Appeal No. UKEAT/0302/18/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 October 2019

Before

THE HONOURABLE MR JUSTICE CAVANAGH

(SITTING ALONE)

X APPELLANT

Y RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RAD KOHANZAD (of Counsel) Advocate (formerly Bar Pro Bono Unit)
For the Respondent	Respondent debarred from taking part in this appeal.

SUMMARY

CASE MANAGEMENT

RESTRICTED REPORTING ORDER

The issue in this appeal was whether the EAT should anonymise the parties' names in this case, and redact passages in the Judgment, because the Reasons referred to the Appellant's transgender status and certain sensitive issues relating to his mental health. No application under rule 50 of the ET Rules of Procedure had been made at the hearing, and the relevant findings were based on evidence given by the Appellant's father in evidence. The Appellant's father was also his representative. The Appellant had not attended the hearing on mental health grounds. About 10 days after the Judgment was sent to the parties, the Appellant wrote to ask for material to be redacted from the Judgment, but Employment Judge declined to do so.

Held. Appeal allowed. This was a rare case in which the EJ had been plainly wrong to have failed to consider of his own volition whether a non – disclosure order should be made. If the EJ had done so, the only possible outcome would have been an order for anonymisation. It would not have been appropriate to redact the passages in the Judgement that dealt with sensitive issues, because that would have been disproportionate. The Appellant has a less drastic remedy for protection of his Article 8 privacy rights, namely anonymisation, and it would rarely if ever be appropriate to amend or delete sections of the Judgment in cases such as these. In addition, the EJ erred in declining to consider the application for a rule 50 order which had been made 10 days after the Judgment was sent to the parties. An application for a rule 50 order can be made at any time, even when the proceedings are otherwise over. If the written application had been considered, the only possible outcome would have been an order for anonymisation.

The EAT also made an anonymity order in relation to the EAT proceedings, and ordered that, if it was necessary to apply to the County Court for Enforcement, the Appellant could supply the County Court with the operative part of the ET judgement, which did not contain Sensitive information, without also having to provide the Reasons, which did contain such information.

THE HONOURABLE MR JUSTICE CAVANAGH

1. This appeal raises novel and difficult points about the circumstances in which an Employment Tribunal ("the ET") should either anonymise a party's name or should refrain from referring to some of the evidence given by a witness in the case because to do so may adversely affect a party's Article 8 rights to privacy and family life.

2. The Appellant issued a number of claims against his former employer, the Respondent, for unpaid wages and holiday pay and in respect of a number of other matters. In a Judgment entered onto the register and sent to the parties on 2 February 2018, Employment Judge Harper, sitting alone, found in the Appellant's favour in respect of his wages and holiday pay claims. Other claims were dismissed on the basis that the ET had no jurisdiction to deal with them, and the Judge gave the Appellant 14 days to clarify whether he wished to proceed with a disability discrimination complaint.

3. The Appellant does not appeal against the substantive rulings in his case and he chose not to proceed with his disability discrimination complaint. This appeal is concerned solely with the fact that the ET's Judgment made reference to the Appellant's status as a transsexual man and to certain issues relating to his mental health. The relief sought by the Appellant in this appeal is that the references to his status and mental health should retrospectively be deleted from the Tribunal's Judgment and that the Judgment should anonymised, or if I am not prepared to do all of that, that the Judgment should at least be anonymised so that he cannot be identified.

4. The Appellant is represented by Mr Rad Kohanzad of Counsel and I am grateful to him for his helpful submissions. The Respondent employer did not file an ET3 and did not take part in the ET proceedings. As the Respondent also did not file an Answer to the Notice of Appeal, the Respondent has been debarred from taking part in the EAT proceedings. In any event, it may be that the Respondent would not have had a particular interest in the issue in this appeal, even if the Respondent had otherwise actively taken part in this litigation.

5. There are a number of reported EAT judgments in which the question of whether a party's name should be anonymised has been considered. This case is different from most of the other cases in two respects: First, the Appellant does not just seek anonymisation but he goes further and asks that passages in the Judgment should be deleted; second, no application for redaction was made to the ET Judge at the time of the hearing. The first time the issue was raised was some 10 days after the Judgment was sent to the parties, on 12 February 2018, when the Appellant sent an email to the Tribunal asking for the relevant material to be deleted; the Employment Judge declined to do so.

6. The following issues arise in this appeal: One, did the Judge err in law in referring to the Appellant's transsexual status and mental health problems in the Judgment, and if so can and should the EAT grant a remedy which would have the effect of redacting, or amending, the ET Judgment? Two, further or alternatively, did the Judge err in law in failing to make an anonymity order in relation to the Claimant (and potentially in relation to the Respondent on the basis that the Claimant could be identified via identification of the Respondent), and if so, can and should the EAT grant an anonymity order in relation to the ET Judgment? Three, still further, should the Judge have given consideration to redaction or an anonymity order at the time of the Appellant's subsequent complaint that his personal information had been referred to

in the Judgment? If the Judge erred in law in this regard, can the EAT substitute its own view and make an anonymity order? Four, if the appeal succeeds in relation to the ET Judgment, what order if any should be made in relation to the EAT Judgment?

7. Before coming on to address these issues in turn, I will first summarise the facts and I then will summarise the relevant law.

The Facts

8. The claim form in these proceedings was presented on 23 November 2017. The Appellant's representative was stated in the claim form to be his father. However, the email address given in the claim form was the Appellant's own and he submitted a letter, plainly written by him, to accompany the claim form. It follows, therefore, that the Appellant was aware of the proceedings and was content for his father to act as his representative. No application was made for anonymisation or for any other steps to be taken to protect the Appellant's privacy at this stage, either in the Appellant's letter to the Tribunal or at any time before the Tribunal hearing took place.

9. The Claimant did not himself attend the Employment Tribunal hearing because of ill health. His father attended on his behalf and gave evidence and made representations. Once again, no application was made for anonymisation or for anything else to be done in relation to the Appellant's privacy rights at the hearing. As I have already said, the Respondent did not attend.

10. There was a preliminary issue which needed to be resolved at the Tribunal hearing, namely whether there were good reasons why the claim should proceed, notwithstanding that it

had been presented out of time. It was therefore necessary for the Claimant's father to explain to the Tribunal the background and the reasons for the delay. The Employment Tribunal Judgment recorded the evidence given in this regard by the Claimant's father and it is this that has caused upset for the Claimant. At paragraph 4 of the Judgment the Judge said as follows:

> **"4. [The Claimant's father] gave his evidence on affirmation. I was impressed with him as a witness and I have no reason at all to doubt his evidence. As a result, I find that the Claimant is a 33 year old man who has a Master's Degree. The Claimant was born female but has transitioned to now being a male, after surgery for breast removal which had medical complications. In 2007 the Claimant's mother died and this appears to have been the start of a very difficult time for the Claimant with regard to mental health issues. He was originally diagnosed with bipolar disorder but the current diagnosis is PTSD. He is described as having multiple personalities and has suicidal ideation in the past; he has also self-harmed. The Claimant is currently on medication and is having therapy. The Claimant prefers not to leave the house, he has not used public transport since he left university, he has fibromyalgia and chronic fatigue syndrome. All these medical issues conspired in him filing the ET1 late but I am satisfied that any of these medical issues or all of them meant that it was not reasonably practicable for him to file a claim on time. I allow the claim of unpaid wages/holiday pay to proceed".**

11. Mr Kohanzad tells me that the Appellant had not expected his transsexual status, or medical issues, to be referred to at the hearing as the case was about unpaid wages and holiday pay. Mr Kohanzad said that the Appellant was aghast when he saw the contents of the Judgment. On 12 February 2018, the Appellant emailed the Employment Tribunal and requested that the Tribunal remove from the Judgment any reference to his status as a transgender male. He said that to make this information public put him at risk and was a betrayal of his personal security and trust. He also asked that the references to his mental health history be deleted so that his privacy was protected. As regards the mental health history, he said that the references to multiple personalities and his relationship with his mother were inaccurate and should be removed for that reason. He also said that this evidence was irrelevant to the case he put forward. The Appellant was, however, content for reference to be made in the Judgment to the fact that he suffered from PTSD and from complex trauma.

12. On 10 March 2018, the Employment Judge responded as follows:

> **"The document accurately records what [the Appellant's father] told the Tribunal in his role as the Claimant's representative. No application, under Rule 50, was made at the hearing and since the Claimant has not indicated he wants to proceed with his disability claim then, in accordance with the order made on 30 January 2018, the Tribunal's file is now closed and no further correspondence will be considered".**

13. The Tribunal received a further letter dated 29 March 2018, from the Appellant's father. He stated that the information he had given in evidence was inaccurate and said that the very private events that he referred to bore no relation to the lateness of the claim. He also said that he had not realised the impact that revealing this information would have on his son. He said that he had not had his son's consent to provide this information and had not anticipated that his words would be so readily available to the public. He added:

> **"After hearing the level of distress my actions have brought to [my son], I now understand that the picture I presented of him at the hearing is unwarranted and unfair. I regret that my efforts to help have only injured him".**

14. On 11 May 2018, the Appellant's GP wrote to the Tribunal to clarify that the Appellant had not been formally diagnosed with any personality disorder and provided some more information about the Appellant's mental health. Finally, so far as the background facts are concerned, the Appellant has a gender recognition certificate which was issued in September 2016.

The Relevant Law

15. Article 8 of the European Convention on Human Rights, introduced into UK law by the **Human Rights Act 1998** states as follows:

> **"1. Everyone has the right to respect for his private and family life, his home, and his correspondence.**
>
> **2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".**

16. Accordingly, Article 8 requires public authorities, including Courts and Tribunals, to show respect for persons' private lives and this includes respect for sensitive personal information. This right is not unconditional, however. Article 8(2) permits interference with the right to private life, to the extent that it is justified, in a sense of being necessary and proportionate.

17. The grant of anonymisation or other steps that may be taken in litigation to protect the privacy of litigants such as redaction may give rise to tension with other rights also derived from the European Convention on Human Rights. In particular, the Article 6 right to a fair hearing encompasses the principle of open justice, and this ordinarily means that the identities of litigants and the reasons for judicial decisions should be made public. Article 6(1) provides, in relevant part:

> **"1. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".**

18. There may also be circumstances in which the qualified right to privacy, under Article 8, gives rise to tension or conflict with the qualified right to freedom of expression under Article 10. In the Employment Tribunal context specific provision for privacy and restrictions on disclosure is set out in Rule 50 of the **ET Rules of Procedure** contained in Schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**. Rule 50 provides as follows:

> **"Privacy and restrictions on disclosure**
>
> **50.**
>
> **(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…**

> **(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.**
>
> **(3) Such orders may include…**
>
> **(b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record…**
>
> **(4) Any party, or other person with a legitimate interest, who has not had a reasonable opportunity to make representations before an order under this rule is made may apply to the Tribunal in writing for the order to be revoked or discharged, either on the basis of written representations or, if requested, at a hearing".**

19. The correct approach that should be taken by an Employment Tribunal to anonymisation and other restrictions on disclosure has been set out by Simler J, as she then was, in **British Broadcasting Corporation v Roden** [2015] IRLR 627, EAT and in a subsequent case, **Fallows**, which I shall return to. Paragraphs 21 to 26 of the **Roden** case are worth setting out in full:

> **"21. An order under Rule 50 interferes both with the principle of open justice and the right to freedom of expression. The principle of open justice was considered recently by the Supreme Court in A v British Broadcasting Corporation [2014] 2 WLR 1243 in which Lord Reed said at [23]:**
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> > **"It is a general principle of our constitutional law that justice is administered by the courts in public, and is therefore open to public scrutiny. The principle is an aspect of the rule of law in a democracy. As Toulson LJ explained in *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)* [2012] EWCA Civ 420; [2013] QB 618, para 1, society depends on the courts to act as guardians of the rule of law…In a democracy, where the exercise of public authority depends on the consent of the people governed, the answer must lie in the openness of the courts to public scrutiny'.**
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> **22. The principle of open justice is accordingly of paramount importance and derogations from it can only be justified when strictly necessary as measured to secure the proper administration of justice.**
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> **23. Where anonymity orders are made, three Convention rights are engaged and have to be reconciled. First, Article 6 which guarantees the right to a fair hearing in public with a publicly pronounced judgment except where to the extent strictly necessary publicity would prejudice the interests of justice. Secondly, Article 8 which provides the qualified right to respect for private and family life. Thirdly, Article 10 which provides the right to freedom of expression, and again is qualified.**
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> **24. Lord Steyn described the balancing exercise to be conducted in a case involving these conflicting rights in In Re S (A Child) (identification: Restrictions on Publication) [2004] 3 WLR 1129 (at paragraph 17) as follows:**
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> > **"…What does, however, emerge clearly from the opinions are four propositions. First, neither article has as such precedence over the other.**

> **Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience, I will call this the ultimate balancing test…'**
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> **25. The paramountcy of the common law principle of open justice was emphasised and explained in Global Torch Ltd v Apex Global Management Ltd [2013] EWCA Civ 819 where Maurice Kay LJ referred to R v Legal Aid Board, ex parte Kaim Todner [1999] QB 966 at 977 and Lord Woolf MR's holding that the object of securing that justice is administered impartially, fairly and in a way that maintains public confidence is put in jeopardy if secrecy is ordered because (among other things):**
>
> > **"…It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely …Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it'.**
>
> **26. Having referred to the question to be asked when seeking to reconcile these different rights as affirmed by the Supreme Court in Guardian News and Media Ltd at [52] (Lord Rodger) as 'whether there is sufficient general, public interest in publishing a report of the proceedings which identifies M to justify any resulting curtailment of his right and his family's right to respect for their private and family life', Maurice Kay LJ set out the relevant passages from the Practice Guidance (interim Non-disclosure Orders) given by Lord Neuberger including as follows:**
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> > **"The grant of derogations is not a question of discretion. It is a matter of obligation…' (paragraph 11);**
> >
> > **2The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence…' (paragraph 13)"**

20. It is clear from this passage that the principle of open justice is paramount and that there have to be clear, cogent, and proportionate grounds before an Employment Tribunal can take any steps which conflict with the principle of open justice. The approach set out in the **Roden** case is consistent with the approach taken by the EAT in earlier cases as **F v G** [2012] ICR 246 and **X v Stevens** [2003] IRLR 411 Burton J, and with the guidance given more recently by HHJ Eady QC, as she then was, in **Ameyaw v PricewaterhouseCoopers** UKEAT/0244/18 at paragraphs 30 to 45. In **F v G**, at paragraph 49 of his Judgment, Underhill J rejected the suggestion that a different approach should be taken in Employment Tribunal cases on the basis that individual employment claims do not raise matters of general public interest.

21. At paragraph 47 in her Judgment in **Ameyaw**, HHJ Eady QC, said, "Where information is revealed in the course of discussion in a public trial, there can be no expectation of privacy". I accept Mr Kohanzad's submission that this was not intended to go so far as to mean that in any case in which the relevant information is given in evidence in a public hearing, Article 8 is not even engaged and so there can never be grounds for a Rule 50 non-disclosure order.

22. The observation made by HHJ Eady QC, in paragraph 47 of **Ameyaw,** was in the context of a reference to paragraph 34(1) of the Judgment of Lord Sumption in **Khuja v Times Newspapers Ltd** [2017] UKSC 49. It is clear that Lord Sumption was not there intending to lay down a general rule that Article 8 could not be engaged in circumstances in which the information was referred to in open court. He was making a comment in the context of the specific and very different facts of the **Khuja** case, which concerned a complaint by a non-party to a criminal case about whom accusations had been made during the course of trial. It is clear that Article 8 can be engaged and in an appropriate case a Rule 50 order can be made, even in cases in which the sensitive information had been given in evidence at an open hearing. This was the position in almost all the cases in which an anonymisation order has been granted in the past. It is the very fact that the information has been disclosed at an open hearing which gives rise to the need to consider a Rule 50 non-disclosure order.

23. The test for whether the Article 8 right to privacy has been engaged is that set out by the House of Lords in **Campbell v MGN** [2004] 2AC 457 and approved by the Supreme Court in **Khuja** at paragraph 21, namely that the right is in principle engaged if in respect of the disclosed facts the person in question had a reasonable expectation of privacy. The test is whether, if a reasonable person of ordinary sensibilities, placed in the same situation, was the

A subject of the disclosure rather than the recipient, that reasonable person would find the disclosure offensive.

B 24. One of the issues that has arisen in the previous appeals is the scope of the EAT's power to intervene if a party is dissatisfied with a Tribunal's decision relating to the non-disclosure of information. The answer was provided in **Fallows & Ors v News Group Newspapers** [2016] ICR 801. At paragraph 48 of her judgment in that case, Simler J said that the EAT should only C intervene with the decision of the ET on a Rule 50 issue if there was an error of principle or if the Employment Tribunal reached a decision that was plainly wrong or was outside the ambit of conclusions reasonably open to the Employment Judge. This was on the basis that a decision on an Article 8/Rule 50 issue was akin to the exercise of a discretion. This had previously been D made clear by the Court of Appeal in **AAA v Associated Newspapers Ltd** [2013] EWCA Civ 554.

E 25. Information regarding a person's transsexual status has been recognised as being very sensitive personal information which may, in an appropriate case, be restricted from disclosure. The **X v Stevens** case was one in which a transsexual claimant sought a restrictive reporting F order. In that case,. the EAT granted such an order, holding that the ET had erred in law in failing to do so.

G 26. Mr Kohanzad has drawn my attention to passages in the Equal Treatment Bench Book which states that a person's gender at birth, or their transgender history, should not be disclosed unless it is necessary and relevant to the particular legal proceedings. Paragraph one of the transgender section of the Equal Treatment Bench Book states that:

H

> **"1. Whilst awareness and understanding towards transgender people has increased in recent years, transgender people are highly likely to experience prejudice, discrimination, and harassment in their daily lives as well as violence. As a consequence, they are less likely to report crimes or press charges and they are likely to**

> **be apprehensive about coming to court…they may be worried about receiving negative attention from the public and the press".**

27. It is not suggested, and cannot be suggested, that the Equal Treatment Bench Book is binding upon me for the purposes of an appeal relating to Rule 50, but it is a useful reminder that transgender persons face a real and constant risk of negative attention and unpleasant treatment.

28. Under Section 22 of the **Gender Recognition Act 2004**, it is an offence for someone who has obtained information about the change of gender of someone who has a gender recognition certificate in an official capacity to disclose that information to any other person. This has no application to the present case because it is not an offence to disclose protected information if the disclosure is for the purpose of proceedings before a court or Tribunal and it could not conceivably be suggested that the Employment Judge in the present case has committed an offence under Section 22. Once again, however, this is official recognition of the sensitivity surrounding the disclosure of information about transgender status.

29. Paragraph 22 of the transgender people section of the Bench Book states that the policy intention behind Section 22 appears to be that disclosure would only be permissible if made for the purpose of court proceedings, that is to say not as a generality within proceedings, but as relevant to the fundamental purpose of the proceedings themselves. For the purposes of family proceedings, Sir James Mumby, the then President of the Family Division, said that: "Disclosure should not be permitted in those cases where it is unnecessary, and irrelevant, to the issues".

Discussion and Conclusions

30. I now move on to my conclusions on the issue in this appeal that I have already identified. I will first consider whether the Employment Judge erred in law in referring to the Appellant's transgender status and mental health history, as he understood it to be, in his Judgment. In my judgment, Employment Judge Harper did not err in law in referring to these matters in his Judgment. The findings of fact were based on witness evidence and were undisputed. Indeed, the relevant evidence had been given in support of the Appellant's application to extend time by the Appellant's own father who was also acting with the Appellant's consent as his representative at the hearing. The information set out in paragraph 4 of the Judgment was directly relevant to a key issue in the case, namely whether the claim should be permitted to proceed, notwithstanding that it had not been lodged in time.

31. In order to decide this issue, the Employment Judge had to consider whether it would have been reasonably practicable to present the claim in time. Evidence of the pressures upon the Appellant and in relation to his mental state were directly relevant to this issue. It is true that, in paragraph 4, the Judge expressed the view that any of the medical issues would, on its own, have led him to find in the Appellant's favour on the time limit issue. It follows that even if reference had not been made to the Appellant's gender transition, or to the multiple personalities issue, the claim would still have been allowed to proceed. However, this does not detract from the position that all of the evidence of medical history put forward by the Appellant's father was directly relevant to the time limit issue. It was not irrelevant or gratuitous, and these were matters that were entirely properly taken into account by the Employment Judge.

32. Given that the findings for the Judge were relevant to an issue in the case and were in fact taken into account by the Judge in coming to his decision, it seems to me clear that the paramount importance of open justice outweighs any privacy concerns that the Appellant has about their inclusion in the Judgment. If the Judge had refrained from referring to these matters, and had referred only to PTSD and complex trauma, this would have been to mislead the reader of the Judgment by giving a false and censored impression of the reasons why the Judge decided that the claim was in time. Moreover, the redaction of this information would not have been proportionate because there was a less drastic way in which the Appellant's Article 8 rights could have been protected, namely by anonymisation. In my view, this is of fundamental importance.

33. The fact that the Appellant subsequently alleged that the description of his medical history in paragraph 4 of the Judgment is not factually accurate cannot be a good reason for criticising the Employment Judge for failing to redact or delete part of his Judgment when originally written. At the hearing, on 30 January 2018, the Judge could only proceed on the basis of the evidence that was placed before him. He did so, relying on evidence given on affirmation by the Appellant's father. The Judge was not to know that sometime later the Appellant himself would dispute that the evidence was accurate or that he would supply a GP's letter which would provide some support to the Appellant's criticisms.

34. The dangers of editing a Judgment, to delete reference to facts and matters which were in reality taken into account and relied upon by the Judge, are highlighted by consideration of the nature of the relief that the Appeal Tribunal would be required to grant if this part of the appeal had succeeded. Is the EAT required to blue pencil parts of the Judgment or to re-write parts of the Employment Judge's Judgment for him? Either way, the end result that would be

reached would be that the written Judgment does not truly reflect the reasoning of the Employment Judge in coming to his conclusion. It would not be the Judge's own Judgment but one that had been doctored after the event. What would happen if the individual appealed against the Decision on the merits? How could the appellate court fairly deal with the appeal if the full scope of the Tribunal's findings of facts and reasoning had been concealed?

35. I accept that the terms of Rule 50 go beyond anonymisation and permit, in an appropriate case, an order which has the effect of preventing the public disclosure of any aspect of the proceedings. However, I think it would only be in a wholly exceptional case that this would be a proportionate response to a litigant's right to privacy, especially when the alternative and must less drastic expedient of anonymisation is available to the Tribunal. I will come on separately to deal with the potential practical problem with enforcement that the Appellant has raised if redaction of paragraph 4 of the Judgment is not granted.

36. I move on, now, to consider whether the Employment Tribunal erred in law in failing to anonymise the Appellant's name. The starting point is that up until the time when the Judgment was handed down, the Employment Judge had not been asked to do so, either by the Appellant himself or by his father who was the Appellant's representative. It might be regarded as somewhat harsh to criticise the Employment Judge for failing to do something that no one had asked him to do. However, Regulation 50(1) of the **Rules of Procedure Regulations** provides that a Tribunal may, at any stage in the proceedings, make an order with a view to preventing disclosure information "on its own initiative or on application". In my judgment, therefore, there can be cases, no doubt rare, in which it is incumbent upon an Employment Tribunal to consider, of its own volition, whether an anonymisation order should be made even if the effected party does not ask for one.

37. In my judgment, this was such a case. The Employment Judge had been informed that the Appellant's mental state was fragile. The Judge was aware that the Appellant was not able to attend the hearing and indeed was told that he preferred not to leave the house. The Tribunal was also aware of the Appellant's transgender status and it is obvious that publication of this fact may give rise to difficulties for an individual. There are several reported cases in which the EAT has said that the identity of a transgender claimant should be removed from the record. It is clear from the text at paragraph 4 of the Judgment itself that the Employment Judge was aware of the sensitivities surrounding the Appellant's transgender status and mental health issues. The Appellant was not legally represented and so there was no reason to assume that the Appellant, or his father, were aware of the right to apply for an anonymisation order. Against this background, I take the view that it was an error of law, albeit perhaps understandable and forgivable, for the Employment Judge to fail to consider whether to grant anonymisation. The failure to do so was plainly wrong.

38. The next issue is what should happen next. I do not think it would be helpful to remit the matter for determination by the Employment Judge; this would be wholly disproportionate. However, I bear in mind that the Court of Appeal has made clear that the EAT should remit matters back to the ET unless the EAT can be satisfied that if the Employment Tribunal had not erred in law, there could only have been one possible outcome (see **Jafri v Lincoln College** [2014] IRLR 544, **Burrell v Micheldever Tyre Services Ltd** [2014] IRLR 630, and **Dunn v Secretary of State for Justice, HM Inspectorate of Prisons** [2019] IRLR 298). I am satisfied that this is such a case. The only possible outcome, if the ET had considered the issue of anonymisation under Rule 50 at the hearing of this case would have been that the ET would have granted anonymisation.

39. In my judgment, it is absolutely clear that it is proportionate to grant anonymisation in this case and that it would be consistent with the Appellant's Article 8 rights to do so. There are strong reasons to grant anonymisation. The appellate courts have recognised the sensitivities around gender transitioning and the importance of keeping the person's identity confidential if that is what the individual wishes. Similarly, there are good reasons to keep the Claimant's identity confidential if the Judgment deals with highly sensitive matters relating to his mental health.

40. On the other hand, I do not think that there are strong countervailing reasons why the identity of the Appellant needs to be disclosed. This was not a case in which he was accused of any form of wrongdoing, let alone any wrongdoing connected with his status or mental health. The issues relating to transgender status and mental health arose from the context of what I may describe, without being rude, as an absolutely standard issue about the extension of time limits. It is not uncommon, nowadays, to anonymise a party's name in a case such as this. It is understandable, however, that the Appellant and his father did not think to apply themselves for anonymisation at or before the hearing.

41. In my judgment, in the present case, the Appellant's Article 8 rights to privacy far outweigh the very limited impact upon the Article 6 principal of open justice arising from anonymisation. Moreover, this is not a case in which Article 10 rights of freedom of expression are significantly engaged. There is no reason to think that the press or the public would have any interest in a time limit issue such as this. There will be no negative impact on the Respondent as a result of anonymisation. The Respondent has taken no part in these proceedings and I cannot conceive that the Respondent would take objection. For this reason,

and because the Respondent is debarred from taking part in this appeal, I am prepared to order anonymisation without first giving the Respondent an opportunity to make representations.

42. Accordingly, I allow the appeal on this ground and will order that the record of this Judgment be amended so as to anonymise the Appellant's name. Indeed, I will go further and order that the Respondent's name is anonymised also; this is to protect the Appellant. He has family links with the Respondent company which is, as I understand it, a small business and so publication of the name of the Respondent might indirectly lead some people to identify the Appellant. Also, where the Judgment refers to the Appellant's father by name, the name should be replaced by the words, "the Claimant's father". I will grant liberty to apply in case a third party wishes to be heard to give reasons why the anonymisation order should be set aside in future, although I think that this would be highly unlikely.

43. I should emphasise, however, that every case depends on its own facts and I am not suggesting that there is any definite rule or principle of law that every time a judgment refers to a party's transsexual status, or refers to sensitive mental health issues, the Tribunal should anonymise the names of the parties, whether or not the parties ask for it.

44. As I have allowed the Appellant's appeal on the preceding ground, I will only deal briefly with the next ground which is that the Employment Judge erred in law in failing to grant anonymity on the basis of the Appellant's email of 12 February 2018, sent some 10 days after the Judgment had been sent to the parties. The Employment Judge declined to do so because the Judgment correctly recorded what had been given in evidence, because no application, under Rule 50 had been made at the hearing, and because the Tribunal's file was closed. If this had still been a live issue, I would have allowed the appeal on this ground also to the extent that

the Employment Judge should have treated the email of 12 February 2018 as being a request for the Employment Tribunal to consider anonymisation, amongst other things, that the Judge would have been plainly wrong not to have done so and the only possible outcome would have been to grant anonymisation at that stage.

45. As I have already explained, I do not think that the fact that the Appellant himself did not make an application at the hearing for anonymisation under Rule 50 is itself a reason to decline to do so. As I have said, Rule 50 permits an ET to make an order of its own volition and there are some cases in which it is incumbent for a Tribunal to consider whether to do so, even if there has not been an application by the relevant party. Also, I do not think that the fact that the application was made 10 days after the Judgment was issued means that the Judge was *functus officio* and so was no longer able to make an anonymity order.

46. There are several cumulative reasons for my view. The main one is that the duty to make an anonymisation order to protect Article 8 rights is an overriding one derived from the **ECHR**, and I think it is a continuing one. Second, there is nothing in Rule 50 which states that the application must be made before Judgment and there may well be cases in which it is only on or after receipt of Judgment that the grounds for such an application arise. In the **Fallows** case, at paragraph 38, Simler J said, "There is no temporal or other limitation on the type of order that may be made under [Rule 50]". Third, and in any event, the case was not over at the time when the email was sent, because it was sent during the 14 day window in which it was open to the Appellant to apply to proceed with his disability discrimination claim. Fourth, the Appellant acted promptly as soon as he realised that the Judgment contained sensitive information.

47. On the other hand, I do not think that the Employment Judge erred in law in failing to accede to the Appellant's request to edit the Judgment so as to delete reference to the Appellant's transsexual status and mental health issues. For the reasons already given, this would offend against the principles of open justice and would be a disproportionate response to the Appellant's Article 8 rights. I add, in passing, that I do not accept Mr Kohanzad's submission that the email of 12 February 2018 should be treated as an application for reconsideration under Rules 70 to 72 of the **Rules of Procedure**. Such an application can only be made in relation to a "Judgment" (see Rule 70). Judgment is defined in Rule 13 of the Rules of Procedure to cover a Decision which finally determines a claim or part of a claim. This would not cover an application for anonymisation. In my view, therefore, the request could not have been dealt with by way of reconsideration.

48. In oral argument, Mr Kohanzad raised a concern that this might give rise to difficulties if the litigant wished to give evidence to support their Rule 50 or Article 8 application. I do not think that it would do so. A litigant may raise Article 8 at any time after the Judgment has been handed down and in an appropriate case the ET may then hold a hearing to consider the application. If there is relevant evidence, such evidence can be given at the hearing. It follows that it is not necessary in order for the ability to give evidence to exist, but the application be treated as a reconsideration hearing. (I should add that this is not to say that it will necessarily be the case that it would be appropriate to hold a hearing to hear fresh evidence which the litigant could have given at the main hearing but had omitted to put before Tribunal. That would depend on all the circumstances of the case).

49. The Appellant submits that anonymisation on its own would not be enough and so redaction should also be granted because if he is to enforce the Judgment in the County Court,

A he will have to produce the Judgment and this will contain sensitive information. He points out that enforcement would not be practicable without disclosing the name of the Appellant and the Respondent.

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50. I do not accept this submission. Application for an order of execution by the County Court is made by filing an affidavit verifying the amount remaining due and by producing the award, order, or agreement under which the sum is payable or a duplicate thereof and filing a C copy of it. In my judgment it would be sufficient for these purposes to supply the County Court with the operative part of the Judgment, that is the four paragraphs under the heading, "Judgment" at the start of the Judgment and Reasons. It is not necessary, also, to provide the D County Court with the Reasons. It follows that non-redaction does not mean that the Appellant's name will be linked to the sensitive information at the County Court stage of the proceedings, if there are any. Moreover, it is open to the County Court itself to anonymise its documentation and one would expect this to happen if the Employment Tribunal has E anonymised.

51. However, as a belt and braces approach, I am prepared to order, in the order that I will F make at the end of this Judgment, that for the purposes of enforcement in the County Court, the Appellant need only provide the County Court with the first page of the Judgment, from paragraphs one to four in the Judgment section, and for the enforcement purposes only, the G entirety of the Reasons part of the Judgment may be redacted.

52. The final question is whether the parties' names should be anonymised in this appeal H Judgment. It is clear that they should be. The reasons that I have given for anonymisation of the ET Judgment apply equally to anonymisation of the EAT Judgment. It is right that the

Respondent's name should also be anonymised because otherwise there would be a danger that the Appellant's identity could indirectly be worked out, even if his name was not mentioned. The Respondent has been debarred from taking part in this appeal but I regard it as virtually inconceivable, in any event, that the Respondent would have any objection to this course of action. I have no doubt that the EAT has power to order that parties' names can be anonymised; this has been done on many occasions. The EAT has been granted power to regulate its own procedure by Section 30(3) of the **Employment Tribunals Act 1996** and in any event in my judgment, the EAT has an inherent power to take steps to protect the parties' privacy rights under the **ECHR** (See **X v Stevens**).

53. For those reasons I am going to make an order in the following terms although I will give Mr Kohanzad an opportunity to comment on the broad terms of the order. That will be: One, that the appeal is allowed; two, subject to the liberty to apply set out in sub-paragraph three : 2(a), the names of the Appellant and the Respondent in these proceedings will be anonymised by the use of appropriate initials so that they cannot be identified and the body of the Judgment and Reasons below, will be amended so that no reference is made to the name of the Appellant or to his father's name, or to the name of the Respondent in the body of the Judgment; (b), the record of the ET Judgment and Reasons will be amended so as to reflect the anonymisation; (c), to like effect the Judgment of the EAT will be anonymised; (d) the anonymisation will remain in place indefinitely; and (e), for the purposes of enforcement in the County Court, the Appellant need only provide the County Court with the first page of the ET Judgment from paragraphs one to four in the "Judgment" section and for enforcement purposes only, the entirety of the Reasons part of the ET Judgment may be redacted.

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54. Additionally, sub-paragraph three, liberty to apply is granted to third parties but not to the Respondent to apply to the EAT to set aside one or more of the above orders on notice to the Appellant.

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