Case No: EA-2020-SCO-000067-DT
(Previously: UKEATS/0020/20/DT)

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 13 October 2021

Before :

THE HONOURABLE LORD SUMMERS

- -

Between :

A	**Appellant**
- and -	
BURKE AND HARE	**Respondent**

- -
- -

MS C LORD (instructed by UNITED VOICES OF THE WORLD) for the **Appellant**
BURKE AND HARE (written submissions) for the **Respondent**

Hearing date: 29 June 2021

- -

JUDGMENT

SUMMARY

Topic 8 - PRACTICE & PROCEDURE

In this claim A sought an anonymity order. She had worked as a stripper and did not wish her name to be published in any judgement dealing with her claim for holiday pay arising from her work as a stripper. **Held** that the principle of open justice required her name to be published. While there was evidence that strippers were stigmatised, that alone did not justify an anonymity order. The EAT accepted that more serious harms such as verbal abuse and the threat of assault would have justified an order but on the evidence it had not been established that she had a reasonable apprehension of such matters. She no longer worked as a stripper and it was not possible to identify circumstances where these serious harms might occur. In any event the chances that the publication of a judgement on the internet register of judgements would lead to such harms was remote. **Held further** that the interest in open justice was at its strongest when evidence was given and applied less strongly at a preliminary application designed specifically to deal with the question of anonymity. Where the Claimant indicated she did not intend to pursue her claim further if a general order was refused, the application was granted in relation to the judgement of the EAT on the question of anonymity alone.

THE HONOURABLE LORD SUMMERS**:**

Introduction

1. This case comes before me on appeal from the Employment Tribunal (hereafter the "ET") in Edinburgh. The legal issue raised by the appeal is whether in the circumstances of this case an anonymity order should have been pronounced so as to protect the identity of the Claimant. The Employment Judge (hereafter the "EJ") refused to pronounce an anonymity order. His judgment refusing the application is dated 26 May 2020. The EJ was asked to reconsider and fresh representations were made to him. On 3 August 2020 he declined to reconsider his decision. No appeal is taken against that decision.

2. The Claimant invited me to allow the appeal and grant an anonymity order. At sift Griffiths, J granted an anonymity order *pro tem* so that the Claimant's identity was protected until the resolution of this appeal. The order designated the Claimant as "A". The Claimant submits that I should allow her appeal and make the order pronounced by Griffiths, J's permanent. The Claimant submitted that if I was against her I should grant an anonymity order but restrict it to the judgements issued in the determination of her application for anonymity.

3. The Claimant was represented by Ms Lord. She was instructed by the Claimant's Trade Union, United Voices of the World. Ms Lord represented the Claimant at the Preliminary Hearing where the application for an anonymity order was disposed of. She appeared in person at the Employment Appeal Tribunal (hereafter the EAT). Ms Lord acted pro bono. I am grateful to her for her assistance. The Respondents did not appear at the EAT. They did however oppose the application. They lodged two Skeleton Arguments setting out their grounds of opposition.

The Law

4. In deciding the application the EJ had regard to the terms of Rule 50(1) of the **Employment Tribunals Rules of Procedure 2013**. It enables an anonymisation order to be pronounced if it is -

> **…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".**

5. The Claimant submits that an anonymisation order is necessary to protect her Convention right to privacy under article 8 of the **European Convention on Human Rights** (hereafter **ECHR**). Article 8 reads 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.**

Reference was also made to article 6 which provides –

> **1. In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing … 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 the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.**

Article 10 provides –

> **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 …**
>
> **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.**

6. Although article 10 figures prominently in many of the cases to which I was referred, it does not arise in this case. Neither party relied on the right to freedom of expression in article 10. The press have not intervened to argue that article 10 is engaged. In the absence of press or media interest or any indication from the public that the issues raised by the claim ought to be reported the only aspect of the matter that may involve article 10 is the publication of the ET or EAT judgement on the Government's online register of judgements. As I understand it the ET judgement has not been placed on the online register. Hence article 10 has a potential application to the publication of the EAT judgement. In the absence of a submission that article 10 has any application to the publication of judgements on the online register I have decided I should proceed on the basis that resolution of this appeal depends on the balance to be struck between the Claimant's article 8 right to privacy and the principle of open justice.

7. The **Employment Tribunal Rules of Procedure 2013** at rule 50(2) provides as follows -

> **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.**

The Procedural Background

8. The Claimant's application came before the Employment Tribunal at a preliminary hearing. It was held by telephone. No oral evidence was led. The only information before the ET was a witness statement from the Claimant, the information supplied in the claim form and the Respondent's response thereto. An excerpt from the Claimant's GP records was also supplied. A statement by Dr Ahearne of the University of Liverpool, was supplied to the ET at the stage of reconsideration.

9. I should note that by the time the appeal came before the EAT the claim form had been redacted as had the GP records to remove the Claimant's personal details. The Claimant's name, address, date of birth and contact details had been covered over. Ms Lord indicated that this had been done so as to preserve the Claimant's identity. This created a difficulty. It was submitted to me that the Claimant had a distinctive name and that if a judgement was pronounced bearing that name it would be picked up easily if an internet search was performed using the Claimant's name. The redaction of the Claimant's name made that submission difficult to evaluate. With that in mind I asked to be told her name during the hearing. Ms Lord then gave me the Claimant's name. The EAT staff have been in contact with the Claimant's representative since the hearing. They have confirmed that the Claimant is willing to permit the EAT to consider her name in determining the appeal. I should say that in my opinion the redactions were unnecessary. The judge in a case of this nature should see all the evidence. If there was a concern that the press or a member of the public might seek access to the Core Bundle at the ET or EAT this should have been drawn to the attention of the administrative staff and arrangements could have been put in place to protect the Claimant's privacy. No request for access by the press or public has been made.

The Underlying Legal Issue

10. Leaving aside the question of anonymisation, the legal issue raised by the case is whether the Claimant was a "worker" when she performed as a stripper at Burke and Hare, the Respondent's establishment. The parties are agreed that she was not an employee of the Respondents. The Claimant submits that as a worker she had a variety of statutory rights and in particular was entitled to holiday pay under regulation 13 of the **Working Time Regulations 1998**. The Claimant seeks payment of £1 846.56 representing arrears of holiday pay.

11. The Respondent's response indicates that they consider that the Claimant was self-employed. In their ET3 they set out a variety of factors that they allege support of this position. They also aver that the Claimant was not a regular performer at Burke and Hare in the years 2017-2019 and was

away travelling overseas during much of this three year period. The Respondents submit that they were not responsible for her tax and did not submit tax returns for her. They submit that she should have submitted tax returns. The Respondents have it would appear tried to recover the Claimant's tax returns. To date no tax returns have been lodged.

The Factual Background

12. The Claimant came to Edinburgh to study for a qualification in IT. I was not told which of Edinburgh's educational institutions she attended. She was in the city for about three years between 2016 and 2019. In this time the Claimant worked intermittently at Burke and Hare. Burke and Hare is a strip and lap dancing bar located near the centre of Edinburgh and close to the campuses of Edinburgh's universities and colleges. She had worked as a stripper before she came to Edinburgh. She had performed at Stringfellows in London.

13. After completing her course the Claimant returned to London in 2019. I am advised she has taken up employment as a waitress. She no longer works as a stripper. The Claimant does not intend to perform as a stripper again. The Claimant hopes to make a career in IT or finance.

14. Ms Lord submitted on behalf of the Claimant that stripping is a form of sex work and that for the period of time she worked as a stripper she worked in what is sometimes loosely called the sex industry. Although it is notorious that sex work is often accompanied by exploitative behaviour, economic hardship and coercion the Claimant did not allege that she had been coerced or exploited. The Claimant did however make it clear that her work involved the risk of physical assault. The Claimant stated that customers had threatened to follow her home. She advised that when leaving Burke and Hare's premises she wore baggy clothing and took steps to conceal her identity. She stated that when working at Burke and Hare she had on occasions been called a "slut" and a "whore". The Respondents dispute the Claimant's assertion that she was verbally abused or threatened. They submit that Burke and Hare is a safe environment for the women who perform there.

15. The Claimant performed under the stage name "Asia". Her name was not disclosed to the audience or to customers. She did not reveal her true name to the Respondents or the staff at Burke and Hare. She called herself "Nicole". The Claimant indicates that she did not wish her true name to be known. I am unclear whether this means that her true name was not known to the management of Burke and Hare, as opposed to the other strippers with whom she worked. In order to work at Burke and Hare certain financial arrangements had to be made that involved payments of money. I presume her true name was given to those with whom she liaised when dealing with the financial and administrative aspects of her work.

16. Ms Lord drew my attention to the nature of the Claimant's work. It is described in the witness statement as follows.

> **The job is to engage in heavy flirtation with customers, including intimate discussion about one's private life (almost entirely fabricated by most dancers). This is with a view to paying for a private dance which involved my stripping entirely naked and showing the customer my naked body. The physical contact was limited to being touched by customers briefly without their consent and in breach of the club rules, and my sitting on client's lap, but the fully nude private dance involved the mimicking of sexual acts such as masturbation and sexual intercourse.**

17. The Claimant refers to "club rules". I take it that the Council regulate Burke and Hare by means of a licence and that the rules are designed to secure compliance with licence conditions. The Claimant says clients could touch her "without their consent". She does not specify whose consent is in view. But it must refer to a prohibition on touching (see **AA v Rakoff** [2019] EWHC 2525 (QB) paragraph 3). It would not appear however that this aspect of the case is relevant to the Claimant's application for anonymity.

18. The Claimant had to pay the Respondents if she wished to perform at Burke and Hare. They did not pay her. Her income came from customers who were willing to pay for a private dance. Payment was made directly to her.

19. The Claimant states that her family and partner were aware that she was working as a stripper at Burke and Hare. The Claimant indicates that her sister was not aware that she was a stripper. The Claimant indicates that her friends did not know she worked as a stripper. I was given very little information about the Claimant's peer group or friendship circle. I presume that they are largely young adults and that the Claimant is also a young adult. Obviously the other strippers and the staff at Burke and Hare knew she worked as a stripper although they did not know her first name. I presume she did not disclose her surname. Likewise any member of the public who attended Burke and Hare might recognise her if they saw her but they would not recognise her by name.

20. I was supplied with parts of the Claimant's GP records. They begin on 15 August 2019. They are redacted so as to conceal her personal details. The Claimant states in her witness statement that if her name was disclosed in a judgement her mental health would suffer. Although the GP notes refer to an episode of depression and indicate that she suffered from stress and anxiety during her exams, there is nothing to indicate that the Claimant suffers from significant mental health issues and nothing to enable me to understand why the Claimant considers disclosure would have an adverse effect on her mental health.

Statement by Dr Gemma Ahearne

21. An unsigned and undated "Statement on the stigma of sex work" was supplied by Dr Gemma Ahearne of the Department of Sociology, Criminology and Social Policy, School of Law and Social Justice, University of Liverpool. Dr Ahearne's statement was given to the EJ for the purposes of reconsideration.

22. The document is not a witness statement. The statement is not an expert report. It is a commentary on the EJ's decision. In particular Dr Ahearne opines on whether women who choose to be strippers should be entitled to privacy. Dr Ahearne offers an opinion on whether disclosure of the Claimant's identity would pose a risk to the Claimant's mental health. But these are not matters within

her province. Legal questions are for the tribunal. Medical questions are for suitably qualified medical practitioners. It may be that Ms Lord appreciated that the statement posed certain difficulties since although I was referred to the statement Ms Lord did not rely on it in submissions.

Other Matters

23. I should add that two claims were brought against the Respondents. They were conjoined. The stripper in the other claim did not object to her name being disclosed. She too had a distinctive name. The co-claimant settled her claim with the Respondents.

The ET Judgement

24. The ET's decision begins at paragraph 24 of the judgement. The EJ took the view that the Claimant should have foreseen that working as a stripper might harm her career prospects. That being so any adverse consequences resulting from the publication of a judgement bearing her name should be regarded as the consequences of her choice of work. He noted that other work options that would not have had these consequences were open to her. More generally he took the view that she should have known that if she raised proceedings in a public tribunal a public judgement would be issued in her name. Although the Claimant had indicated that she did not know that tribunal judgements were published on the internet the EJ took the view that this sort of thing should have been drawn to her attention by her representatives. She could not be relieved of the consequences of her decision to litigate in a public forum if she had not been informed of the consequences of doing so by those that advised her.

25. The claimant also submitted that if a judgement was to be published disclosing that she had worked as a stripper she would be at risk of sexual violence and stigmatisation. The EJ noted that there was no evidence that the Claimant had ever suffered sexual violence although he accepted that there was evidence that customers had threatened to follow her home from Burke and Hare. He noted that the Respondents disputed the Claimant's evidence in this connection. He observed that she had

willingly undertaken the risk of abuse and violence when she worked as a stripper. It would seem by implication that the EJ thought that she should continue to be held to have assumed the risk that this might occur. He took the view that since she had left the sex industry and no longer worked as a stripper the risks she faced had receded. This proceeds on the assumption that she was no longer in an environment where there was a risk of violence stemming from her sex work.

26. The EJ examined the evidence of risk to the Claimant's health. He noted that the Claimant was of the view that her health would deteriorate if it became widely known that she had worked as a stripper when a student. The EJ was unable to uphold this submission in the absence of supportive medical opinion. He noted that the GP records submitted by the Claimant did not appear to support the Claimant's fear. He accepted she had suffered from mental health issues but concluded that they did not suggest that disclosure of a judgement on the Government website would cause her mental health difficulties.

The Claimant's Submissions

27. In relation to her first Ground of Appeal, Ms Lord submitted that the ET had omitted to consider whether publication of judgement in the case would be damaging to the Claimant's honour and reputation. She argued that privacy entailed the preservation of personal interests such as honour and reputation. She submitted that strippers along with others who work in the sex industry are stigmatised by society and that if a judgement was issued bearing her name people would identify her and she would be stigmatised as a result.

28. Secondly she submitted that the ET had erred in law by taking into account irrelevant factors. It should not have taken account of the fact that it was the Claimant's choice to work as a stripper. The right to privacy remained even though she had chosen to work as a stripper. She had endeavoured to keep her name out of the limelight throughout her time at Burke and Hare. She also submitted that the ET was wrong to take account of the fact that others who worked at Burke and Hare would be

named in any future judgement. It was irrelevant to the Claimant's rights that others who worked at Burke and Hare were willing to be named.

29. The last ground of appeal was that the ET's decision was perverse. She submitted that there it was perverse to conclude that there was a public interest in publishing a judgement bearing her name. This was especially so since a judgement relating to her would be easily tracked down by anyone who used her name as a search term. She had a distinctive name and a search engine would be bound to generate the judgement among its search results. She submitted that she wished to leave her life as a stripper behind her. If an internet search would reveal that she had worked as a stripper her employment prospects would suffer. She submitted that publication would be damaging to her mental health. She submitted that the ET had failed to take account of the fact that she had not had an opportunity to give evidence in support of this concern.

30. The Claimant indicated that if the EAT was not willing to anonymise any judgements given in her claim she would drop proceedings. The Claimant submitted that a decision that elevated the principle of open justice over her right to privacy would in that circumstance impede access to justice.

The Legal Principles

31. The courts over the years have made some powerful statements about the principle of open justice.

32. In **Scott v Scott** [1913] AC 417 at 463 Lord Atkinson stated –

> **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.

33. In **R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court** [2013] QB 618, Toulson LJ stated (para 1) -

> **Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed? … In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse. Jeremy Bentham said … 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial'.**

34. In an employment law context **BBC v Roden** [2015] IRLR 630 (para 22) Simler, J has recently stressed that the principle of open justice is of paramount importance and derogations from it are only be justified when necessary in the interests of justice. **R v Legal Aid Board ex. P. Kaim Todner** [1999]] QB 966 at p 978E-G is authority for the proposition that parties and in particular claimants should expect their names to be made public, while witnesses have a greater claim to anonymity.

35. The principle of open justice has three common manifestations. It requires cases to be heard in public, judgement to be given in public and the names of those who contest cases or who give evidence in them given to the public. The terms of articles 6(2) make it clear that derogations from the principle of open justice must be shown to be necessary. It is not sufficient that derogation is desirable. Article 6 indicates that open justice is characteristic of a fair trial. Article 8(2) acknowledges that the right to privacy may have to give way if it is necessary.

36. Although the principle of open justice may be found in article 6 the 2013 Rules give it statutory expression. Rule 50(2) enjoins tribunals to give the principle of open justice "full weight". The exact weight to be attributed to the principle is difficult to judge. But the cases quoted above

suggest that it has considerable weight. Articles 6 and 8 sit close together in the hierarchy of **ECHR** rights. Both are qualified rights. Prima facie both are rights of similar weight. As a rule the litigant claims the protection of article 6 but in this case the need for open justice is a matter for the tribunal. Although the respondents have lodged Skeleton Arguments and sought to support the principle of open justice, they did not appear at the appeal and it is clear their interest in naming the Claimant is because she has stated that she will abandon her claim if she is not granted anonymity. In these circumstances it is for the tribunal to apply the terms of rule 50(2) and do so with an eye on the benefits the principle offers to the legal system as a whole rather than individual cases.

37. It is a question of judgement in each case whether the "full weight" of open justice tips the scales against the weight of right to privacy. Neither enjoys a priori superiority over the other. In **re S (A Child)** [2005] 1 AC 593, para 17 Lord Steyn dealt with the situation where rights are in conflict. He stated -

> **…neither article has as such precedence over the other … 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 … the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each:**

The Case Law

38. In her oral submissions Ms Lord referred me to a number of cases. I will deal with them first of all. I was referred to paragraphs 29 and 30 in **Khuja v Times Newspapers** [2019] AC 161. In paragraph 30 Lord Sumption stated -

> **None of this means that if there is a sufficient public interest in reporting the proceedings there must necessarily be a sufficient public interest in identifying the individual involved. The identity of those involved may be wholly marginal to the public interest engaged.**

Ms Lord submitted that this dictum supported the application for anonymity. She submitted that the Claimant's identity was "wholly marginal" to the question of whether strippers should be regarded as workers under employment legislation. I consider however that the "public interest" Lord Sumption had in mind is that covered by article 10. Article 10 does not arise in this case. I also doubt if Lord Sumption would have regarded the Claimant's name as "wholly marginal" for the purpose of an article 10 argument. She is the person who has brought the claim and around whom the claim revolves. That said I do not see any reason why anonymity could not be granted where a claimant's identity was "wholly marginal" in a case based on article 8 and rule 50(2) of the 2013 Rules. Where the only form of publication in contemplation is on the Government database or an appearance in the law reports, it might be argued that disclosing the Claimant's name is "wholly marginal". Although judges may at times choke on a diet of "alphabet soup" (**In re Guardian News and Media Ltd** 2010 2 AC 697 at p. 708 per Lord Rodger), the legal profession has in general no interest in knowing the names of the parties.

39. The principle of open justice however rests on broader concerns (see above). In **R v Legal Aid Board ex p. Kaim Todner** [1999] QB 966 at p 977 D-E Lord Woolf MR dealt with an application from a firm of solicitors to have their name anonymised. Their licence to provide legal aid services had been suspended because of allegations of irregularity. The firm began judicial review proceedings. The firm applied for anonymity in light of the fact that the facts of the case were likely to prove very damaging to their business. The Court of Appeal refused the application. Lord Woolf sets out a variety of considerations that justify the principle of open justice. He noted that -

> **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.**

Public awareness of who is litigating can therefore contribute to the evidence that is available to the court. In the libel action between the Sun and Gillian Taylforth in 1994 important evidence was

supplied by the public during the course of the trial. Were it not for the fact that the trial was being reported the evidence would not have come to hand. No doubt this was an exceptional case but it is a prominent example of the point made by Lord Woolf in **Kaim Todner**. Open justice also encourages candour on the part of those who give evidence. If a witness is tempted to mislead the court the knowledge that what he or she says may be reported to those who know the true position is capable of deterring false evidence.

40. I was referred to **X v Y** [2020] IRLR 762. It demonstrates that article 8 may in appropriate circumstances trump the principle of open justice. In **X v Y** the claimant brought a claim for arrears of wages. At the time the claimant was undergoing gender reassignment and had sensitive mental health issues arising from his transition. When he discovered that the judgement disposing of his claim rehearsed evidence about the gender reassignment, he applied for an anonymity order. The EAT granted the order. Cavanagh, J concluded that there was no need to name the claimant given the sensitivity surrounding his gender reassignment and his mental health issues. Cavanagh, J emphasised that he was not to be taken as saying that every case involving gender reassignment must be anonymised (paragraph 43). This case shows that article 8 rights to privacy may outweigh the principle of open justice. It also emphasises that each case depends on its facts.

41. I was referred to **EF v AB** [2015] IRLR 619. In this case the claimant had a managerial role in a company. He was the subject of various allegations. In order to protect his position he disclosed various texts and photographs of the CEO and his wife engaged in sexual activity. An order restraining publication was put in place by the High Court. At a tribunal held to consider the claimant's challenge to his dismissal, the tribunal concluded that the claimant's allegations about the CEO were meritless and his disclosures were motivated by a desire for revenge. A question arose as to whether the Restricted Reporting Order (RRO) pronounced by the tribunal should be continued after proceedings had ended. The tribunal declined to continue the RRO in respect of the claimant, the CEO and the CEO's wife. The CEO and his wife appealed. They relied on article 8. The EAT

allowed the appeal and granted the order. Ms Lord directed me to paragraphs 50 and 68 which state as follows -

> **The first element of public interest identified by the ET was "general human interest in sex and money involving relatively rich people". This was more or less prurient. This clearly falls within the well-known dictum in Lion Laboratories Ltd v Evans [1985] QB 526 that there is a world of a difference between what is in the public interest and what is of interest to the public.**

The ET considered that two elements of the public interest were engaged. The first was described by them at paragraph 31 as "the general human interest in sex and money involving relatively rich people". The EAT allowed the appeal and restored the RRO. The EAT referred to Ward LJ in **K** at paragraph 23, "publication may satisfy public prurience but that is not a sufficient justification for interfering with the private rights of those involved." Ms Lord submitted that to identify the Claimant in this case would similarly involve the gratification of public prurience and that the Claimant's sexual conduct was entitled to a high level of protection. While I can accept these submissions in general terms, **EF v AB** is not analogous to the present case. It involved a variety of allegations of sexual misconduct. This is not a strong feature of the present case. Stripping is a lawful activity albeit strip clubs are subject to licensing provisions and are regulated by local authorities. The case does however illustrate an important general point which is that sexual activity conducted in private between consenting adults should be regarded as attracting a high degree of privacy (**EF v AB** at p 624; paragraph 59). I accept that if the Claimant sought to keep her activity as a stripper private, she would be entitled to rely on article 8.

42. I was referred to **AAA & Ors v Rakoff & Ors** [2019] EWHC 2525 (QB). In this case a group of strippers who performed at a lap dancing or strip club known as Spearmint Rhino brought a case alleging that the Respondents had breached their article 8 rights by filming without their permission inside Spearmint Rhino premises. Spearmint Rhino joined their application. The Respondents represented a campaigning body who sought to expose and highlight damaging aspects of sexual

entertainment venues. In particular they sought to expose breaches of licence conditions so that they could challenge applications for renewal. The Claimants sought to restrain circulation of footage obtained of performers at a Spearmint Rhino venue. The case report indicates concerns similar to those expressed by the Claimant in this case (see **AAA** paragraph 40). In the event the claimants in that case did not seek anonymity order preventing their names being published in the proceedings (paragraph 41). Nicklin, J concluded that it was inappropriate to anonymise their names on the claim forms if they had no objection to being identified in the proceedings. He also concluded that if they sought anonymity for the purpose of preventing footage being published that he could not determine that matter until the Respondents had lodged their defence. On that basis he also considered the application premature. Nothing in **AAA** assists in the determination of the present application.

43. In **Ameyaw v Pricewaterhousecoopers Services Ltd** [2019] ICR 976 Eady QC as she then was, considered whether an anonymity order should be made where it was said that publication of a judgement online had caused breach of article 8 rights to privacy. The EAT refused to pronounce an order. The facts of that case are very different from the present case. It arose long after the judgement had been published on the register. The EAT was largely occupied with the question of whether it had power to take a judgement off the Government website. In this case the application is taken at an early stage and is focussed on the need for an anonymity order.

Discussion

44. The Claimant's Grounds of Appeal are in three parts. On the face of it there are three grounds of appeal. In reality more than three grounds are stated. I shall deal with them in the order they arise.

Ground 1

45. The first ground of appeal is that the EJ erred in law because he did not "acknowledge that the protection of an individual's honour and reputation is well-recognised as an aspect of the rights

protected by article 8". The only paragraph in the first Ground of Appeal that takes up that argument is paragraph 6 of the Notice of Appeal. The other paragraphs deal with other issues.

46. I am a little wary of criticising the ET for failing to refer to "honour and reputation". I was not referred to any cases that discuss this concept. I am reluctant to assume that the EJ was favoured with a more extensive citation of authority. His decision was taken at a preliminary hearing conducted by telephone. I was advised that he did not have the full papers. It is plain that he did not have the benefit of the extensive argument that was deployed at the EAT. His judgement sets out rule 50 at length and refers to the Claimant's "convention rights" and **BBC v Roden** [2015] IRLR 627, a case that focusses on the right to privacy. It would have been preferable if he had referred to article 8. That after all was the basis of the application. It seems to me however that this is not a fatal defect. He addressed the argument that the Claimant was stigmatised. It would appear to me that in doing so the EJ applied himself to the question of "honour and reputation" and the issue that lies at the heart of this ground of appeal. Stigmatisation involves loss or damage to "honour and reputation". The EJ referred to the risk of stigmatisation on a number of occasions (paragraphs 7, 9, 24 and 28). The question the EJ addressed was whether the behaviours that flow from stigmatisation justified the use of an anonymity order. He noted the Claimant's submission that strippers are not taken seriously (paragraph 7) and that she feared that she would not be taken seriously if it became known she had once been a stripper. He acknowledged that strippers are exposed to various forms of injurious behaviour. I do not consider therefore the EJ's failure to refer to article 8 or the Claimant's "honour and dignity" is an error of law that undermines his disposal.

47. Ground of Appeal 1(paragraph 5) raises a separate issue. The Claimant submits that the ET was wrong to take account of the fact that she had chosen to be a stripper. This issue is also raised in Ground 2 where the fact that the Claimant chose to work as a stripper is said to be an irrelevant consideration.

48. The EJ dealt with this issue in paragraphs 24-27. He considered that if a potential employer found out that she had worked as a stripper and was dissuaded from employing her on that account, any harm she suffered on the labour market should be attributed to her decision to work as a stripper and not the ET's decision to name the Claimant in its judgement.

49. The EJ's conclusions however do not take account of the Claimant's evidence in her witness statement. Although the Claimant had chosen to work as a stripper her witness statement indicates that she tried to conceal her name when she worked at Burke and Hare. She took various steps to preserve her identity (see above). The EJ does not interact with this evidence. I can see that a stripper who had made no attempt to conceal her name but who advertised her services by name might not be able to rely on article 8. In that situation her work as a stripper would already be in the public arena. But the Claimant had sought to protect her identity. She had not impliedly waived her right to keep the fact that she worked as a stripper a private matter. Although it might be thought difficult for someone who performs in public as a stripper to assert that she has a right to keep her work private, I accept that the Claimant's evidence to the tribunal in this case demonstrates that she took steps to protect her identity. I also consider that there is a difference between the risk that someone would recognise the Claimant for example on the street as the stripper who appeared at Burke and Hare and the recognition that might follow from the publication of a judgement on the web. I accept therefore that by choosing to work as a stripper she did not forfeit her right to rely on article 8.

50. At paragraph 24 the EJ states that the Claimant "may be stigmatised and suffer potential risks to her own safety or person". It held however that this was -

> **…a serious issue which goes well beyond the scope of this Tribunal" (paragraph 28 line 10).**

51. I am not clear what the EJ meant by the "scope" of the tribunal. I suspect he thought that the breach of privacy was insufficient to justify protection under rule 50(2) and thus lay beyond the

"scope" of the tribunal. I was not invited to remit back to seek clarification of the position and given that the materials the EJ examined are before me, I consider I should examine the EJ's conclusion.

Injury to Honour and Reputation

52. I consider that stigmatisation without more would be beyond the "scope" of the tribunal. In **R v Legal Aid Board ex. p. Kaim Todner** (above) the Court of Appeal held that "embarrassment and reputational damage" are ordinary concomitants of litigation (p. 978F). Although **Kaim Todner** involved the risk of harmful publicity to the commercial interests of a firm of solicitors, the Court of Appeal's judgement sets out the broad circumstances in which a derogation from open justice would be permissible. If derogation is not appropriate where publicity would be damaging to a person's reputation it is difficult to see why an anonymity order would be appropriate in the present case. In **Roden** Simler, J refused to grant the order even although the case contained unproven allegations of sexual misconduct of an egregious sort; see Simler, J's reference at paragraph 50 to in **Re S**. I consider therefore that the case law shows that social opprobrium is not regarded as sufficient to justify an anonymity order. It would appear to me that stigmatisation is a form of reputational damage and is not sufficient to outweigh the principle of open justice.

Verbal Abuse and the Risk of Assault

53. But stigmatisation may of course lead to other harms. The Claimant submitted that stigmatisation was the cause of a continuing risk of verbal abuse and sexual assault of the sort she encountered while she worked at Burke and Hare. I would accept that if such harms were a material risk, different considerations would arise

Evidence of Injury

54. The EJ expressed a broad conclusion that the evidence was "extremely thin" (paragraph 28). The Notice of Appeal does not attack the EJ's assessment of the evidence. There is no complaint that he failed to reach proper conclusions based on the factual material presented to him. I acknowledge

that this is an appeal against a preliminary application and that no findings in fact have been made but I would have expected the Claimant to challenge the EJ's factual conclusions if she thought they were wrong. In the absence of an appeal to the EJ's conclusion that there was insufficient evidence that the Claimant had suffered any harm through the alleged breach of article 8 the appeal must fail.

55. If I am wrong about that I would have held that the EJ's characterisation of the evidence as "thin" was justified. In **Fallows v News Group Newspapers Ltd** [2016] IRLR 827 Simler, J held that there must be "clear and cogent evidence" of harm. In **Roden** Simler, J held that the "default position" (paragraph 50) was that open justice should prevail. Where the evidence is deficient it would appear to me that the "default position" should prevail.

56. Although the EJ does not explain his conclusion I would have upheld his rejection of the Claimant's evidence for the following reasons. In the internet age a massive amount of information is posted on the web every day. Hundreds of judgements are issued every year on the ET and EAT register of judgements. A tiny fraction generate publicity. In the absence of press interest it is difficult to see how this judgement or any judgement on the merits would come to the attention of those who know the Claimant. The users of the Government website are I suspect largely those involved in the employment law or who work in recruitment. No evidence was offered to indicate that searching the Claimant's name would produce a "hit". Given the variables that control the operations of internet search engines, I am unwilling to assume that a search against the Claimant's name would necessarily take a user to a judgement on the ET or EAT database. The capabilities and parameters of search engines are not matters on which I am well informed and such experience as I have suggests that such a search would not necessarily reveal a judgement bearing the Claimant's name.

57. I was told that she would be easily identified on the internet because of her distinctive name. But I have no reason however to think her name is unique. I would not expect anyone who encountered a judgement bearing her name to automatically assume that the case was about the

Claimant. In order to make a definite identification there would have to be more than a "name match". I am not persuaded that the Claimant is in a position to say that she would be recognised or that her work as a stripper would become known if a judgement bearing her name was published.

58. If someone who knew the Claimant and who was unaware that she had worked as a stripper found the judgement in this case I accept that there is a risk that she might suffer harm to her honour and reputation. But I am not persuaded that her activities would affect everyone in the same way. I have little evidence about the Claimant's age. Precise information was withheld from the EAT. If she is young and has a friendship circle that is also young, it is possible that the knowledge that she had been a stripper would have no or little impact on her dignity and reputation. My impression is that social attitudes are heavily dependent on age and that the young are less likely to be influenced by such considerations. Likewise there are those who, quite apart from age considerations, might (quite sensibly) take the view that they should not allow the past to affect their treatment of her in the present. It is now over two years since she left Edinburgh and performed as a stripper. It would appear to me that the risk of harm is limited by these considerations.

59. If as I have held social opprobrium is not sufficient to overturn the principle of open justice, the chances of her past emerging make no difference to her application. The risk verbal abuse or violence is a different matter. But in this connection however the evidence before the EJ was "extremely thin". It would appear that she was exposed to these sorts of behaviours when she worked as a stripper. No explanation was given as to how these risks would arise now she has left the sex industry and is working as a waitress. It would not appear to me that there is much chance of her past becoming known to those who know her or how those who discovered she had been a stripper might cause her harm of this nature.

Handicap on the Labour Market

60. The Claimant submitted that she was at risk of handicap on the labour market if a judgement was published. If, as I have held, she did not forfeit her right to privacy by choosing to work as a stripper might this risk be sufficient to overturn the principle of open justice? The EJ does not address this issue at all. Given his conclusions, he did not assess the evidence for handicap on the labour market.

61. I am advised that employers or recruitment agencies use the Government online register when scrutinising job applications. But I do not know how widespread the practise is or whether it would be likely to affect the Claimant. Thus although I accept that the Claimant has a right to assert privacy, I do not consider that the EJ had sufficient evidence to decide whether publication might harm her career prospects. If there was such evidence I accept that it might be possible to argue that the risk of harm outweighed the principle of open justice. I cannot predict the outcome of such an application.

Mental Health

62. No challenge is taken to the EJ's findings in relation to the risk to the Claimant's mental health. For that reason the Claimant's appeal in this connection must fail. The only attack on the EJ's approach is that the EJ rejected her evidence without hearing her oral evidence. But the Claimant could if she wished have given oral evidence at the Preliminary Hearing. If she chose not to that was a matter for her. Even if she had given evidence the EJ was not bound to accept her assertions. She had no medical qualifications. No evidence from a suitably qualified person was provided. No attempt was made to explore the nature of the condition to which she might succumb or the potential causes. It was not clear whether she was suggesting that her mental health would breakdown if she was identified as a stripper in the judgement or whether the breakdown would occur if she was identified as a former stripper by her friends or whether other circumstances were anticipated as likely causes. The only source of medical evidence were the GP notes. They do not address the question of whether publication of her name would affect the Claimant. There are too many variables and a lack of solid evidence.

Ground 2

63. In Ground 2 the Claimant returns to an issue raised in Ground 1. She submits that the EJ ought not to have taken into account the Claimant's choice of work. As I have indicated I agree that her decision to work as a stripper does not remove article 8 rights of privacy. Although much of what she did was in public and although no doubt in a busy city centre venue she could easily have been recognised by those that knew her, she did take steps to conceal her identity. I am not confident that the use of a stage name was necessarily designed to conceal her identity. Even if it had other purposes I accept however that one side effect of a stage name is anonymity. She did not use her first name in her interactions with the staff at Burke and Hare. Whether she gave her full name to the management for payment purposes or legal purposes is not stated. She does not say that she concealed her surname from the staff and management of Burke and Hare. Her surname is the distinctive part of her name so the name "Nicole" would not have concealed her identity if her surname was known. When coming and going from the premises she dressed in a non-descript way. She stated that this was to avoid recognition. In these circumstances it seems to me that in choosing to work as a stripper she made attempts to protect her name and identity. Given the nature of her work, the location of the premises and the type of work she did, she must have recognised that her strategy might not always succeed. That however does not in my opinion mean she has no right to rely on article 8 for the reasons I give above.

64. I accept that other members of staff might lose their anonymity by being named in the proceedings. But if they are concerned about that possibility they too may apply for anonymity. The Claimant has tried to protect her private life. I do not see why she should lose her right to privacy because the Respondents may wish to lead evidence from staff who do not wish to be named. As this application demonstrates not everyone is concerned about privacy and the fact that one person wishes to remain private does not mean the next person will feel the same way. In addition the right to privacy is in part determined by the nature of the disclosure. Whether a member of staff may also have a right

to privacy will depend on the nature of their evidence. I do not accept therefore that the Claimant's right to privacy is circumscribed by the possibility that others may be named in the judgement.

65. The Claimant submits that if an anonymity order is not pronounced she will abandon her claim. She submits that if the EAT forces her into this position it will have prevented her from obtaining access to justice. As I have sought to explain however the law does not exist to provide access to justice whatever the cost. The principle of open justice represents a commitment to transparency that is designed for the greater good. It may not always serve the interests of the individual.

Ground 3

66. The last ground of appeal is that it was perverse to conclude that the principle of open justice outweighed the Claimant's article 8 right to privacy. The basis for this attack is the proposition that there is no public interest in exposing the Claimant as someone who once worked a stripper. I have sought to explain however that the EJ was bound to approach matters the other way around. He did not have to identify a reason why people should know that the Claimant was a stripper. The reverse was true. He needed to identify a reason why the Claimant should not be identified as a stripper. The law assumes that all the details of a case should be made public unless some injury can be identified to the Claimant's Convention rights. In this case that injury must be more than embarrassment or reputational loss. If there was not a strong countervailing reason for granting anonymity the EJ was bound to assume that it was in the public interest to publish the Claimant's name. In the absence of sufficient evidence the EJ was entitled to conclude that the Claimant was not at a continuing risk of verbal insult or injury, handicap on the labour market or injury to her mental health. There is no perversity in his decision.

Decision

67. In these circumstances I uphold the decision of the ET. I do not consider that the Claimant is entitled to an anonymity order as sought.

Postscript

68. The Claimant indicated that if the price of obtaining payment of her alleged right to arrears of holiday pay was the publication of her name in the merits judgement, she would prefer to drop her claim. In this situation I was asked not to publish her name on this judgement. Ms Lord pointed out that if her name was published on the judgement the Claimant would suffer a loss of privacy merely because she had sought to obtain anonymity as opposed to seeking a remedy for her alleged right to holiday pay. I was advised that the hearing before the EJ took place in private. Ms Lord submitted that it would be unfortunate if the Claimant was forced into the open merely because she wished to challenge the EJ's decision.

69. The public interest in open justice is at its strongest when it restricts or interferes with reporting or publishing the merits of the case. That will usually be at the point when evidence is led, though it may be when submissions are made on legal issues that are in dispute. At that stage the identities will usually be disclosed and may be published. I am not persuaded that the principle of open justice has the same weight at the stage of a preliminary application designed to establish whether an order under rule 50 should be made. In effect the Claimant has asked whether she would be entitled to anonymity if she pressed on with her case. It does not seem proper to publish a judgement in the Claimant's name merely because she has asked for anonymity. As I have indicated I am satisfied that article 8 is engaged. In that situation I consider I should grant an order in relation to the present application.

70. In her Grounds of Appeal (paragraph 21) Ms Lord addressed this situation. In the Notice of Appeal she submits that I should grant an RRO. I assume however that this is an error and that the

Claimant seeks an anonymity order in respect of her appeal against the EJ's decision at the Preliminary Hearing as opposed to an anonymity covering the ongoing proceedings.

71. For the reasons given, and on the understanding that the Claimant intends to drop her claim against the Respondents, I will continue the anonymity order pronounced by Griffiths, J in respect of this judgement and that of the EJ.