Appeal No. UKEAT/0036/20/AT

EMPLOYMENT APPEAL TRIBUNAL

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

27 May 2020

Before

HIS HONOUR JUDGE AUERBACH

(IN CHAMBERS)

MISS A CHRISTIE APPELLANT

(1) PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
(2) MR D LAKHDHIR RESPONDENTS

JUDGMENT

(DECISION IN CHAMBERS)

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HIS HONOUR JUDGE AUERBACH

1. The Appellant is a lawyer and former employee of the First Respondent law firm. The Second Respondent is a partner in that firm. Following her dismissal the Appellant presented multiple claims to the Employment Tribunal ("the Tribunal"), including sex discrimination and harassment. The claims are defended. The matter is listed for trial opening on 22 June 2020.

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2. At a Preliminary Hearing ("PH") on 19 December 2019 the Tribunal (Employment Judge Glennie) made anonymisation Orders pursuant to Rule 50 **Employment Tribunals Rules of Procedure 2013**. These were that (a) the names of a particular corporate client of the First Respondent and a particular individual (from that client) "shall be redacted from the Claimant's witness statement and the 2 pages in the trial bundle in which they appear"; (b) "in the hearing the client and the individual shall be referred to as 'A' and 'Mr L' respectively".

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3. The Appellant appealed against those Orders. I considered the Notice of Appeal on paper and, in particular because certain aspects were not then clear to me, directed that there be a Preliminary Hearing. Subsequently, on account of lockdown restrictions, the EAT became unable to conduct that hearing in person. In light of submissions, in particular, about the Appellant's ability to participate in a remote hearing, I then directed that the question of whether the matter should proceed to a full appeal hearing be considered on paper.

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4. That consideration was undertaken by Kerr J, who directed a full appeal hearing. His Orders and Reasons were sent to the parties on 29 April 2020. In view of the impending trial in the Tribunal, he directed an expedited hearing, if possible.

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5. A full bundle and detailed submissions had been tabled for the purposes of Kerr J's decision. At point 4 of his Order he directed that within 14 days "the Respondents must either elect to rely on their written submissions filed for the purpose of the preliminary hearing or lodge with the Employment Appeal Tribunal and file an Answer …".

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6. On 13 May 2020 the Respondents' solicitors wrote to the EAT. They stated: "For the reasons set out below the Respondents do not oppose the appeal and propose that the Decision be remitted to the Employment Tribunal for fresh consideration, where the Respondents intend to renew their application, and invite the EAT to make an Order to that effect." They then set out various submissions. Having referred to the background of the implications of lockdown, and the desirability of expedition, they also suggested that, in view of the approach that they had taken, "the EAT could consider dealing with this appeal on the papers".

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7. On 17 May 2020 the Appellant replied to the Respondents' solicitors' submissions and made submissions of her own, in particular, opposing the proposal that the matter be remitted on the basis that the Respondents intended to renew their application before the Tribunal. As requested in her Notice of Appeal, she invited the EAT to substitute its own Order.

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8. The Appellant also submitted that, as the Respondents had not filed an Answer, all the outstanding issues should be determined upon consideration of her submissions alone. I see the force of that in relation to the question of whether to allow the appeal on its merits. While correctly noting that the EAT will not allow an unopposed appeal unless satisfied that it is appropriate to do so, the Respondents have stated clearly that the appeal, as such, is not opposed. Further, they have neither submitted an Answer, nor taken the alternative step allowed by Kerr J of indicating that they wish to rely on their previous written submissions.

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9. However, while a Respondent that fails to submit an Answer (or a timely one) may be debarred, that is not automatic. Further, the Respondents' solicitors have, within the timescale set by Kerr J, set out their position regarding next steps if the appeal is indeed allowed, which in practice feeds in to the merits; and they have also referred to a procedural issue which I consider I ought to address. Further, the Appellant has had the opportunity to respond to all the Respondents' submissions, and has done so. So it is fair to both sides that I consider them.

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10. The procedural point is this. The PH on 19 December 2019 was audio-recorded, and a transcript, including of the oral decision given by the Judge, was provided to the EAT. However, the Respondents have argued that the appeal was not properly instituted, as written reasons had not been requested or furnished to the EAT with the Notice of Appeal. As to that Kerr J said: "I reject the Respondents' technical point that the written reasons of the Employment Judge are not available. The transcript shows what the Judge's reasons were. The transcript is in writing. It contains the Judge's reasons in written form."

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11. In their letter of 13 May 2020 the Respondents' solicitors, however, maintain their position. They submit that this point relates to a jurisdictional requirement of the EAT's Rules, and is of substance, because written reasons are "the product of drafting and consideration with the benefit of additional time for reflection and articulation."

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12. I do not consider that this aspect presents any obstacle to my considering, and determining, this appeal. That is for the following reasons. First, the appeal was accepted by the EAT as properly instituted, and this point was considered, and ruled upon, by Kerr J for the purposes of his decision. His ruling stands. Secondly, in any event, I respectfully agree with it. I add two observations to his. The first is that this is an appeal against an Order of the Tribunal,

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and, pursuant to Rule 3(1)(e) **Employment Tribunals Rules of Procedure 1993**, a copy of the Tribunal's written reasons are only required to accompany the Notice of Appeal, "if available." The second is that, at the PH itself, the Judge indicated that, after a break, he would give an oral decision, and observed "…if there is a request for [his reasons] in writing, obviously that will follow. In any event, as we know, they are being transcribed." That suggests that, on this occasion, the Judge was comfortable not only to give an oral decision, having gathered his thoughts, but for the transcript of it thereafter to be referred to.

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13. I turn to the substance of the appeal. Numbers in brackets refer to the page and line numbers of the transcript of the PH before the Tribunal.

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14. In her witness statement for the Tribunal proceedings the Appellant refers to an annual event involving people from both the First Respondent and the client concerned, including the individual concerned. She alleges that the individual concerned behaved badly, including making inappropriate remarks to her, and that he followed up after the event with an inappropriate emailed invitation. It is her case that she raised this with the Second Respondent and a colleague, but was warned not to do anything to offend the individual client. It is also her case that this influenced her not being invited to the same event the following year. That passage in her statement, and that email, are the material to which the Tribunal's Order relates.

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15. At the PH before the Tribunal (which the Appellant did not attend) a number of matters were considered. In the course of the opening discussion the Judge observed [7/14-16]:

> **"As far as anonymisation of the client is concerned, there is now a pretty regular practice of anonymising, in the Tribunal's reasons at least, references to people who are not parties or witnesses. That, as I am sure those present are aware, comes about because the judgment and reasons go on the Tribunal's website. So if you do a Google search against someone's name, it will turn up, or may turn up, a link to a tribunal hearing. And people don't particularly want that. So there is, certainly in my case, and I think more generally than that, a practice of anonymising third parties in those terms in any event."**

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16. In his oral submissions, counsel for the Respondents referred the Tribunal to the relevant material and to the *Harvey* commentary on Rule 50. He continued [13/20 – 14/19]:

> **"So putting it very briefly, as you will know, the default position is that justice should be open justice. Names of parties, witnesses and others, should be used rather than anonymised. That principle may be outweighed if the rights of others under the European Convention on Human Rights may be infringed, for example the right to privacy, which they would be in the case of allegations about misconduct or of the type that is described in paragraph 136 of the claimant's witness statement. And it is a matter for you, sir, to weigh up the relative interests of open justice against the interests of those third parties, including the corporate entity, as to whether there is a sufficient interest in either allowing the names to be used or not. In the circumstances of this case, I would respectfully submit that there is every reason why the names of the individual and of the client ought not to be used, that they ought to be referred to anonymously. It is not in any way going to impact on the ability of the claimant to bring her claim. It is only a small aspect of the case. And there is no legitimate public interest in the names being published relating to these allegations. I have put that in very summary terms, but those are the three reasons."**

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17. In his decision, the Judge cited Rule 50, including Rule 50(2), which provides:

> **"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."**

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18. After describing the material to which the application related, he said [25/24 – 27/21]:

> **"The starting point is that indicated in Rule 50, of open justice. And it is important to have in mind the need for justice to be conducted in public and for there to be the ability for the press to report freely on the proceedings of the tribunal.**
>
> **I have to balance that important consideration against the Article 8 rights of third parties to litigation and the right to privacy.**
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> **As I have said, I take account of the importance that tribunal proceedings should be conducted openly and with the opportunity to report them openly.**
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> **Against this, I take into account that the company and the individual are not parties to the case, or even witnesses. They are referred to in the evidence.**
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> **Secondly, anonymisation in the way that is sought would not impede the claimant in presenting her case. It is a small element of her case, this particular incident. It is mentioned once in the claimant's witness statement of 253 paragraphs and, as I have said, it appears in two pages of the bundle of documents, which runs to something over 700 pages.**
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> **Thirdly, there is, I find, no particular public interest in knowing who it might be or which company it might be that was involved in this particular incident. These are not, as I find, public figures in any sense. And it is important, in my judgment, that the Article 8 rights of the individual, and indeed of the company, should be borne in mind.**
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> **Carrying out that balancing exercise, I find that it is necessary in the interests of justice and in order to protect the third party's Article 8 rights, to make an order that will ensure that the names are not disclosed in the course of the public hearing.**
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> **These will be, then, an order that the names of the company and the individual should be redacted from the two pages on which they are referred to in the bundle and from the claimant's witness statement where they appear in paragraph 136.**
>
> **Secondly, I will order that the company and the individual should be referred to by letters in the course of the hearing. What letters can be identified in a moment, but that their names should not be given, that there should be reference to them by way of letters or initials.**

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Beyond that, and as to how the individual and the company may be referred to in the tribunal's judgment and reasons, I leave it to the tribunal hearing the case to decide on that."

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19. The EAT has considered the correct approach to Rule 50, and the pertinent guidance in a number of other authorities, more than once in recent years. I refer the reader in particular to the authoritative guidance of Simler P (as she then was) in **BBC v Roden** [2015] ICR 985 and **Fallows v News Group Newspapers Limited** [2016] ICR 801. I do not need to repeat it all.

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20. I am mindful that the conduct of the balancing exercise required of the Employment Tribunal in relation to such applications is treated as analogous to the exercise of a discretion. The EAT may therefore only interfere if there was an error of principle, or the Judge reached a

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decision that was plainly wrong or outside the ambit of conclusions reasonably open to him. (See **Fallows** at [51]). I have concluded that this is such a case. My reasons are as follows.

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21. The Judge correctly reminded himself that the starting point was the principle of open justice, and of the provisions of Rule 50(2). He was right, as such, then to consider whether the Article 8 rights of the company or the individual concerned were engaged. The Tribunal had to

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give proper consideration to that, notwithstanding that neither is a party or a prospective witness, and notwithstanding that the application had not come from them.

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22. However, there is no actual critical or fact-specific consideration in the decision of whether, on the facts, the Article 8 rights of either the individual or the company were engaged in this case, or, if so, how, and to what degree or in what way they might be infringed by a refusal of the Orders sought. That, alone, is an error, because the Judge as a result did not identify, for

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the purposes of the detailed and specific balancing exercise that he needed to conduct, what aspects might go into the scales on their side, and what weight they should carry.

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23. The Judge's remarks at the start of the PH are also troubling in this respect. In some cases there may be a concern that the name of a client or customer of the employer should be anonymised, because confidentiality attaching to the client's affairs, privileged advice, or, sometimes, even the fact that the client was a client at all, might otherwise be compromised. But no such concern or argument was raised in this case.

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24. The Judge identified three other considerations that he regarded as relevant. I can take the first two together. They are that the company and the individual were not parties or witnesses; and that these allegations were a small element in the case. The point implicitly being made here is that the infringement of the open justice principle involved in granting the Order sought would be a relatively small one. If so, I agree that the degree of infraction of the open justice principle that might be involved in a particular case is, in principle, a relevant consideration. However, in this case again there is a lack of critical analysis of how this should weigh in the scales. In particular, no consideration was given to the fact that the Claimant's case was (plainly) that the alleged conduct of the individual was related to sex, and that the Respondents reacted inadequately, indeed adversely, when the matter was raised with them.

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25. The third aspect is that the Judge stated that there was no particular public interest in knowing the name of the company or the individual, who were not public figures in any sense. But the fact that an individual is not a public figure does not mean that anonymising them involves no derogation from public justice; and, again, the public interest in a dispute about whether the Respondent put protection of client relations above the interests of an employee in a matter related to sex, appears not to have been considered. So, again, the Judge did not calibrate the weight to be attached to it, in the scales of the balancing exercise.

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26. For all of these reasons I am therefore satisfied that the Tribunal did err, and that this appeal should be allowed.

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27. I turn to the question of whether I should substitute my own decision, or remit the matter to the Tribunal. In accordance with **Jafri v Lincoln College** [2014] ICR 920 I should remit unless I am in as good a position to take the decision as was the Tribunal, *and* I am satisfied that, applying the law correctly, only one outcome is possible.

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28. The Respondents' solicitors submit that the matter is fact sensitive. No facts have yet been found by the Tribunal. The careful balancing exercise that is called for needs to be carried out by the Tribunal itself. The matter should be remitted so that they can renew their application before the Tribunal.

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29. I do not agree. My reasons follow.

30. On the first aspect, the correspondence in the run up to Kerr J's decision, in a further exchange on 28 and 29 April 2020, which came too late for consideration by him, and now in the exchanges of 13 and 17 May 2020, does canvas a number of factual disputes. But these are largely about matters to do with the substantive issues in the case. What I have to consider is whether I have as good a picture as the Tribunal did, of the facts that are material to the Rule 50 application, and whether any further fact finding is needed in order to resolve that application.

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31. In this respect, I have all the factual material that was available to the Tribunal. I have a copy of the Claimant's witness statement, and the email that the individual sent to her. I know what her case is about the significance of this material, and that it is factually disputed. There is

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no dispute that no witness statement or other factual evidence pertinent to the Rule 50 issue was put before the Tribunal by the Respondents. Thanks to the transcript I can see precisely what oral submissions were made, and to what material in *Harvey* the Tribunal was referred. Importantly, I can see that it was not invited to find any additional facts, or draw any particular factual inferences, relevant to the Article 8 aspect, and it did not do so.

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32. There is an issue in the correspondence and submissions up to date, about one aspect which the Claimant argues in her Grounds of Appeal is relevant to the anonymity issue, being the degree to which the names are already in the public domain. However, on a careful reading, it appears to me that the material facts are not disputed. There is no dispute that the names were at least referred to by the Claimant at an open Preliminary Hearing in which the individual's email was in the bundle, and at which one person was observing; and that the email has been exhibited to a tweet posted by a friend of the Claimant. I should note that it is not clear to me whether this is an aspect of which the Judge was in fact made aware. But in any event the dispute of substance is about the significance of these facts for the anonymity issue.

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33. I turn to the question of whether, on the facts, evidence and material presented when the application was considered and determined, there was only one legally correct answer. I remind myself once again in this context, of the discretionary nature of the balancing exercise.

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34. The starting point is the principle of open justice. The fact that the making of an anonymisation order would not prevent the Claimant from advancing her case, as such, before the Tribunal is not to the point. The making of such an order would involve a derogation from the open justice principle. In relation to the overall issues in this case, it would, on any view, be at the lower end of a scale of possible derogations. But on any view it would still be a material

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derogation. That is because, notwithstanding that the individual and the company are not well-known to the public, the allegations against the Respondents to which they relate do, on any view, pass the threshold of being a matter of legitimate public interest. Further, whilst the Respondents have made the point that these specific allegations are not mentioned in the particulars of claim, and assert that they are not relevant, they do form part of what the Claimant says is the material background and context; and the Tribunal was not (and, as far as I am aware, has not been) asked to exclude this material entirely, on grounds of relevance.

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35. On any view, therefore, this material should not be anonymised, unless it could properly be concluded that there is a countervailing interest that anonymisation would protect, and which should carry greater weight. The only contention raised by the Respondents was that Article 8 was engaged, both in relation to the company and the individual. But the Tribunal was presented with neither evidence, nor fact-specific argument, either to support the contention that Article 8 was engaged at all, or as to the degree or seriousness of infraction of Article 8 rights that would, or might, occur were the anonymisation Order not to be made.

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36. What information did the Judge have? As I have noted, there was no suggestion that the client relationship was, itself, confidential, nor that any confidential material relating to the affairs of the client or the Respondent was at risk. The alleged conduct of the individual prior to the email took place at a joint firm/client event. Whilst this was, one may infer, not open to the public, it is difficult to see how those allegations, by reason of the setting or context alone, engaged the Article 8 right. The email which followed was sent from a personal address, but it was to a work connection; and, again, I am doubtful as to whether the context, as such, in this particular case crossed the Article 8 threshold. No argument was advanced as to why the Article 8 rights of the company were engaged. I struggle to see how they would be.

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37. On the Claimant's case, the individual's alleged behaviour at the event, included the making of remarks of a sexist nature, and it is her case that the email amounted to an inappropriate advance. But it is not suggested that the individual revealed anything of an intimate nature about himself or his personal life. There was no other evidential material before the Tribunal about the individual's private or family life, beyond (on the Claimant's case) the fact that he is married, and some (alleged) remarks made by the colleagues to whom she says she reported the matter, about his reputation in such matters. Plainly there is a risk of embarrassment, but Article 8 does not exist to protect against that; and risk to reputation may be protected, only in a context which properly belongs within the Article 8 domain (such as damage to reputation within a particular community in private life).

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38. I am mindful that the company and the individual were not represented before the Tribunal, nor have they been before the EAT. But I have carefully reviewed not only the arguments advanced to the Judge, but those advanced by the Respondents' solicitors in the course of the litigation in the EAT, both in formal written submissions and in correspondence. There is no other dimension to that Article 8 aspect that I can see that has been raised, or that there is reason to suspect might be in play.

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39. I conclude that, fully respecting the nature of the balancing exercise, it would not be properly open to the Tribunal, were the matter remitted to it to take the decision again, properly applying the law, to conclude that Article 8 rights of either the individual or the company were both engaged, and carried such weight, as to justify the derogation from open justice that granting the anonymity Order in this case would, on any proper view, involve.

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40. It follows that the argument about the significance of the existence of the tweet, or what occurred at the earlier open PH in the Tribunal, could not materially impact the outcome in this particular case. The Respondents fairly submit that it is established that the mere fact that allegations, or information, and who they are about, have, to *some* degree, or in *some* media, entered the public domain, will not *automatically* defeat a claim for an Order conferring anonymity to protect Article 8 rights. But, in this case, it follows that, in my judgment, even had the tweet and the open PH not occurred, the Tribunal could not properly have concluded that there was a sufficiently strong Article 8 case to justify the making of the Order.

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41. For these reasons I conclude that, had the Tribunal correctly applied the law to the application which was presented to it, the only proper outcome would have been to refuse it. I will therefore quash the Orders that the names be redacted in the relevant paragraph of the Claimant's witness statement for the forthcoming trial, and the relevant pages of the trial bundle; and that the company and individual concerned be referred to by ciphers during the trial. The application will not be remitted for further consideration.

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42. There are two closing points to address.

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43. First, I note that the Respondents' solicitors invited me, in the event that I allowed the appeal but remitted the matter to the Tribunal for reconsideration, to make a temporary anonymisation Order to hold the ring until that reconsideration could take place. But, as I have not remitted the matter to the Tribunal for reconsideration, that application (and it is the only one of its kind before me) falls away.

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44. Secondly, the Orders that the Tribunal made, that I have quashed, relate to the contents of a witness statement prepared for the purposes of a forthcoming trial at which it is anticipated that the witness (the Claimant herself) will, in fact, be called to give evidence, and of a document contained in a bundle prepared for the purposes of that trial. The parties are reminded that there is a body of authority concerning when or how the contents of statements or bundles prepared for a trial, are or not to be treated as having entered the public domain.

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