Appeal No. UKEAT/0046/20/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 26 February 2020
Judgment handed down on 6 March 2020

Before

THE HONOURABLE MR JUSTICE GRIFFITHS

(SITTING ALONE)

THE HOME SECRETARY — APPELLANT

MATTHEW JOHN PARR — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR CHARLES BOURNE (One of Her Majesty's Counsel) Instructed By: Government Legal Department 102 Petty France Westminster London SW1H 9GL
For the Respondent	MS SALLY ROBERTSON (Of Counsel) Appearing via the Direct Public Access Scheme

SUMMARY

PRACTICE AND PROCEDURE

The Employment Tribunal at the full hearing of claims for equal pay and sex and race discrimination was entitled to review and revoke an earlier case management order which had provided for part of the proceedings to be in private under rule 50 of the ET Rules. The earlier order was expressly subject to review by the full Tribunal. There had also been a material change of circumstances within the meaning of rule 29. The full Tribunal was able to see all the documents and witness statements for the hearing, which were not before the earlier Tribunal. The second Tribunal had the benefit of being shown authorities on the open justice principle which the first Tribunal had not seen.

THE HONOURABLE MR JUSTICE GRIFFITHS

1. The Claimant (Respondent to the appeal) is one of five people currently appointed to the office of one of Her Majesty's Inspectors of Constabulary ("HMI"). HMIs inspect the police and report publicly on the efficiency and effectiveness of the police. In 2018, he began proceedings in the Employment Tribunal claiming equal pay and, further or alternatively, alleging race and sex discrimination. His named comparator is the HMI appointed before him, who is a woman of BME heritage. The Appellant (Respondent to the claims) admits that he does "like work" within the meaning of the Equality Act 2010, and that he is paid less, but contends that the reason for the discrepancy in salaries, which are apparently individually negotiated for each HMI, is a pay policy which aims to reduce senior salaries. The Appellant also denies the allegations of sex and race discrimination.

2. I will refer to the Appellant/Respondent (the Home Secretary) as "the Appellant"; to the Respondent/Claimant (Mr Parr) as "the Respondent"; and to the comparator as "the Comparator".

3. This appeal is about whether part of the proceedings should be heard in private, and whether some of the Employment Tribunal's decision, when it is eventually made, should be withheld from publication or otherwise kept confidential.

Procedural background

4. The Respondent began the proceedings with an ET1 presented on 6 October 2018, to which the Appellant responded with an ET3 dated 7 February 2019. At a case management hearing on 13 February 2019, an Employment Judge directed a Preliminary Hearing to consider

issues raised by the Appellant, including allegations that the claims were out of time. This hearing was listed for 12 and 13 June 2019 ("the First ET").

5. After receiving a bundle of documents, the Appellant applied by letter dated 14 May 2019 for the First ET to be held in private rather than, as is usual, in public. This was opposed by the Respondent (who was a litigant in person) by letter dated the same day. A direction was given that this question should be decided at the First ET itself.

6. Witness statements were exchanged for the First ET hearing. These were addressed to the preliminary issues to be decided at the First ET hearing and were not the witness statements that would be relied on in any final full merits hearing.

7. The Appellant followed up with a letter dated 11 June 2019 (the day before the First ET hearing) saying that, in the witness statements of the Respondent Mr Parr and of Sir Thomas Winsor,

> **"[the Comparator's] private and confidential information was referred to, namely information relating to her private and confidential negotiations with [the Appellant], leading to her appointment as a HMI".**

With the letter were a witness statement from a Home Office HR Director and a letter from the Comparator, both supporting a further application from the Appellant. Whereas the Appellant had previously only asked that the First ET hearing should be conducted in private, now the letter applied "for part of the Final Hearing (yet to be listed) to be heard in private". I will call this yet-to-be-listed Final Hearing "the Second ET".

8. At the First ET, before Employment Judge Isaacson sitting alone on 12 and 13 June, the Respondent was still a litigant in person and the Appellant was represented by junior Counsel (not Counsel appearing before me).

9. The First ET decided all the issues in front of it, including the applications for hearings in private. In that respect, the following order ("the First ET Order") dated 14 June 2019 was made by EJ Isaacson:-

> **"Pursuant to rules 50(1) and (3)(a) of the Employment Tribunals Rules of Procedure 2013 and section 10A of the Employment Tribunals Act 1996 it is ORDERED that the following parts of these proceedings namely:**
>
> 1. That any evidence or submissions that relate to the negotiation and finalising of the Claimant's named comparator's terms of appointment in the Claimant's race and sex discrimination claims are heard in private.
>
> 2. That, if relevant, any evidence or submissions that relate to the negotiation and finalising of any of the other HMIs terms of appointment is heard in private.
>
> 3. That any published written reasons deal with such matters in a confidential annex which is not published.
>
> 4. That the Employment Tribunal make appropriate adjustments to any written reasons or any other documentation forming part of the public record to ensure that the named comparator cannot be identified, and that information relating to her pay negotiations remain private and confidential.
>
> This order applies to both the preliminary hearing heard on the 12 and 13 June 2019 [the First ET] and the full hearing [the Second ET]. It may be subject to review by the Full Tribunal panel at the full hearing."

10. The wording of paragraphs 1 to 4 was taken substantially (and, for the most part, verbatim), from the formulation in a "Private and Confidential Skeleton Argument re Rule 50

Application" submitted by the Appellant's junior Counsel to the First ET. The only part which was not suggested by the Appellant's Counsel was the final sentence: "It may be subject to review by the Full Tribunal panel at the full hearing". I am told that the Employment Judge did emphasise that point, however, at the conclusion of the First ET when announcing her decisions.

11. With the First ET Order (and her other orders at the First ET), the Employment Judge provided a Case Management Summary which included reasons for the First ET Order ("Reasons") as follows:-

> **"Rule 50 application**
>
> **5. The Respondent applied under rule 50 of the ET Rules for part of the preliminary hearing [i.e. the First ET] and full hearing [i.e. the Second ET] to be heard in private. This order was granted on the basis that it was agreed by both parties that all the named comparators could be easily identified and anonymity alone would not work.**
>
> **6. Section 10A of the Employment Tribunals Act 1996 (Confidential Information) enables the Tribunal to sit in private if the Tribunal is of the opinion that that hearing of evidence is likely to be "*information which has been communicated to him in confidence or which he has otherwise obtained in consequence of the confidence reposed in him by another person*".**
>
> **7. A Tribunal may make a privacy order if it considers it necessary in the interests of justice or in order to protect the Convention rights of any person or in circumstances identified in section 10A of the Employment Tribunals Act.**
>
> **8. A privacy order is the exception to the "open justice" principle and in considering whether to make a privacy order, the Tribunal is required to give full weight to that principle and to the Convention right to freedom of expression. Orders restricting the principle of open justice must be no wider than reasonably necessary.**
>
> **9. Information relating to the negotiation and finalising of the HMIs terms of appointment, and in particular of the named comparator in the Claimant's race and sex discrimination claims, are private and confidential and the Tribunal should respect the confidentiality of information. There is a real risk of reputational damage to the named comparator if the circumstances of the pay negotiations were to enter the public domain.**
>
> **10. Therefore, the Tribunal agreed to hear part of the preliminary hearing in private and that an order be made that part of the full hearing be heard in private. The terms of the order are set out in a separate Private Hearing order. The Tribunal made it clear that the order may be reviewed at any time by the full Tribunal at the full hearing."**

12. The First ET Judge listed the full hearing of the claims excluding remedy (the Second ET) for 7 days, to start on 13 January 2020. She directed disclosure of documents and exchange of witness statements for the full hearing.

13. On 6 January 2020, after the disclosure of documents and exchange of witness statements, the Respondent wrote to the ET saying that he would now be represented by Counsel on a direct access basis at the Second ET. He applied "for the tribunal's decision [on a private hearing] to be reviewed by the full Tribunal at the full hearing. At the preliminary hearing the Claimant was unrepresented". He referred specifically to paragraph 10 of the First ET's Case Management Summary, in which "The Tribunal made it clear that the order may be reviewed at any time by the full Tribunal at the full hearing."

14. His letter provided arguments in support of review, based both on the facts of the case, and citation from various cases also relied upon in front of me. These included the following statement by the Court of Appeal in *Curless v Shell International Ltd* [2019] EWCA Civ 1710 [2020] IRLR 36, para 39 (judgment dated 22 October 2019):-

> **"Although none of those Convention rights has automatic priority over the other or others, and always depending on the precise facts and circumstances, due to the importance of the principle of open justice it will usually only be in an exceptional case, established on clear and cogent grounds, that derogation from the principle of open justice (including the freedom to publish court proceedings) will be justified; and, in such a case, the derogation must be no more than strictly necessary to achieve its purpose. There is no general exception to open justice where privacy or confidentiality are in issue."**

15. The Appellant emailed a short response on 10 January 2020 opposing the review.

16. The Second ET began as listed on 13 January 2020, and was intended (as I have indicated) as the final full merits hearing of all the claims and issues, excluding only questions of remedy. Disclosure had taken place, the bundles, of about 1,000 pages, were complete, and, as I have mentioned, the witness statements had been exchanged as evidence in chief. The Tribunal for the Second ET consisted of Employment Tribunal Judge Lewis and two lay members. They read all the witness statements (Reasons para 1). They then heard submissions on the application for review, which they granted on the second day of the hearing, 14 January 2020.

17. Their decision was the First ET order "should be revoked in its entirety" (Reasons para 2).

18. The Appellant immediately indicated she would appeal. In order to give the best possible chance of the appeal coming on and being decided quickly enough for the Second ET to continue within the listing, the Second ET worked with extraordinary speed to produce an 11-page decision of 50 paragraphs documenting its "Reasons for Lifting Rule 50 Order" the same day, 14 January 2020.

Grounds of Appeal

19. There are 3 Grounds of Appeal.

    i) The Second ET wrongly interpreted the First ET Order as giving the Second ET a general power to review it, when EJ Isaacson had no power to make such provision.

    ii) The Second ET incorrectly applied rule 29 of the ET Rules.

    iii) The Second ET erred in deciding the merits.

20. I will consider each of these in turn.

Ground 1: The Second ET wrongly interpreted the First ET Order

21. The First ET Order stated:-

> **"This order applies to both the preliminary hearing heard on the 12 and 13 June 2019 [the First ET] and the full hearing [the Second ET]. It may be subject to review by the Full Tribunal panel at the full hearing."**

22. The Reasons with the First ET Order stated:-

> **"The Tribunal made it clear that the order may be reviewed at any time by the full Tribunal at the full hearing."**

23. The Second ET heard submissions which are substantially the same as those made to me (Reasons paras 11-15).

i) It was argued that the words in question made no difference, and simply referred to (limited) powers that would have existed in any event under rule 50(4) without intending to confer a general power of review on the Second ET over and above rule 50(4). This was an important submission because, whereas the twice-repeated statement that the full Tribunal could review the order at the full hearing was unqualified, the power in rule 50(4) is limited to parties, "or other person with a legitimate interest" (which might include the press) "who has not had a reasonable opportunity to make representations before an order under this rule is made".

ii) It was also argued that where (as in this case) the Respondent did not fall within rule 50(4) (because he had been given an opportunity to make representations before the order was made), the Tribunal's powers were limited to those in rule 29, which apply only when "necessary in the interests of justice", and, again, "in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made".

iii) It was argued, finally, that the application of rule 29 (and the power to review the First ET's order generally) was limited and on the present facts excluded by dicta of His Honour Judge Hand QC in *Serco v Wells* [2016] ICR 768 and the earlier cases reviewed by him. These cases included *Maurice v Betterware UK Ltd* [2001] ICR 14 per Keene J at para 22; *Goldman Sachs Services Ltd v Montali* [2002] ICR 1251 per Judge Peter Clark at paras 24-26 and 29; *Jameson v Lovis* [2001] EWCA Civ 1264

per Laws LJ at para 22; *Onwuka v Spherion Technology UK Ltd* [2005] ICR 567 per Rimer J at para 35; *Hart v English Heritage (Historic Buildings and Monuments Commission for England)* [2006] ICR 655 per Elias J at paras 31-33 and *Neary v Governing Body of St Albans Girls' School* [2010] ICR 473 per Smith LJ at para 47. From this, the Second ET singled out the following statement from *Serco v Wells* [2016] ICR 768 at para 43(d):-

> **"…variation or revocation of an order or decision will be necessary in the interests of justice where there has been a material change of circumstances since the order was made or where the order has been based on either a misstatement (of fact and possibly, in very rare cases, of law, although that sounds much more like the occasion for an appeal) or an omission to state relevant fact and, given that definitions cannot be exhaustive, there may be other occasions, although as Rix LJ put it these will be "rare" and "out of the ordinary"."**

24. The Second ET then decided as follows (Reasons paras 16-17).

> **"Our decision on whether to vary or revoke the order**
>
> **We find that we do have power to vary or set aside the rule 50 order. In our view, the natural reading of EJ Isaacson's statement that 'It may be subject to review by the full tribunal panel at the full hearing' was indeed that her order was provisional and made on the basis that the full tribunal would be at complete liberty to vary or revoke it.**
>
> **That was the independent initial impression of each of us on reading the order and the preliminary hearing letter, before we heard any argument. It is still our impression, having heard the argument and applied our mind to how the phrase should be understood on an objective basis."**

25. In addition to the natural meaning of the words used by the First ET, they gave the following reasons for this conclusion:

i) "EJ Isaacson repeated her qualification twice, in her covering letter and in the order itself." (Reasons para 18).

The Appellant's submission had been that it was merely a reference to the powers in rule 50(4), which would have existed in any event, so that, as had been submitted to the Second ET, the qualifications were "merely a statement of fact" (Reasons para 11).

However, the words in question were not boilerplate words added to an order; they were included also in the reasons accompanying the order and (I am told) emphasised by the Employment Judge at the end of the hearing when she announced her decision as well.

ii) The First ET order and Reasons use the word "review".

This responded both to the submission based on rule 50(4), which talks about a right to "apply" for the order to be "revoked or discharged", and does not use the word review, and also to the submission based on rule 29 (Case Management Orders), providing for case management orders which "vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice", which also does not at any point use the language of "review". Neither the First ET order nor its reasons used the language of the rules which the Appellant contended were being referred to.

ii) The First ET did not use wording "which would sound like a warning as to the state of the law".

I understand this to mean that the First ET appeared to be making a specific provision which, if not stated, would not have existed; wording of its own which changed the quality of the order from something fixed, final and immutable (subject to appeal) into something provisional and contingent, subject to the fresh judgment of the Second ET.

iii) The Second ET also pointed out that the First ET order and its reasons both referred to "the Full Tribunal". (The reference in both documents was to "the Full Tribunal" at "the full hearing".) They read this as "also suggestive that she was

distinguishing a full panel from her own decision as a single judge, and was envisaging that we may wish to look at matters again."

26. The Second ET also decided that "we had such power in the interests of justice under rule 29." It explained this part of its decision as follows (Reasons para 20, divided into paragraphs for clarity):-

> **"We fully take account of and accept the guidance in *Serco*. Although expressed in general terms, *Serco* did not concern a rule 50 order which brings into play the central principle of open justice. We believe that the current circumstances are one of the further rare categories envisaged by Judge Hand where a carefully defined exception might apply.**
>
> **First, EJ Isaacson flagged up the possibility that the full tribunal might review the decision.**
>
> **Second, this concerns the important principle of open justice and Convention rights.**
>
> **Third, the position had changed in that the claimant was now represented at the hearing and his representative was able to make references to key authorities in support of open justice as well as how the substantive issue should be decided. This did not happen at the preliminary hearing because the claimant was not represented and because the respondent's submissions did not cite the major cases on open justice. While the respondent's submissions did refer to the principle of open justice, that was not developed or underpinned by any reference to the guidance.**
>
> **We therefore consider it in the interests of justice to review the order at the full hearing where both parties were represented and the full trial bundles available.**
>
> **We add that some important decisions have further emerged since the preliminary hearing which, while not changing the law, significantly underline the important principle of open justice and provide guidance on the approach to be followed."**

27. I agree with the Second ET that the words used by the First ET Judge appear to give an unfettered power of review "by the Full Tribunal… at the full hearing." They neither refer to Rule 50(4) nor reflect its wording: I see no reason, therefore, to accept the submission that they were intended to be limited to the circumstances which fall within Rule 50(4). The words are not qualified in any way.

28. It also seems to me from the context unsurprising that the First ET, although it had acceded to the Appellant's last-minute application that the rule 50 orders against the usual course of open justice should apply, not only to the First ET, but to the Second ET, should feel

less qualified than the "Full Tribunal" would be to decide what, if any, restriction was appropriate; and would not wish to limit the Second ET's freedom of manoeuvre based on the material before it. It was common ground that "any orders restricting the principle of open justice… must be no wider than reasonably necessary" (Appellant's skeleton argument for the First ET, para 25). The Appellant's junior Counsel at the First ET also said (at para 12):-

> **"It is appreciated that the ET is in no real position at present to evaluate the relative merits of the parties' factual positions."**

29. It must have been obvious to the First ET Employment Judge that the full Tribunal at the full hearing, with full bundles, and final witness statements (all of which were directed by the First ET Judge herself) would be in a far better position to make sure that that "any orders restricting the principle of open justice" were "no wider than reasonably necessary" than she was.

30. And so, indeed, they were. With the benefit of all the documents, and all the evidence, which was subject to exclusion from public knowledge and public scrutiny by the First ET order, the Second ET decided that there was, in fact, nothing which deserved rule 50 protection at all. I will return to this when considering Ground 3.

31. However, the Second ET would only be "at complete liberty to vary or revoke" (quoting Second ET Reasons para 16) if there was a change in circumstances to warrant it. The principle of certainty and finality, and the need to avoid mere arbitrariness and caprice in different bodies making different decisions on the same facts in the same case, required this. This is also in accordance with the principles expressed in the cases I have referred to above, including *Serco*.

Ground 2: The Second ET incorrectly applied rule 29 of the ET Rules

32. Ground 2 is linked to Ground 1. The Appellant argued that the constraints of rule 29 and *Serco* should be used as an aid to construing the First ET Order. But the Second ET also applied rule 29 as an alternative basis for finding the jurisdiction to reconsider the First ET order and, if it was entitled and correct to do so, the argument about the scope of the power of review given by the First ET order itself became immaterial.

33. I have set out the Second ET's reasoning on this point in paragraph 26 above.

34. Rule 29 of the Employment Tribunal Rules 2013 provides:-

> **"29. Case management orders**
>
> **The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order… A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made."**

35. The particular example given in rule 29 (a party affected who did not have a reasonable opportunity to make representations) is not exclusive, and does not limit the general power to vary, suspend or set aside an earlier case management order "where that is necessary in the interests of justice".

36. However, the interests of justice include finality, certainty, and the orderly disposal of disputes by due process, including appeals, and this is where the principles discussed in *Serco* and the other cases referred to in paragraph 23(iii) above are important. *Serco* was itself a decision about the limits that must be placed on the exercise of a rule 29 power and it summarises the principles, in particular, at para 43(a) to (d). Other cases since have adopted a

similar approach: *Dobson v PricewaterhouseCoopers LLP* UKEAT/0022/18 at paras 59-60, and *Brettle v Dudley Metropolitan Borough Council* UKEAT/0103/17 at paras 28-29.

37. Was the Second ET's review of the First ET's order "necessary in the interests of justice" and therefore permitted by rule 29? And, in particular, did it follow a "material change in circumstances" or fall within one of the other exceptions considered in *Serco*?

38. The most obvious change in circumstances was the one I have said the First ET must have anticipated when it made the First ET Order. The Second ET was able to see, as the First ET could not, exactly what the evidence at the Full Hearing was going to be. Since the First ET hearing, there had been disclosure of documents, exchange of witness statements, and finalisation of the hearing bundles. The Second ET was therefore in a better position to judge whether and, if so, what rule 50 restrictions could be justified as an exception to the principle of open justice. In my judgment this was a change in circumstances, and a very important one. Given the exceptional nature of the rule 50 jurisdiction, and the need to limit any derogation from the open justice principle to the minimum required by the interests being protected, it was a material change in circumstances that what was inevitably, to some extent, at the First ET hearing, mere speculation, assertion and apprehension, was now replaced by the complete final form of the evidence itself, with final hearing bundles containing all the documents and all the witness statements.

39. The Appellant argued that this was not a ground relied on by the First ET itself. I disagree. In the passage applying rule 29 which I have quoted, the Second ET said:

> **"We therefore consider it in the interests of justice to review the order at the full hearing where both parties were represented and the full trial bundles available."**

40. This ground alone, in my judgment, entitled the Second ET to reconsider the rule 50 order.

41. The Second ET also identified the change in representation, and the new authorities cited to the Second ET but not to the First ET, as making it necessary in the interests of justice to reconsider under rule 29, particularly given the importance of the principle of open justice.

42. I do not think that open justice cases are exempt from the usual limits applied to rule 29 reconsideration by *Serco*. However, it was undoubtedly the case that, whereas the Respondent had been a litigant in person at the First ET, he was now represented by Counsel, and, whereas little or no authority adverse to the Appellant's application had been cited to the First ET, additional relevant and important authority on the other side of the argument was cited to and considered by the Second ET (set out in its Reasons paras 36-50, and incorporated into its decision making earlier, at para 25).

43. Contemporary standards about citation of authority by a represented party litigating against an unrepresented party derive, ultimately, from section 1(3) of the Legal Services Act 2007, which states that all lawyers (referred to as 'authorised persons') "should act in the best interests of their client" and "should comply with their duty to the court to act with independence in the interests of justice". They are not, of course, required to act as lawyers for their unrepresented opponent: the system is adversarial, and they are entitled and, indeed, bound to "act in the best interests of their client". But this is qualified by their duty to the court, which requires them to act, also, "in the interests of justice".

44. These two principles, which may sometimes conflict and require difficult professional judgments, are reflected in the professional codes of conduct of barristers (in the Bar Standards

Board Code of Conduct), solicitors (in the Solicitors Regulation Authority Handbook) and legal executives (in the Chartered Institute of Legal Executives Code of Conduct) and have been helpfully summarised in guidelines issued jointly by the General Council of the Bar, the Law Society and the Chartered Institute of Legal Executives, entitled "Litigants in Person: Guidelines for Lawyers" (June 2015, now somewhat out of date following changes to the applicable codes of conduct).

45. At the first hearing, the Appellant was represented by junior Counsel, and so the standards were set by the Bar Standards Board Code of Conduct. Core Duty 1 in the Code of Conduct is "You must observe your duty to the court in the administration of justice." Core Duty 2 is "You must act in the best interests of each client." The duty to the court is paramount: Core Duty 1 "overrides any other core duty, if and to the extent the two are inconsistent" (gC1). One consequence of this is (rC3.4): "you must take reasonable steps to ensure that the court has before it all relevant decisions and legislative provisions". This is of particular importance when a barrister is faced by a litigant in person; see Code of Conduct gC5:-

> **"Your duty under Rule rC3.4 includes drawing to the attention of the court any decision or provision which may be adverse to the interests of your client. It is particularly important where you are appearing against a litigant who is not legally represented."**

46. I do not intend by these references to suggest that junior Counsel did not refer to factors that told against her applications. Her written submissions to the first ET said, at para 25:-

> **"R recognises that r.50 stands as an exception to the "open justice" principle and that in considering whether to make a privacy order, the ET is required to give full weight to that principle and to the Convention right to freedom of expression: r.50(2). It is also acknowledged that any orders restricting the principle of open justice principle must be no wider than reasonably necessary."**

At para 31:

> **"As the wording of Rule 50 of the Employment Tribunal Rules make clear, where the court is satisfied that the information in principle is protected by Article 8, and there is a potential conflict between Articles 8 and 10 of the Convention, the court has to undertake a balancing exercise between those rights. The essential question for the ET is whether in all the**

> **circumstances, the interest of the owner of the private information must yield to the right of freedom of expression conferred by Article 10."**

At para 32:

> **"In this case, the order sought by R is a proportionate and justified derogation from the principle of open justice"**

47. She therefore, very properly, acknowledged and referred to the principle of open justice, and the need to perform a balancing exercise. Her submissions are reflected in two sentences in paragraph 8 of the First ET reasons, quoted in paragraph 11 above.

48. The authorities she cited were those emphasising the importance of confidentiality, and approving measures to protect confidentiality, which favoured her application (see, in particular, paras 19-23 of her skeleton argument to the First ET, which cited *Science Research Council v Nassé* [1979] ICR 921 at 929, *Asda Stores Ltd v Thompson* [2002] IRLR 245, *Asda Stores v Thompson (No 2)* [2004] IRLR 598, *Arqiva Ltd v Sagoo* UKEAT/0135/07/ZT, *Plymouth City Council v White* UKEAT/0333/13/LA and *Eversheds LLP v Gray* UKEAT/0585/11/CEA). The only authority she cited on the principles of open justice and the Convention right to freedom of expression was rule 50 itself, which, in rule 50(2), states:-

> **"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."**

49. In this respect, also, the Second ET was in a better position than the First ET, because it had been shown (or cited from its own knowledge) a long and powerful line of authorities which are referred to in its Reasons at paras 39-50 and which were not referred to by the First ET. The earliest was *Scott v Scott* [1913] AC 417, 463 in which Lord Atkinson said:-

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

50. They also included *R (on the application of Guardian News and Media Ltd v City of Westminster Magistrates Court* [2012] EWCA Civ 420; *R (on the application of C) v Secretary of State for Justice* [2016] UKSC 2; *Re S (a child) (identification: restrictions on publication)* [2004] UKHL 47; *Re Guardian News and Media Ltd* [2010] UKSC 1; and *Cape Intermediate Holdings Ltd v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK)* [2019] UKSC 38 at paras 41-44. Other authorities not mentioned by the Second ET but cited to me include *BBC v Roden* [2015] IRLR 627 and *Curless v Shell International* [2020] IRLR 36, which was cited to the Second ET and includes the statement I have already quoted at paragraph 14 above: "There is no general exception to open justice where privacy or confidentiality are in issue." Although *Curless* was not decided until after the First ET, this dictum accords with the earlier cases.

51. It was not necessary for the First ET to have been referred to all of these. Some of them, indeed, were decided after the First ET although, as the Second ET observed, "not changing the law" (para 20).

52. However, as the First ET had not looked at and did not refer to any authorities at all on the importance of open justice, or to any authorities explaining that the protection of genuinely confidential information will not always justify a breach of the open justice principle, the First ET was at a disadvantage which compromised its ability to decide the point correctly and in accordance with well-established principle.

53. I agree with the Second ET that this justified reconsidering the First ET order "in the interests of justice" under rule 29. It is no answer to say that there should have been an appeal.

It was in the nature of the situation that the unrepresented litigant, who did not have the expertise to cite any additional cases to the First ET, did not know that he might base an appeal upon them. I stress that this does not mean that anyone who discovers authority which they wish had been cited at an earlier hearing can reargue the question under rule 29. Nor does it mean that every unsuccessful litigant in person is entitled to have another go, by instructing lawyers and starting again. The point arises in this case only because the First ET was given authorities on one side of the question only, and was left to derive the principles weighing against the Appellant's position exclusively from the wording of rule 50(2) (which was certainly inadequate for that purpose) or from its own knowledge (which cannot be guessed, and in respect of which the very brief treatment in paragraph 8 of the First ET's reasons is not reassuring enough). Since one side was legally represented and the other was not, this imbalance was, on the particular facts of this case, a justification "in the interests of justice" for reconsideration at the review by the Second ET which the order of the First ET had expressly provided for.

Ground 3: the Second ET erred in deciding the merits

54. In support of this ground, the Appellant identified two points which, it was argued, showed that the decision of the Second ET was perverse or wrong in principle.

i) First, it was said that the Employment Tribunal gave little or insufficient weight to the confidential information which, it was common ground, existed, and which would be made public in the course of the hearing and (probably) in the final decision, if a rule 50 order was not made.

ii) Second, objection was taken to the Employment Tribunal's reference to "balancing the relatively small impact of the article 8 infringement against the gaping hole in the principle of open justice" (Second ET Reasons para 32). It is said that the level of redaction and the proportion of private to public hearing will be relatively small in the context of the case as a whole.

55. The Appellant does not say that, if the Second ET was entitled to consider the matter afresh (contrary to the Appellant's position on Grounds 1 and 2), it was bound to come to the conclusion that rule 50 protection should be continued. If it succeeds on Ground 3, the Appellant asks for the question to be remitted to the Employment Tribunal.

56. On the first point, the Appellant emphasises that protection of confidentiality is recognised as important by section 10A of the Employment Tribunals Act 1996 which provides:-

> **"10A Confidential information**
>
> **Employment tribunal procedure regulations may enable an employment tribunal to sit in private for the purpose of hearing evidence from any person which in the opinion of the tribunal is likely to consist of –**
>
> **…**
>
> **(b) information which has been communicated to him in confidence or which he has otherwise obtained in consequence of the confidence reposed in him by another person…"**

57. This is the basis for rule 50 of the ET rules, which at rule 50(1) refers to section 10A explicitly:-

> **"(1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act."**

58. The Appellant particularly objects to paragraph 30 of the Second ET's Reasons, which says:

> **"The nature of the information involved is sensitive in the sense that it refers to salary negotiations, but not as sensitive as certain matters we could envisage and which have been the subject of much case-law. We were not told of any intensely personal information which would emerge in relation to the salary negotiations"**

59. The Appellant argues that the question is whether the information is confidential, not whether it is "intensely personal", and that confidentiality is not only entitled to protection in extreme cases.

60. However, this was only part of the balancing exercise which the Second ET was, rightly, carrying out. Clearly, when performing a balancing exercise the weight of one factor (in this case, confidentiality) will affect the balance to be struck against another (such as open justice). The more highly sensitive the confidential information in question, the heavier it will weigh in the balance. That was very much a matter for the Employment Tribunal. Moreover, paragraph 30 needs to be read in context, and the previous paragraphs showed a proper appreciation of the other side of the question. At paragraphs 28 and 29, the Second ET said:-

> **"28.The principle of open justice is a very strong and important principle, but there can nevertheless be proper exceptions. We consider that article 8 is engaged. Information about the claimant's salary negotiations do engage her [i.e. the Comparator's] private rights even though, as we were told is the case her salary is already in the public domain."**
>
> **29. We also take account of the fact that [the Comparator] is not a party and not even a witness. She is merely a comparator. She has had no choice whatsoever about being referred to in these proceedings. That is a very strong factor."**

61. The Second ET was, therefore, giving weight to the Comparator's interests in maintaining confidentiality.

62. On the second point, the Second ET's reference to "the gaping hole in the principle of open justice" in paragraph 32 of the Reasons is explained by paragraph 27, which said:-

> **"Although Mr Bourne urges upon us that only a small amount of information would be hidden from public view, the information in question is at the heart of the case. The respondent states that the real issue is the pay policy which it introduced, in accordance with which the claimant's pay was identified. The claimant's case, however, is essentially that an exception would have been made for him if he was black and/or a woman. He says that such an exception was made for [the Comparator] because she was black and/or a woman because of the fear of discrimination litigation. He says the respondent did not have equal fear of potential litigation from a white man such as himself. The claimant's argument is not plucked out of thin air. He will be able to point to certain references in the documents that the risk of litigation was flagged in relation to the claimant's comparator at the time. His witness will also testify to this. Whether or not the tribunal make such fact-findings remains to be seen. However it is the central issue in the claim. <u>If such information is excluded from public view, the public will be simply unable to understand the central argument and basis for the tribunal's decision either way. The principle of open justice will be completely defeated.</u> The respondent has said that mere anonymity of [the Comparator] will not do, because she will easily be identifiable as the only black woman within the group of HCIs. This is therefore not a practical alternative route." (emphasis added)**

63. The Second ET was well-equipped to make this judgment, having prepared to conduct a full merits hearing, and having read the witness statements in full.

64. However, the real difficulty the Appellant faces is that the evidence relied upon before the First ET was heavy on assertion, but very light on specifics. Although the Appellant is the Home Secretary, and although the Respondent is the holder of an office to which he was appointed by the Queen on the recommendation of the Home Secretary, and although his work is the inspection of police forces, the confidentiality alleged in this case was not a matter of any state secret, or sensitive policing, or public interest immunity, or private discussions of public policy, or anything of that sort. The salaries of the Respondent, and of the Comparator, and of all the HMIs, were also in the public domain, so no question of confidentiality arose there. It was not the salaries, but only the pay negotiations with the Comparator, which were said to be confidential and to require protection. Since the final salary was public, it was not obvious why the negotiation of the salary, although confidential, was confidential in a way that required protection to the extent that "the public will be simply unable to understand the central argument", in the words of the Second ET. The two pieces of evidence relied upon before the

First ET were a witness statement from the HR director, which said HMI salary negotiations "take place at a senior level and are regarded by the Home Office as strictly private and confidential." It did not identify any particular need to maintain confidentiality. More to the point was the Comparator's letter to the First ET, objecting to disclosure of her pay negotiation. Again, she said (which is not disputed) that her negotiations about salary (although the salary itself was not confidential) were "strictly private and confidential." However, she went further and said she was "extremely concerned that information about the negotiations surrounding my appointment was being used without my consent". She said "I could be caused significant detriment by my information being disclosed." She referred to "the potential impact it could have on my role as Her Majesty's Inspector and my credibility with the organisations which I oversee and inspect when they become aware of my negotiations regarding my salary." She also referred to "the added adverse impact that such disclosures could have" on her additional role as the Independent Advisor to a particular Review she had been appointed to conduct outside the police force. However, she gave no details at all of how this impact would arise, or how her credibility would be affected.

65. The Second ET was entitled not simply to take her fears at face value, but to examine to what extent they had a basis in fact, given the actual content of the witness statements and of the bundles which would be forming the materials for the hearing and for the decision. They were not only in a very strong position to make this judgment, having the materials in front of them, but they were in a much better position than the Comparator, who was not (apparently) a witness, who was not (certainly) a party, and who had not, when expressing her concerns to the First ET, been able to see the witness statements or what documents would be included in the hearing bundles, since they were not yet available. It is clear from the Second ET's Reasons

(paras 22-24) that no further evidence was provided from the HR Director or from the Comparator over and above what had been said by them at the time of the First ET.

66. The conclusion of the Second ET was that there was simply no basis for the concerns that had been expressed. In para 30 they said:

> **"All three members of the Panel had difficulty understanding why the negotiations would in any way impact on [the Comparator's] role or affect her credibility. She was initially offered a lesser sum, she pointed out that it was not fair or equal and subsequently, for whatever reason, (the claimant says, because it looked discriminatory), her pay was increased."**

67. In para 33 they said:

> **"In so far as the order seeks to keep confidential the salary negotiations of the other HCIs, we consider the article 8 argument even weaker. The others did not write any letter to the tribunal nor is there any suggestion that their pay was increased when it was appreciated that paying them less looked like discrimination. Regarding the respondent's own interest in keeping salary negotiations confidential, we find this a particularly weak argument. The salaries themselves are often public in any event. But apart from that, we do not see why the Home Office's position is different from that of any private sector employer."**

68. This was a conclusion the Second ET was entitled to reach and I see no basis for a challenge based upon perversity or error of principle.

Conclusion

69. The appeal against the Second ET's order will therefore be dismissed.