



EMPLOYMENT TRIBUNALS

Claimant

Respondent

AB

**v The Commissioner of Police of the
Metropolis**

Heard at: Watford

On: 16 July 2020

Before: Employment Judge Bedeau

Appearances

For the Claimant: Mr J Feeney, Counsel

For the Respondent: Mr P Martin, Counsel

RESERVED JUDGMENT

1. The claimant's application for anonymity orders is refused.
2. The claimant's application for the final hearing to be conducted in private, either in whole or in part, is refused.
3. The claimant is granted a restricted reporting order pursuant to section 12 Employment Tribunals Act 1996 and rule 50(3)(d), Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, prohibiting the publication of any material identifying the claimant or his wife until the promulgation of judgment on liability. The claimant shall be referred to as "AB" and his wife as "CD".

REASONS

1. In this case the claimant presented his claim form on 8 February 2019 in which he claims discrimination arising in consequence of disability, section 15 Equality Act 2010, and failure to make reasonable adjustments, sections 20 and 21. He works as a Police Sergeant and asserts that by reason of his post-traumatic stress disorder, bipolar and psychosis, he had been discriminated by the respondent because of his disabilities.

2. In the response, presented to the tribunal on 4 June 2019, the claims are denied. No admissions are made in respect of the disabilities. In addition, all or part of the acts relied upon by the claimant are out of time and do not form part of a continuing act nor would it be just and equitable to extend time.
3. At the preliminary hearing held on 6 February 2020, before Employment Judge R Lewis, the case was set down for a preliminary hearing, in public, today, for an Employment Judge to hear and determine:
 - 3.1 Whether at the material times the claimant was a disabled person under s.6 Equality Act 2010;
 - 3.2 Determine the claimant's application for a rule 50 order;
 - 3.3 Consider an application for Judicial Mediation; and
 - 3.4 Issue case management orders
4. The case was set down for a final hearing, over 7 days, from 14 to 22 April 2021, before a full tribunal.
5. On 12 June 2020, the respondent wrote to the claimant and the tribunal conceding disability and requested that the preliminary hearing scheduled to take place on 16 July 2020, be converted to a 2-hour preliminary hearing, in private. That request was acceded to by the tribunal.
6. On 15 July 2020, the claimant's legal representatives wrote to the respondent's representatives informing them that an application will be made under rule 50, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, seeking the following:
 - "1. That the name of the claimant on the tribunal's public record, for all listings, and on all documents on the tribunal's register is anonymised to "AB" pursuant to Rule 50(3)(d) of the ET Rules.
 2. The name of the claimant's wife on all documents is anonymised to "CD" pursuant to Rule 50(3)(d)
 3. The final hearing take place wholly in private pursuant to Rule 50(3)(a).
 4. A restricted reporting order is made pursuant to s.12 ETA and Rule 50(3)(d), prohibiting the publication of any material identifying the claimant or his wife".
3. Attached to the application was the claimant's witness statement in which he states that he suffers from post-traumatic stress disorder, bipolar disorder, and psychosis. He then wrote:
 - "4. One of the major symptoms of my conditions is anxiety which is brought on by stressful events. When under pressure my brain cannot handle or properly process the stress and due to the nature of my underlying

conditions, I become paranoid, irrational and frustrated to such a degree that I have previously believed that I was being followed and made plans to run away as I thought the police were out to arrest me.

5. My symptoms have been well documented and are recorded in my medical records.
6. I accept the Employment Tribunal will be a naturally stressful environment and the thought of giving evidence already causes me significant anxiety but having the additional factor of having members of the public and/or press watching and reporting on intimate details of my past and present really terrifies me.
5. It is not just the fact that my life will be on offer to all interested parties but more that my family's privacy will potentially be in jeopardy. My wife and children have been through so much already with my illness. My children's school is at the heart of the local community and whilst we have tried very hard to insulate them, I do not want them to be subjected to scrutiny or questions regarding their father. They should be able to go to school without knowing that their father's mental health condition is widely known to others. There is a close-knit group of parents at the school and my wife is involved with numerous charity events throughout the year. It would be unfair to place her in any situation where she may be asked about or judged in light of any evidence given at the final hearing. Ultimately, my mental health - which is at the heart of this case - is a deeply private matter and not something anyone would want publicised.
6. I am very aware of what happens to me when I feel cornered and observed - I clam up and suffer auditory hallucinations in the form of voices. I suffer these on an almost daily basis now but they become terrible and aggressive when I am under increased stress. I also suffer with visual hallucinations. These are extremely distressing and being able to concentrate and give clear and cogent evidence will be all but impossible.
7. I understand that the status quo is that all employment tribunal hearing are open but to have this in my case would cause an injustice to me as I genuinely believe, having lived with these conditions for a number of years, that I would be unable to give proper evidence and therefore my right to have a fair hearing would be compromised.
8. If it is not possible to hold the final hearing in private, then at the very least I request that my name and my wife's name is anonymised and a restricted reporting order to stop the press reporting on the hearing is put into place."

Background

4. Here I am not making findings of fact but refer to what I hope are uncontested matters. The claimant is 48 years of age. He was born on 5 July 1972. In August 2012, living in Australia, he was involved in a serious road traffic accident while cycling. He had previously worked for the respondent but then lived and worked in Australia. He returned to the

United Kingdom in 2016 and applied to join the respondent as a police officer. He wrote that he completed a questionnaire on 12 February 2016 stating that he suffered from PTSD arising out of his experience in the military. He asserted that he was put in the Response Team as a Sergeant, without a risk assessment having been carried out. He was on sick leave from 25 October 2016 to June 2018. As a result of informing the respondent that his parents had died when, in fact, they were alive, on 2 November 2016, he was charged with gross misconduct. His explanation was that, at the time, he was experiencing auditory hallucinations which led him to believe that certain things were happening when they were not, such as the death of his parents. He submitted that his behaviour was a manifestation of PTSD and/or bipolar. Various medical reports were obtained on his mental state diagnosing, at various times, bipolar effective disorder, bipolar type 2, and PTSD moderate depression.

5. On 21 September 2018, the gross misconduct allegation was withdrawn.

Submissions

6. Mr Feeney, counsel on behalf of the claimant, submitted that article 6 of the European Convention on Human Rights, engages the claimant's rights because of his disabilities, as he is susceptible to stressful situations which are magnified if he is watched by members of the public, as well as members of the press being present. Interests of justice comes into play because although the respondent concedes disability, the claimant will be questioned in relation to matters relevant to the reasonable adjustments claim. This would put him at a disadvantage. He will also be cross-examined in respect of the discrimination arising in consequence of disability claim. Being watched brings on certain conditions, such as, hypersexuality, hearing voices and suicidal thoughts.
7. Further, in relation to his article 6 rights to a fair hearing, if members of the public and the press were present and the hearing is not in private, he is likely to suffer from auditory hallucinations. A restricted reporting order may not resolve matters as he would be cognisant the press and members of the public being present at the hearing, and it would not be acceptable to have only his wife's evidence in private. He asked that the final hearing be in conducted in private.
8. The claimant's article 8 rights are also likely to be engaged. If the case is publicised, it will cause embarrassment to members of his family. Details of his mental impairments will be disclosed or made available to his neighbours, friends, and work colleagues to read.
9. Mr Martin, counsel for the respondent, who did not have, in advance of this hearing, the arguments and submissions of Mr Feeney, submitted that the burden is on the claimant to establish that there are grounds for derogating from the principle of open justice. The respondent concedes that he became a disabled person in 2018 but not the manifestation of his conditions. An issue is whether his auditory hallucinations arise out of his disabilities.

10. Mr Martin further submitted that the respondent expected the claimant to have produced medical evidence in support of his assertion that people present in a tribunal room would cause him stress and anxiety, but this was not the case. Paragraph 8 of his witness statement makes reference to his current medical conditions, but the respondent had not seen the medical evidence in support. The tribunal cannot be satisfied that the claimant's article 6 rights are likely to be infringed.
11. If there is likely to be damage to the cogency of the claimant's evidence by people watching him, an anonymisation order is unlikely to change the position.
12. Private hearings are contrary to the principle of open justice. There is no basis for either the claimant or his wife being allowed to give evidence in private.
13. In paragraph 7 of the claimant's witness statement, he does not give the name and address of his children's school or their age.
14. Mr Martin further submitted that the least offending route would be a restricted reporting order but even that is unlikely to improve the claimant's ability to give evidence.
15. He finally submitted that the correct approach is to wait until the parties have exchanged witness statements which would give the claimant a clear indication of where his evidence is likely to be challenged.

The law

16. Section 12(1) Employment Tribunals Act 1996 states the following:

“12 Restriction of publicity in disability cases

(1) This section applies to proceedings on a complaint under section 120 of the Equality Act 2010, where the complaint relates to disability in which evidence of a personal nature is likely to be heard by the employment tribunal hearing the complaint.”

17. Section 12(2) provides for regulations in making a restricted reporting order. A restricted reporting order prohibits the publication of any “identifying matter” in Great Britain, 12(7). An “identifying matter” is “any matter likely to lead members of the public to identify the complainant or such other persons (if any) as may be named in the order.”, 12(7).
18. Section 120 Equality Act 2010 is the Employment Tribunal's jurisdiction.
19. Rule 50 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, provides:

“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 or in the circumstances identified in section 10A of the Employment Tribunals Act.
- (2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.
- (3) Such orders may include—
- (a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;
 - (b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;
 - (c) an order for measures preventing witnesses at a public hearing being identifiable by members of the public;
 - (d) a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act.
- (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.
- (5) Where an order is made under paragraph (3)(d) above—
- (a) it shall specify the person whose identity is protected; and may specify particular matters of which publication is prohibited as likely to lead to that person's identification;
 - (b) it shall specify the duration of the order;
 - (c) the Tribunal shall ensure that a notice of the fact that such an order has been made in relation to those proceedings is displayed on the notice board of the Tribunal with any list of the proceedings taking place before the Tribunal, and on the door of the room in which the proceedings affected by the order are taking place; and
 - (d) the Tribunal may order that it applies also to any other proceedings being heard as part of the same hearing.
- (6) "Convention rights" has the meaning given to it in section 1 of the Human Rights Act 1998(22)."

20. Rule 50(1) provides that there are three situations which can justify the making of a rule 50 order. These are where the tribunal considers an order to be necessary:
 - a. In the interests of justice; or
 - b. To protect Convention rights, or
 - c. In any of the section 10A circumstances, such as the evidence is likely to be subject to statutory or other duties of confidentiality or, if disclosed, would cause substantial injury to any undertaking where the person works.
21. Rule 50(3) gives four examples of the kind of orders which a tribunal may make. The list is not exhaustive so a tribunal may make another type of order, if appropriate. A combination of orders, such as an anonymity and restricted reporting order, may be required in some circumstances.
22. Rule 50(3)(a) provides that an order may be made at a hearing that would otherwise be public, should be conducted in private.
23. Rule 50(3)(b) an anonymity order preventing by anonymisation or otherwise, disclosure to the public of the identities specified parties, witnesses, or other persons.
24. In an anonymity order, the tribunal is the guardian of the private information. The information is not disclosed to the public or the media at all. This contrasts with a restricted reporting order where the information is aired but the public and the media have the responsibility of keeping it secret.
25. When making an anonymity order, consideration should be given to:
 - a. Who should be specified in the anonymity order? Is it necessary to anonymise the respondent or any other persons to protect, for example, the claimant?
 - b. The points in the process at which a party or other person requires anonymity, for example, during the course of a hearing, or in relation to the listing, the judgment, or other public documents.
 - c. The duration of the protection, including whether the position may need to be reconsidered after promulgation of the judgment. An order for permanent anonymity, or an order permanently restricting reporting, is unlikely to be justified save only in exceptional circumstances, F v G UKEAT/0042/11.
26. Rule 50(3)(c), relates to orders for measures to prevent the identification of witnesses during a hearing.

27. Finally, a restricted reporting order is an order prohibiting the publication in Great Britain of an identifying matter in a written publication made available to the public, rule 50(3)(d).

31. Article 6 is the right to a fair trial. It states:

“.. everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of 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.”

28. Article 8, the right to respect for private and family life, states:

“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.”

29. Article 10 on the right of freedom of expression, this provides:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

30. The above rights were introduced into United Kingdom law by the Human Rights Act 1998.

31. In considering an application for rule 50 order, consideration must be given to open justice as set out in rule 50(2) and article 10 of the European Convention on Human Rights, freedom of expression. The default position is that hearings are in public, and that full decisions with the names of the parties are published and maybe reported. This reflects the general public interest and applies irrespective of the subject matter of the case, even if it does not raise issues of public interest in the wider sense, F v G.

32. Derogations from the principle of open justice will only be justified in exceptional circumstances, if and to the extent that the tribunal is satisfied that they are the minimum strictly necessary to ensure justice is done. The burden of establishing that a derogation is necessary, is on the person making it.
33. The tribunal must engage in a balancing exercise. A fact-finding proportionality approach must be carried out, with a focus on the importance of each of the specific rights being claimed and the justifications for interfering with or restricting each right. Clear and cogent evidence is required. The proportionality test must be applied. The question to be considered is whether harm will be done by a public hearing or reporting, to the Convention rights of the person seeking the restriction, so as to make it necessary to derogate from the principle of open justice, BBC v Roden UK EAT/0385/14.
34. In relation to article 8, family and privacy rights, the mere publication of embarrassing or damaging material is not a good reason for anonymity or for restricting the reporting of the judgment, BBC v Roden. Tribunals can mitigate the risks of misunderstanding by making clear in a written judgment that they have adjudicated on the truth or otherwise of the damaging allegation. Where anonymity is being sought by a claimant, the fact that they have chosen to bring proceedings is a significant factor to be considered, BBC v Roden. A witness with no interest in the proceedings has a stronger claim to be protected by the courts if he or she is prejudiced by publicity. Further, findings of dishonesty against the person seeking anonymity, it may be inimical for that person to be shielded from full publication of the judgment which includes those findings, BBC v Roden.
35. In relation to article 10 rights, freedom of expression, if this is for limited periods, it is less objectionable than a restriction on disclosure that is permanent. A public judgment can reduce or minimise any risks of inaccurate reporting and, therefore, the principle of open justice is stronger once judgment has been delivered. There may be an interest in relevant bodies or future employers knowing about the outcome of proceedings, especially where there are findings of dishonesty. Where a party has successfully brought or defended a claim, it is entirely legitimate that someone who has had their rights vindicated after a hard fought piece of litigation, should wish to be able to report, and produce the evidence of that victory without constraint, F v G (2012) ICR 246, paragraph 49.

Conclusions

36. In the field of restricted reporting there are essentially three competing fundamental human rights: the right to a fair hearing, article 6; the right to private and family life, article 8; and the right to freedom of expression. These are not absolute rights but are subject to certain qualifications. Set against them is the fundamental principle of open justice.

37. In relation to the claimant's application that the final hearing or part of it, be in private, I was not persuaded that it is in the interests of justice to do so. The principle of open justice requires that the public have access to hearings whether in person or by reading accounts of them. The claimant brought claims against the respondent and must have been aware that in so doing the normal course of action would be that the hearing would be in public although, thus far, it has been in private. Having members of the public and the press present, he says, will have an adverse effect on his ability to give accurate and cogent evidence and that under stress he has a tendency to hallucinate. His counsel, Mr Feeney, submitted that being watched would bring on conditions, such as, hypersexuality, hearing voices, and suicidal thoughts. The burden is on the claimant to provide evidence to persuade the tribunal to derogate from this fundamental principle. No medical evidence was produced to persuade me that I should derogate from applying the principle of open justice.
38. All litigation is stressful. Even if the press, members of the public and witnesses are excluded, there will be the tribunal and the representatives observing the claimant when giving evidence.
39. There was no medical or other evidence in support of the claimant's wife giving her evidence in private.
40. In relation to the right to private and family life, in paragraph 7 of his witness statement, he refers to his article 8 rights to family life stating that his family's privacy would be in jeopardy. No evidence is given in relation to the ages of his children or the school they attend and whether or not they have been subjected to scrutiny or questions regarding the claimant.
41. I do have regard to the claimant's right to a fair hearing. Equally, the respondent, as a large employer, has a right to a fair hearing. A number of serious allegations have been made. One of the issues in the case is whether or not the claimant's disabilities give rise to auditory hallucinations. That matter would require testing in evidence. It is in the public's interest to know how such a large employer treats its disabled staff and workers. I am not persuaded that it is in the interests of justice or that the claimant's right to family life and a fair hearing would be seriously compromised if the hearing or part of it is held in private. He has not persuaded me that I should derogate from the principle of open justice.
42. I am satisfied and do conclude that the principle of open justice should apply in this case and that the hearing should be in public.
43. I shall leave anonymisation to the last and consider next the application for a restricted reporting order.
44. I am persuaded that this case comes under s.12(1) Employment Tribunals Act 1996 as this complaint relates to disability in which evidence of a personal nature is likely to be heard by the tribunal.

45. In his grounds of complaint and witness statement, the claimant refers to his accident in Australia; his return to the United Kingdom; being put in to the position of being a Police Sergeant in the Response Team without a risk assessment having been conducted; made claims that his parents were dead when in fact they were alive; that he had been prescribed different medications for his mental impairments; the various diagnoses and his alleged treatment by the respondent. If there is no protection afforded, he is likely to be inhibited in giving full, accurate, consistent, and credible evidence. His right to a fair hearing is engaged.
46. I consider that a restricted reporting order meets the interests of justice in this case and also engages his right to respect his private and family life which outweighs the application of the right to freedom of expression and the application of the principle of open justice. He could give evidence safe in the knowledge that he would be identified only by reference to letters notwithstanding the press, possibly, and members of the public, may be present to hear his evidence and the evidence from his wife.
47. If no restrictions are placed on his wife's evidence, he is likely to be identified.
48. Neither his name nor that of his wife's should be revealed and that should be the case until the promulgation of the final hearing judgment.
49. I now return to the application that the name of the claimant on the tribunal's public record for all listings, and on all documents on the tribunal register be anonymised to "AB" pursuant to rule 50(3)(d). The claimant's argument is that he is less likely to give consistent and cogent evidence should members of the public and witnesses be present at the hearing, and under stress he has the tendency to hallucinate. It is under the circumstances, difficult to see how anonymisation is likely to be of assistance.
50. In paragraph 76 of his witness statement, he acknowledges that tribunal proceedings are naturally stressful and the thought of him giving evidence causes him significant anxiety, made more acute and terrifying by members of the public and/or the press watching and reporting on intimate details of his past and present.
51. No documentary evidence has been produced in support of this statement notwithstanding several medical reports have been referred to in the pleadings. He brought the claims against the respondent in the full knowledge that he would be required to give evidence. There is nothing in the documentary evidence in support of his application that, medically, the presence of members of the public watching him and reporting on intimate details would terrify him. It is not clear to me how that state of mind is alleviated by the anonymisation of tribunal documents.
52. I have come to the conclusion the case is not made out for an anonymisation order in the form asked for.

53. In relation to the anonymisation of all references to his wife, I have not been given a witness statement from her and the basis upon which it is in the interests of justice to issue an anonymisation order in respect of her details. I, therefore, refuse this application.
54. In my view the restricted reporting order provides some of the protection sought by the claimant. It will prohibit the publication of any material identifying the claimant and his wife until the promulgation of the final hearing judgement. The claimant suggested that his wife should be referred to by the initials, 'CD' and I endorse this approach. He shall be referred to as "AB".
55. If there are material changes in the claimant's circumstances, having regard to the potential sensitivity of the issues involved, he may renew his application for a rule 50 order.

Employment Judge Bedeau

7 October 2020

Date:

Sent to the parties on: .21/10/2020

.Jon Marlowe

For the Tribunal Office