lord Sumption's subsequent statement in **Khuja** that Lord Rodger's observation "cannot be treated as a legal presumption, let alone a conclusive one" was no more than that. Lord Sumption had continued that "experience suggests that as a general rule the public understand there is a difference between allegation and proof;" but that in the particular case and prevailing public opinion there was a real risk that a person knowing of the matters in question would conclude that the person concerned had sexually abused the child complainant notwithstanding he had never been charged [8].

40. The evidence in the Second Respondent's witness statement was not disputed. However, it did not begin to outweigh the twin aspects of the public interest in open justice or the Article 10 right and need to engage the reader's interest with a name.

41. As to EAT Rule 23(2), Mr Wolanski accepted that its mandatory effect was that my Judgment of 16 July 2018 had to be anonymised; and without time limit. This did not require an order of the EAT, but was the automatic direction of that Rule. However, that was quite independent of any decision to be made on the making of an RRO, whether under Rule 23(3) or otherwise. In **F v. G** Underhill P had considered the same disparity which at that stage existed between ET rules 49 and 50. Rule 49 was in the same mandatory terms as EAT Rule 23(2); whereas ET rule 50 gave power to make an RRO until both liability and remedy had been

determined. He observed: "The difference in purpose and effect between the two rules may give rise to some difficulties as to how they inter-relate." [18]. He referred to an earlier decision where the point had been considered ("though…not fully discussed"):**Vatish v Crown Prosecution Service** (UKEAT/0164/11/DA).

42. In **Vatish**, the appeal came on at short notice and the discussion of the point had evidently been very limited. Underhill P (sitting with members) observed that there was "apparent anomaly" where the ET was obliged to make an order under rule 49 but, absent an RRO under Rule 50, the press was free to report the identity of witnesses who would be anonymised in the ET record. Noting the limited duration of an order under rule 50, he observed that the journalist would in any event be able to report the hearing without restriction once the case was over. He concluded that

> **"… In the circumstances of this case, we do not wish to discuss these wider questions. It is sufficient to say that rules 49 and 50 are different provisions, each of which requires to be applied in accordance with his own terms. [17]".**

43. In **F v. G** Underhill P added that:

> **"…anonymisation of the record is on its face no more than that: it simply determines what appears in the public judgment. It does not as such prevent the parties or others from publishing information derived from the hearing even if that might enable third parties to get behind the cloak of anonymity in the judgment itself. I heard no argument about whether such conduct might nevertheless on some basis the unlawful; but it seems to me desirable that if such publication is to be restrained beyond the life of the proceedings it should be by an explicit order, in effect an extended RRO, so that everyone knows where they stand. [25].**"

44. Whereas the change to the ET rules in 2013 removed this anomaly in the ET, the provisions of EAT rule 23(2) and (3) are unchanged. Citing Underhill P in both **Vatish** and **F v. G**, Mr Wolanksi submitted that the decision under EAT Rule 23(3) – and therefore any like power to make a post-promulgation RRO - must be made independently of the mandatory anonymity rule in EAT Rule 23(2).

45. Turning to the 1992 Act, this could only affect the exercise of any discretion to make an RRO if its effect was *"*likely to lead members of the public to identify" either or both of the Claimants: s.1(1). For that purpose, the test of 'likely' was whether there was a *"*real risk… real danger… real chance" of such identification: **O'Riordan v. DPP** [2005] EWHC 1240 (Admin), citing **Attorney General v. Greater Manchester Newspapers Ltd**, The Times, 7 December 2001. Given the steps which had been taken to withdraw/replace the Dismissal Judgment from the ET website, and then to remove it from Bailii and Google, there was no such risk or danger. It was fanciful to suppose that others might have already obtained and retained the information, or would thereby or otherwise be able to make a jigsaw identification of the Claimants via a report of the EAT proceedings which identified the Respondents.

The Claimants

46. On behalf of the Claimants Mr Christopher Milsom took a neutral stance on the application. This was subject to the preservation of their anonymity by the **1992 Act**; but in the light of the steps taken by TNL this would not be compromised by the removal of the existing RRO.

Analysis and Conclusions

Jurisdiction

47. For the reasons advanced by Mr David Reade QC, I do not accept that the EAT is without jurisdiction to make a RRO which continues beyond the promulgation of its decisions, whether falling within the s.31 ETA categories or otherwise. The observations of Lord Sumption in **Khuja** simply reaffirm the established law that there is no inherent power to impose restrictions on reports of public hearings; and that any restriction must be found in legislation. The previous EAT decisions recognise that requirement (see e.g. Fallows at [35]); and find the necessary

A authority in the identified statutory provision, duly read down where Convention rights are in play. The distinctions in the facts and circumstances of those decisions are immaterial to the central proposition which they support. In the case of the EAT, I see every reason to follow the conclusion in **A v. B** [2010] ICR 849 that the relevant statutory provision is s.30(3) ETA; and B consider that this applies to RROs as much to anonymisation. I accept that the use of s.29(2)(c) ETA for this purpose appears to be prevented by the analogous decision in **Trinity Mirror**.

C 48. In reaching this conclusion, I do not accept that sufficient protection following an appeal is provided by the EAT's powers under s.35 ETA. That provision affects only the order in the ET. The position in the EAT would then depend on press judgment as to whether a report of the D EAT proceedings might compromise the order below. That could leave a real uncertainty. The EAT must be able to make a continuing RRO order in its own proceedings in order to ensure that the position is clear.

E Balancing exercise

49. In the present case it is therefore necessary to carry out a balancing exercise between the principles of open justice and Article 10 against the Second Respondent's Article 8 right in F respect of his honour and reputation. For the reasons largely advanced by Mr Reade, I am clear that the balance is firmly in favour of a continuing RRO. In the present case it is necessary to start with consideration of the interplay between EAT Rules 23(2) and (3).

G 50. It is common ground that the effect of Rule 23(2) is that my judgment of 16 July 2018 must be and remain anonymised, so that there is no "identifying matter which is likely to lead members of the public to identify any person affected by or making such an allegation [i.e. of the H commission of sexual offences]. The same must apply to this present linked judgment. As

Underhill P observed in **F v. G** of the (then) comparable ET Rule 49, it "…does not confer a power to impose any obligations as such: it simply prescribes what should or should not appear in the tribunal's own record. Strictly speaking, indeed, it involves the making of no order at all…" [16(1)]. Where this Rule applies its effect is permanent: [16(5)].

51. Rule 23(3) is not limited to appeals involving allegations of the commission of sexual offences, but extends to those which involve allegations of sexual misconduct, the definition of which includes sexual offences. Furthermore, it is time limited until the promulgation of the relevant EAT decision: see also rule 23(9). However, in **A v B** Underhill P concluded that s.30(3) ETA as "read down" empowered the EAT to grant a post-promulgation RRO in protection of Convention rights.

52. The reason for the distinction between the EAT's obligation of permanent anonymisation where the appeal involves allegations of the commission of sexual offences (Rule 23(2)) and its discretionary power to grant RROs until promulgation where it involves allegations of sexual misconduct (which includes sexual offences) (Rule 23(3)) is unclear: see the discussion in **A v. B** at [7-8]. However, in respect of the specified types of appeal, the statutory direction is that those making and affected by the allegations of sexual offences (including the alleged perpetrators) must permanently be protected from identification in judgments and other documents available to the public on the EAT record.

53. In **Vatish**, Underhill P observed that the potential anomaly, of anonymised judgment but anonymised reporting, cannot be prevented once the decision has been promulgated. However, the subsequent decision in **A v. B**, by holding that there is jurisdiction to grant post-promulgation RROs, gives scope to prevent that anomaly.

54. The mandatory terms of Rule 23(2) do not have the effect of requiring the parallel grant of an RRO, whether under Rule 23(3) or the extended post-promulgation power identified in **A v. B**; nor did Mr Reade so contend. That would remove the element of discretion. However, at least for so long as the allegations are no more than that, the mandatory anonymisation of the relevant EAT judgment must be a strong factor in favour of the exercise of the discretion to make either a pre- or post-promulgation RRO. Where the Rule (23(2)) requires anonymisation of EAT Judgments and records available to the public, there is inherently good reason for that objective not to be defeated by a press report of the proceedings which were the subject of the anonymised judgment. This is particularly so where the claims have been withdrawn and dismissed. Thus, the effect of Rule 23(2) on the balancing exercise is to be seen either as a diminution of the public/Article 10 interest in open reporting or as an enhancement of the weight to be given to Article 8 rights.

55. I do not accept Mr Reade's submission that TNL should not be able to seek advantage from the fortuity that the imposition of an RRO by the ET went on appeal to the EAT. The fact remains that there was an open hearing in the EAT which referred to the fact and nature of the allegations. However, TNL is in turn subject to the fact that the appeal fell into the category which attracts the mandatory direction of Rule 23(2). This in turn makes it inherently more difficult to resist a continuing RRO in respect of those appellate proceedings. For the same reasons, the decision in **Fallows** is for this purpose to be distinguished from the present case. Neither **Fallows** nor para.60(6) of my 16 July judgment involved consideration of the effect of EAT Rule 23(2) on the balancing exercise.

56. In any event, TNL's submissions as to the public interest in this case place particular emphasis on the ongoing debate about sexual abuse and harassment by the wealthy and powerful;

and in particular the use of NDAs to prevent complainants speaking out and/or the use of court powers to protect their identity. However, there is no suggestion of the use of NDAs in the present case. Furthermore Rule 23(2) and the consequent anonymisation of my judgment do not depend on any application by the Respondents. The Rule operates as a mandatory direction to the EAT.

57. On the other side of the balance, the Second Respondent has a qualified Article 8 right to the protection of his honour and reputation. In **Fallows**, Simler P acknowledged that such right fell into the balance in a post-promulgation case. She accepted that the judge below was entitled to take into account the fact that there had been a settlement; and the consequent legitimate expectation that this would preserve a measure of confidentiality.

58. As to Simler P's statement that the public is to be trusted to understand that allegations made and then withdrawn are no more than that, I respectfully consider that this has to be qualified in the light of the subsequent observations of Lord Sumption in **Khuja.** Lord Sumption was not only making a point about legal presumptions. He was also acknowledging the risk that, depending on the particular allegations and circumstances of the case in question, the distinction between allegations and proof may not be understood [8]. The unchallenged witness statement of the Second Respondent raises that particular fear.

59. In considering the Second Respondent's Article 8 rights and evidence, I first reiterate that his public and social status and profile do not come into the account on side or the other: see my 16 July judgment at [27(8)] and [65-66], citing **Crawford v. CPS** [2008] EWHC 854 (Admin) at [36].

60. In my judgment the Second Respondent's Article 8 rights merit substantial weight in this case. In particular:

(i) he did not initiate the claims;

(ii) the claims have been withdrawn and dismissed;

(iii) there has been no reference to settlement, whether at the open hearing on 3 September or otherwise, as Mr Milsom was careful to acknowledge;

(iv) there is reason to fear that some people reading of the allegation of sexual offences, and notwithstanding that the report includes the fact of his denial and of the withdrawal and dismissal of the claims, may not distinguish between allegation and proof;

(v) his unchallenged witness statement demonstrates his real fears and distress, enhanced by his advanced age and ill-health, of the personal consequences if the nature of the allegations is reported.

61. As to the 1992 Act, I am not persuaded that the removal of the Dismissal Judgment from the ET website, or the other subsequent steps taken by TNL, have removed the risk of jigsaw identification of the Claimants if they and others are free to report the EAT proceedings in unanonymised form. Whilst the evidence as at 1 May is that removal has been achieved, the previous evidence of the changing results of searches on Google does not inspire confidence that the information may reappear. Furthermore, I do not think it fanciful that the identifying information may have previously been obtained and retained by people using the internet and being interested in such matters. Whilst accepting that the Claimants do not think so, I conclude that there is a real risk and danger that the protection provided by the 1992 Act may be compromised without a continuing RRO.

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62. Weighing up all these matters, I conclude that the result of the balancing exercise points firmly to the continuation of an RRO, albeit this must be pursuant to the post-promulgation jurisdiction to make such orders rather than EAT Rule 23(3). I ask Counsel to consider the appropriate terms of the Order.

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