



EMPLOYMENT TRIBUNALS

Claimant: Broome
Respondent: Bournemouth, Christchurch and Poole Council
Before: Employment Judge Mr. M. Salter

JUDGMENT

The Claimant's application for an order under r50(3)(b) of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 is refused

REASONS

INTRODUCTION

1. These are my reasons for the above judgment.

BACKGROUND

The Claimant's case as formulated in his ET1

2. By a claim form presented on 16 April 2020 the Claimant brought a complaint of discrimination on the grounds of disability. The disability discrimination complaint relates to:

- (a) Direct disability discrimination (s.13 Equality Act 2010 – "EqA 2010")
- (b) Disability-related harassment (s. 26(1) EqA 2010)
- (c) Failure to make reasonable adjustments (ss 20 and 21 EqA 2010)
- (d) Discrimination arising from disability (s.15 EqA 2010)

The Respondent's Response

3. In its Form ET3, the Respondents denied the claims.

Relevant Procedural History

4. The matter Employment Judge Gray for two Preliminary hearings and me for a third.

5. By an ex-tempore judgment on 17th June 2021 I determined that the Claimant did not have capacity to conduct the litigation and so a litigation friend should be appointed. The Respondent was neutral to that application.
6. By email dated the 2nd July 2021 an application was made by the Claimant for an anonymity order in these proceedings (“the application”). The application was made on the basis that the claimant, although successful in his application and although represented by both counsel and a solicitor at the hearing, required a full written record of my determination, not for any appeal but:

“principally so that there is clear written record of the Tribunal’s reasons for its decision on capacity, given its importance not just for the Claimant but for his litigation friend and representatives.”

7. The Claimant’s application records that the Respondent has indicated it has no plans to oppose this application, but wishes to reserve its position until it has sight of this application. The Claimant requested the application be dealt with on the papers.
8. The Respondent was copied into the email containing the application, but no substantive response was received from it

THE APPLICATION

General

9. The Claimant’s application states:

The Claimant submits there are four principal reasons why an anonymity order should be made in respect of the Claimant.

Firstly, the Claimant’s health, in particular his mental health, will be considered and referred to in the claim. The claim is one of disability discrimination and will result in disclosure of one of the most private aspects of any person’s life: their health and medical records. Mental health in particular is a very personal and sensitive issue. The evidence before the Tribunal at the PH showed that the Claimant is a vulnerable person who has been recorded as suffering anxiety, delusional disorder, and a significant learning disability. That information being made public would amount to an unjustified interference with his Article 8 rights, and may have an adverse effect on the Claimant’s health.

Secondly, the Claimant lacks capacity. These proceedings are brought and pursued on his behalf. Given decision in the litigation are not

ultimately his, the Tribunal should take a cautious approach before very private information about him become a matter of public record.

Thirdly, there is no public interest in specifically knowing who the Claimant is. The Claimant is not a public figure (he is a refuse worker) and his specific identity is an irrelevant feature of the claim.

Fourthly, an anonymity order is a proportionate balance of rights, including with the principle of open justice. The Claimant does not propose any restricted reporting order. The case may be attended by members of the public and the facts may be reported on. There may be public interest in a local authority's treatment of a vulnerable employee, but that will still be a matter of public record.

THE LAW

General

10. The principle of open justice has its foundations in the common law, reinforced by the rights under the European Convention of Human Rights. Article 6 guarantees the right to a fair and public hearing with a publicly pronounced judgment, except where, and to the extent strictly necessary, publicity would prejudice the interests of justice. Article 8 provided for the qualified right of respect for family and private life; Article 10 provides the qualified right to freedom of expression.

The Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("the 2013 Rules of Procedure")

11. In the employment tribunal, derogation from the principle of open justice is permitted by Schedule 1, rules 50 and 94 of the 2013 Rules of Procedure. Rule 50 is relevant for this application. So far as is relevant rule 50 states:

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—
 - ...
 - (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;

12. Rule 50 deals with situations where article 10 and article 6 rights may be competing with an individual's privacy rights under article 8 requiring a balancing exercise to be carried out. As an order under rule 50 interferes with both the principle of open justice and the right to freedom of expression, it is only justified when strictly necessary to secure the proper administration of justice.

Authorities and Texts

13. The approach the tribunals should take when considering orders under rule 50 has recently been considered by the Employment Appeal Tribunal in X v Y [2021] ICR 147, where the Appeal Tribunal set out:

19. The correct approach that should be taken by an employment tribunal to anonymisation and other restrictions on disclosure has been set out by Simler J, as she then was, in British Broadcasting Corpn v Roden [2015] ICR 985, and in a subsequent case, Fallows v News Group Newspapers Ltd [2016] ICR 801, which I shall return to. Paragraphs 21 to 26 of the Roden case are worth setting out in full:

“21. An order under rule 50 interferes both with the principle of open justice and the right to freedom of expression. The principle of open justice was considered recently by the Supreme Court in A v British Broadcasting Corpn (Secretary of State for the Home Department intervening) [2015] AC 588, in which Lord Reed JSC said, at para 23: ‘It is a general principle of our constitutional law that justice is administered by the courts in public, and is therefore open to public scrutiny. The principle is an aspect of the rule of law in a democracy. As Toulson LJ explained in In re Guardian News and Media Ltd v City of Westminster Magistrates’ Court [2013] QB 618, para 1, ‘society depends on the courts to act as guardians of the rule of law ... In a democracy, where the exercise of public authority depends on the consent of the people governed, the answer must lie in the openness of the courts to public scrutiny’.

22. The principle of open justice is accordingly of paramount importance and derogations from it can only be justified when strictly necessary as measured to secure the proper administration of justice.

23. Where anonymity orders are made, three Convention rights are engaged and have to be reconciled. First, article 6 which guarantees the right to a fair hearing in public with a publicly pronounced judgment except where to the extent strictly necessary publicity would prejudice the interests of justice. Secondly, article 8 which provides the qualified right

to respect for private and family life. Thirdly, article 10 which provides the right to freedom of expression, and again is qualified.

24. Lord Steyn described the balancing exercise to be conducted in a case involving these conflicting rights in In re S (A Child) (Identification: Restrictions on Publication) [2005] 1 AC 593 , para 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.’
25. The paramountcy of the common law principle of open justice was emphasised and explained in Global Torch Ltd v Apex Global Management Ltd [2013] 1 WLR 2993 , where Maurice Kay LJ referred to R v Legal Aid Board, Ex p Kaim Todner [1999] QB 966 , 977 and Lord Woolf MR's holding that the object of securing that justice is administered impartially, fairly and in a way that maintains public confidence is put in jeopardy if secrecy is ordered because (among other things): ‘It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties’ or witnesses’ identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely ... Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it.’
26. Having referred to the question to be asked when seeking to reconcile these different rights as affirmed by the Supreme Court in In re Guardian News and Media Ltd [2010] 2 AC 697 , para 52, per Lord Rodger of Earlsferry JSC, as ‘whether there is sufficient general, public interest in publishing a report of the proceedings which identifies M to justify any resulting curtailment of his right and his family's right to respect for their private and family life’, Maurice Kay LJ set out the relevant passages from the Practice Guidance (Interim Non-disclosure Orders) [2012] 1 WLR 1003 , given by Lord Neuberger of Abbotsbury MR including at para 11: ‘The grant of derogations is not a question of discretion. It is a matter of obligation ...’ and, at para 13: ‘The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence ...’
20. It is clear from this passage that the principle of open justice is paramount and that there have to be clear, cogent, and

proportionate grounds before an employment tribunal can take any steps which conflict with the principle of open justice. The approach set out in the Roden case is consistent with the approach taken by the appeal tribunal in earlier cases such as F v G [2012] ICR 246 and X v Comr of Police of the Metropolis [2003] ICR 1031 (Burton J presiding), and with the guidance given more recently by Judge Eady QC, as she then was, in Ameyaw v PricewaterhouseCoopers Services Ltd [2019] ICR 976, paras 30–45. In F v G, at para 49 of his judgment, Underhill J rejected the suggestion that a different approach should be taken in employment tribunal cases on the basis that individual employment claims do not raise matters of general public interest.

CONCLUSIONS ON THE ISSUES

General

14. I have considered the Claimant's representations. I note the following in response to each of the four reasons:

- (a) First Reason: the tribunal are well versed and experienced in dealing with sensitive issues concerning health and mental health. The reasons given by the Claimant in his application do not, on the material I have before me go beyond the norm for claims of disability discrimination. I have not been provided with any evidence at all to support the contention that the information being made public "may have an adverse effect on [his] health";
- (b) Second Reason: the Claimant's lack of capacity: the tribunal have found the claimant lacks capacity, and have granted the application for a litigation friend, and I have reminded myself of the respect that rightly must be given to those represented by litigation friends (JXMX v Dartford and Gravesham NHS Trust [2015] 1 WLR 3647) as cited in the application.
- (c) Third Reason: lack of public interest in the "specifically knowing who the Claimant is". This is, at best, a factor of little weight in the assessment I am undertaking. The principle of public justice applies no matter who the parties are and less well known litigants are not afforded enhanced opportunity to derogate from that principle. This point may, however, be a relevant factor if the balancing act I am to undertake is finely balanced;
- (d) Fourth reason: this appears to me to be a reminder of the need to balance the rights of the Claimant and the overarching requirement of public justice and to not act disproportionately.

15. The most powerful reason offered by the claimant is his Article 8 right to private life, which seems to be at the heart of the reasons offered, and I have considered the application as being brought on this basis.

16. I have considered these individually and collectively and do not think that they alone or together, provide sufficient basis to override the requirement, of paramount importance, for public justice.
17. The points advanced by the Claimant, and the reasons provided to support them, are those issues that tribunals are adept at dealing with, are experienced in dealing with and do not appear to present challenges to the interests of justice, or weigh more heavily than the principle of open justice so that this should be derogated from.
18. I consider the application falls a considerable way short of succeeding. The Claimant has not satisfied me on clear and cogent evidence that an order under r50 is necessary in the interests of justice or in order to protect a Convention right of the Claimant
19. The Application is refused.

Employment Judge Salter
Date: 16 September 2021

Judgment & reasons sent to parties: 15 October 2021

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.