EMPLOYMENT TRIBUNALS

Claimant: Mrs A Abercrombie

Respondent: The Equality and Human Rights Commission

Heard at: Manchester **On:** 26 October 2020

Before: Employment Judge Grundy

REPRESENTATION:

Claimant: In Person
Respondent: Mr Chegwin, Solicitor

This hearing has taken place on a remote basis by CVP platform in accordance with the Presidential Practice Direction on remote hearings and open justice and in accordance with Rule 46 ET (CRP) Regs 2013 and the Guidance issued on 14th September 2020.

RECONSIDERATION JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's application for reconsideration of the refusal to grant anonymisation of the judgment given on 31 May 2019 is refused.

2. The Claimant requested the Tribunal to provide written reasons for the decision, on 9 November 2020. These are the written reasons in accordance with the oral extempore judgement given to the parties on the day of the reconsideration hearing, now provided at the Claimant's written request.

REASONS

ISSUE

1. This is the claimant's application for reconsideration of the Tribunal's refusal to grant anonymisation or redaction of its judgment on the claimant's

application to amend her ET1 heard on 31 May 2019.

2. Submissions have been made by the claimant, and the respondent today, 26 October 2020 orally, remotely by CVP and a bundle of relevant documents has been produced for this application.

3. **BACKGROUND**
The original judgment was given at a public hearing, the judgment clearly states that it was given on an extempore basis page 45, which means the decision and reasons were announced at a public hearing, after the submissions of the parties. The Judge cannot now recall if any members of the public were present or any observers, the hearing was in person in Manchester at the time, nor is such a note available.

4. Judgment was published on 11 June 2019 in full, in the meantime on 29 July 2019 [40] Employment Judge Warren dismissed the claimant's substantive claim following withdrawal of the claim by the claimant. Judgment was sent on 19 August 2019 by that time the May judgment had been published for 6 to 8 weeks.

5. On 27 November 2019 the claimant applied by letter [49] for " a procedure for requesting that judgment be removed from online", and further she did not want her " personal details to be made public"

6. On 6 February 2020 Employment Judge Shotter treated her letter as a request for an anonymisation [50]. She sought a response from the respondent; the respondents' response is at [51] and is neutral. The respondent referred to the following cases in its response to the claimant's application:-

Scott v Scott [1913] AC 417 (see 463) 5 May 1913 61-113

Fallows and others v News Group Newspapers Ltd. [2016] ICR 801 (see 48)
13 May 2016 114-138

Khuja v Times Newspaper Limited and others [2017] UKSC 49 (see 34(1))
19 July 2017 139-171

Ameyaw v PriceWaterHouseCoopers Services Limited UKEAT/0244/18/LA
(see 49 and 56)
4 January 2019 172-200

7. Further at the hearing the respondent also drew the Tribunal's attention to an additional relevant authority -X v Y UKEAT/0302/18/RN 7 October 2019 201-226.

8. Prior to giving judgment the Tribunal also referred the parties to L v Q Ltd 2019 EWCA Civ 1417. Neither party wished to have further time to consider the authority, as it was primarily concerned with removal of a judgment and

reasons from the public register which the claimant accepts is not possible.

9. On 4 March 2020 at [53] the tribunal refused the application to anonymise or for a redacted judgement on paper with brief reasons at [54]. The claimant requested reconsideration on 10 March 2020. The claimant indicated that on a "Google" search of her name, detrimental information appeared from the search, which had she screen shot at [56], she claimed that this caused her harm.

10. On 6 May 2020 the Tribunal sent out a letter for the anonymisation reconsideration to be listed for hearing and on 9 October 2020 a listing order was sent out. Subsequently the claimant applied for a remote hearing, which was granted by Regional Employment Judge Franey in the circumstances of the Covid 19 pandemic.

HEARING ON 26TH OCTOBER 2020

11. The reconsideration hearing has therefore been a hearing, taking place on a remote platform by Cloud Video Platform. The ground rules were established at the outset and as all parties were working from electronic bundles, the parties were asked to deal with matters at a slow pace.

12. The claimant was asked if she required any adjustments to this process and she did not, as long as she could indicate if a break was required, which had been confirmed by the Tribunal and all parties were asked for patience if the technology meant someone dropped out and was joined back in. This did happen during the hearing to the claimant but the hearing was paused to allow her to join back into the hearing.

SUBMISSIONS OF EACH PARTY :CLAIMANT

13. The procedure at this hearing, which the Tribunal adopted, was to hear submissions of the claimant and the respondent. The burden of establishing that anonymity should be applied is on the claimant. The respondent takes a neutral position. The Tribunal had a bundle of documents and the authorities referred to above.

14. The claimant submitted that the publication of the judgment had prevented her from getting another job. She had "Googled" her name and she believed that it was this that had prevented her from going further in getting another job; in that, future employers, would Google search her name and find some details from the judgment and then they would not employ her.

15. She felt that she was being "sent backwards" by the judgment being published online on the gov.uk Employment site and she didn't want to go backwards. She said that Article 8 ECHR was engaged because the judgment quoted from her medical records and she felt that Article 8 had been breached and she was upset about that. The Tribunal clarified that she was talking about paragraph 7 and 8 on page 44 of the 31 May 2019 judgment.

16. She said she did not feel the impact until afterwards, so she had not checked the site straightaway, but had screenshot the Google search as on page 56.

She felt that prospective employers who were skilled in recruitment when she approached them were using the Google search as part of their investigations.

17. She said she had asked Google to remove information but that they relied on publishing the judgments as being information publicly available.

18. The tribunal specifically asked how she could rely on the Google search assertion to conclude that that was the reason she was not given employment- as there was evidence a contract for a job offer was being withdrawn after a bad reference had been supplied, and it seemed given that, the conclusion did not seem to gel with the claimant's conclusion arising from information online. The claimant indicated, " It could have been a bit of both." The Tribunal understood the claimant to mean the bad reference as well as the information on line.

19. The claimant also had a further period of sickness. The claimant said she had a doctor's sick note for some period of the time since the judgment.

20. The tribunal enquired about the delay between the judgment being published- June 2019 and the application for anonymity in November 2019.

21. The claimant asserted that she didn't carry out a Google search immediately it was after she had "great feedback" on her CV but no further offers, that she started to wonder why and to search.

22. It transpired that the claimant did in fact secure a short-term contract, which she told the tribunal about on further inquiry; this was at a local authority towards the end of 2019 this lasted for a period of two months. Significantly the claimant had been able to obtain this employment.

RESPONDENT

23. Mr Chegwin for the respondent confirmed to the Tribunal on a Google search that the screenshot as in the claimant's documents did still appear as at this hearing, when a search was carried out. Mr Chegwin on behalf of the respondent took a neutral stance as set out in the respondent's letter [51-52]. He drew to the Tribunal's attention the general work of the respondents' organisation as to be clear the respondent is the Commission for Equality and Human Rights and he referred to Article 10 ECHR as well as Article 8.

24. Mr Chegwin invited the Tribunal's attention to [54] of the claimant's letter and submitted that in relation to the hearing on 31 May 2019 there was a public hearing, and the Tribunal could not be a breach of GDPR regulations. He submitted there is no power to alter the publication by making redactions and that anonymisation would be less interference.

25. He referred the Tribunal to Rule 50 of the Employment Tribunal (Constitution and Rules of Procedure Regulations 2013. Rule 50 provides:-

"50. Privacy and restrictions on disclosure

(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.

26. He submitted that the ECHR Articles at play are Article 10, Article 6 and also Article 8 and particularly the tribunal needed to have regard to what was necessary. In respect of Article 8 he pointed out that it was a qualified right to respect for private life and as such there would have to be a balance with open justice.

27. Considering Article 10 rights he referred to paragraph 34 page 160 of Khuja v Times Newspaper Limited and others [2017] UKSC 49

"34. In my opinion, Tugendhat J committed no error of law, and his conclusion was one that he was entitled to reach. Left to myself, I might have been less sanguine than he was about the reaction of the public to the way in which PNM featured in the trial. But that would have made no difference to the conclusion, for the following reasons:

(1) PNM's application is not that the trial should be conducted so as to withhold his identity. If it had been, the considerations urged by Lord Kerr and Lord Wilson in their judgments in this case, might have had considerable force. But it is now too late for that. PNM's application is to prohibit the reporting, however fair or accurate, of certain matters which were discussed at a public trial. These are not matters in respect of which PNM can have had any reasonable expectation of privacy. The contrast between this situation and the case where a newspaper responds to a tip-off about intensely personal information such as a claimant's participation in private drug rehabilitation sessions could hardly be more stark.

(2) That is not the end of PNM's article 8 right, because he is entitled to rely on the impact which publication would have on his relations with his family and their relations with the community in which he lives. I do not underestimate that impact. There is force in the judge's observation that the public nature of the trial, combined with the notoriety of the case, especially in the Oxford area, means that some people will know of the allegations about PNM in any event. But whether that be so or not, the impact on PNM's family life of what was said about him at the trial is no different in kind from the impact of many disagreeable statements which may be made about individuals at a high profile criminal trial. A defendant at such a trial may be acquitted, possibly on an issue of admissibility, after bruising disclosures have been made about him at the trial. Within the limits of professional propriety, a witness may have his integrity attacked in cross-examination. He may be accused by other witnesses of lying or even of having committed the offence himself. All of these matters may be exposed in public under the cloak of the absolute immunity of counsel and witnesses from civil liability, and reported under the protection of the absolute privilege from liability for defamation for fair, accurate and contemporaneous publication. The immunity and the privilege reflect the law's conviction that the collateral impact that this process has on those affected is part of the price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public. "

28. This is a decision of the Supreme Court and concerns considerations regarding the request for anonymisation in criminal case. He drew a parallel of that being an application after the event, rather than before the hearing and publicity, and the consideration of whether the claimant could have had any expectation of privacy in those "after the event" circumstances.

29. He drew attention to the fact that the claimant was represented at the beginning of the application before May 2019 by Kuits solicitors, that this was a disability discrimination case and therefore the fact that the claimant's ill health would be under consideration was known throughout that time and he submitted that it was relevant to the main hearing that no application was made at any time by Kuits on the claimant's behalf for privacy or other restrictions on publicity.

30. Further he reminded the Tribunal that the claimant had a McKenzie friend with employment tribunal experience present to assist her on the date of the hearing. The substance of the consideration of the Tribunal was amendments to the ET1 and the reason for the late amendment was said to be due to the claimant's health. She was aware of what was going to be put forward and indeed she provided letters containing medical information for the Tribunal to read and consider to put across a case relating to reasons for the late amendments.

31. It was not until 5 to 6 months later that she gave any thought to anonymisation. The Tribunal gave an extempore judgement on the 31st May and the publication took place on 7 June the claimant was therefore aware at the latest by 7 June that issues relating to her disability would be publicised.

32. The Tribunal asked Mr Chegwin to consider whether it was significant that the Khuja case considered a criminal matter where the anonymity sought related to an alleged criminal defendant whereas this was an Employment application for anonymity. He submitted that should be part of the balancing of factual matters.

33. He submitted there could be no expectation of privacy here as the hearing was in public.

34. It was necessary to consider whether there should be a derogation from the principle of open justice and whether or not the claimant had demonstrated harm as the burden of proof was on her. He referred to the tribunal to the Fallows case and in particular paragraph 48,

> "48 The authorities to which both I and the employment judge were referred, including **In re Guardian News and Media Ltd [2010] 2 AC 697, A v British Broadcasting Corpn (Secretary of State for the Home Department intervening) [2015] AC588, In re S (AChild) (Identi_cation: Restrictions on Publication) [2005] 1 AC 593 and Global Torch Ltd v Apex Global Management Ltd [2013] 1 WLR 2993**, emphasise the following points of relevance to this appeal:
> (i) That the burden of establishing any derogation from the fundamental principle of open justice or full reporting lies on the person seeking that derogation. It must be established by clear and cogent evidence that harm will be done by reporting to the privacy rights of the person seeking the restriction on full reporting so as to make it necessary to derogate from the principle of open justice.
> (ii) Where full reporting of proceedings is unlikely to indicate whether a damaging allegation is true or false, courts and tribunals should credit the public with the ability to understand that unproven allegations are no more than that. Where such a case proceeds to judgment, courts and tribunals can mitigate the risk of misunderstanding by making clear that they have not adjudicated on the truth or otherwise of the damaging allegation.
> (iii) The open justice principle is grounded in the public interest, irrespective of any particular public interest the facts of the case give rise to. It is no answer therefore for a party seeking restrictions on publication in an employment case to contend that the employment tribunal proceedings are essentially private and of no public interest accordingly.
> (iv) It is an aspect of open justice and freedom of expression more generally that courts respect not only the substance of ideas and information but also the form in which they are conveyed."

35. Mr Chegwin invited the Tribunal to consider whether there was clear and cogent evidence that harm will be done and contended that the claimant's reference to personal details at page 49 was a wish rather than cogent or clear evidence. He also referenced the fact that the claimant believes that she has been harmed although in fact the refusal of confirmation of one job offer related to a poor reference and she accepts she has also managed to obtain

other employment. It was therefore submitted that there was no evidence that the publication of the judgment had necessarily caused harm.

36. In respect of granting of anonymisation he referred to the balancing exercise as at paragraph 49 on page 130

49 "As for the balancing exercise itself, Lord Steyn described the exercise to be conducted in **In re S (A Child)**, paragraph 17 as follows:
"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."

37. Mr Chegwin asserted that the tribunal would have to consider firstly whether the right to private life was engaged, secondly whether the claimant had established with clear and cogent evidence that harm had been done or could be done and whether it was necessary to interfere with article 10 if the tribunal considered anonymisation appropriate. The Tribunal would also have to consider the position of the respondent also.

38. On request for assistance in relation to the decision in X v Y, Mr Chegwin submitted that this was a fact sensitive case given the transgender element that was present, although he accepted that mental health issues were part of the decision but perhaps most significantly in that case, the claimant had not been present at the tribunal hearing and had acted promptly to seek to restrict publicity.

39. The Claimant indicated that she didn't see the relevance of some of the authorities. The tribunal explained that decision-making was based on principles elicited from previous cases and application of the Judge's discretion on the facts of this case.

LEGAL PRINCIPLES

40. The tribunal considered rule 50 as set out in paragraph 25 above and the relevant Articles of the European Convention on Human Rights, set out below.

ARTICLE 6 Right to a fair trial:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests 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."

ARTICLE 8
Right to respect for private and family life
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 interestsof national security, public safety or the economic wellbeing 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."

ARTICLE 10
Freedom of expression
1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to 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."

41. The Tribunal had regard to the authorities listed previously in paragraphs 6, 7 and 8. The Scott case was an old divorce case reported in 1913 still quoted in the more recent authorities.
In Khuja, a criminal case, the tribunal took consideration of page 144 paragraph 12 where the principle of open justice may involve "painful and humiliating matters" but that does not justify privacy in itself.

12. With limited exceptions, the English courts administer judgment in public, at hearings which anyone may attend within the limits of the court's capacity and which the press may report. In the leading case, Scott v Scott [1913] AC 417, public hearings were described by Lord Loreburn (p 445) as the "inveterate rule" and the historical record bears this out. In the common law courts the practice can be dated back to the origins of the court system. As Lord Atkinson observed in the same case at p 463, this may produce inconvenience and even injustice to individuals:
"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."

42. In Ameyaw v PWC Services a decision of Her Honour Judge Eady QC as she then was, the Employment Appeal tribunal dismissed the claimant's appeal against the Tribunal decision. The decision was as follows:-
"The ET had correctly held that it had no power to exclude or remove a Judgment from the public Register. By Rule 67 of the ET Rules, it was required that, subject to Rules 50 and 94, every Judgment and document containing Written Reasons for a Judgment was entered on to the public Register. Although the ET could decide not to enter Written Reasons for a Judgment in a national security case

(Rule 94), there was no corresponding power under Rule 50.
The real issue raised by the appeal was whether the ET had properly exercised its discretion in refusing to make an Anonymity Order under Rule 50. The Appellant had contended that such an Order was necessary to protect her Article 8 ECHR rights. Her application related, however, to a Judgment reached after an open Preliminary Hearing at which the ET had considered an application to strike out the Appellant's claims on the basis of her conduct at an earlier (closed) Preliminary Hearing. The matters to which the Appellant objected had, therefore, been the subject of discussion at a public trial of the strike out application; Article 8 was not engaged - the Appellant could have had no expectation of privacy in that regard. Even if that was wrong, it was for the ET to carry out the requisite balancing exercise (see Fallows and Others v News Group Newspapers Ltd [2016] ICR 801 EAT) and, in the particular circumstances of this case, it had been entitled to take the view that the principles of open justice and the interests arising from Articles 6 (fair trial) and 10 (freedom of expression) were not outweighed by the Appellant's interests under Article 8 ECHR such that there should be any restriction on publicity under Rule 50."

43. In the X v Y case, anonymity was granted to the claimant but this was a case regarding gender reassignment taking place where there was no consent from the claimant to publicity, as he was not present at the hearing and was not represented by a person who was legally qualified (he was represented by his father) and although no rule 50 application was made at the hearing it was made very shortly afterwards.

44. L V Q Limited 2019 EWCA Civ 1417, a Court of Appeal decision dealt with removal of a judgment from the register in circumstances where there was already an anonymisation of the parties and witnesses in the judgment.

CONCLUSION

45. The original substantive claim before the Tribunal related to alleged disability discrimination. The claimant was seeking amendment to plead a dismissal relating to public interest disclosure / automatic unfair dismissal. To evidence the reasons for delay and for not including such claims the material with which the claimant was concerned, was reference to sensitive information within medical records/ letters, which the claimant relied on adduced by her and her McKenzie friend at the hearing in May 2019.

46. There is plainly a tension between the right to privacy of that information and the claimant relying on it at a public hearing and not seeking to indicate she regarded it as private and wished to keep it as so. There is in fact a matter of very few lines in the totality- in relation to one paragraph on page 46 there are three lines and in the next paragraph five to seven lines that are objected to and it is from this base line that the claimant now seeks an anonymised judgment.

47. Given the information was made public by the claimant at the hearing, although medical information may usually be seen as private information, it may not be the case that the claimant is entitled to privacy, having elicited the same in a public hearing and not sought to prevent publication at the time. The tribunal relies on the judgement of Lord Steyn in Re S quoted above repeated in Fallows on page 130. It is the case that that material has been

available since June 2019 no application was made in July when the claim was withdrawn before Employment Judge Warren and there could better be an expectation of privacy considering the immediacy. It is arguable therefore that Article 8 is not engaged.

48. If given the sensitivity of the material it is considered that Article 8 is engaged, it is now several months down the line. Further the claimant has to satisfy the Tribunal as to risk of harm or causation of harm. The Tribunal cannot conclude that she has suffered harm in being prevented from obtaining further work by future employers Google searching for this judgment. In fact on the contrary on her own submission she has found work - a short-term contract with a local authority. Further she has had a job offer which was rescinded due to a reference, which was negative, which would not therefore be because of the judgment. In the circumstances the tribunal has not been provided with clear and cogent evidence of harm or risk of harm.

49. The Tribunal went on to consider proportionality in this matter, the claimant did not make any application in May 2019 regarding privacy, that is not fatal but she had the opportunity to make a further application when she withdrew her claim in July 2019 before Employment Judge Warren but that did not happen, unfortunately there has been a significant delay and it is now some months later. There is some personal information, which is recorded in the judgment, however it is no way as significant as the information in X v Y.

50. The Tribunal takes into account the claimant was represented at first by solicitors, then by a McKenzie friend at the May 2019 hearing and there was no application then or in early course after having made all the facts public. Carrying out the balance at this stage now in October 2020 in reconsideration of a previous refusal to grant anonymisation dealt with on paper, and in the knowledge that the public hearing was held back in May 2019 the Tribunal considers it neither necessary nor proportionate to grant an anonymity order at this juncture.

Employment Judge Grundy
Date 22 December 2020

JUDGMENT SENT TO THE PARTIES ON
31 December 2020

FOR THE TRIBUNAL OFFICE