



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107534/2019

5

Held via Written Submissions

Employment Judge L Wiseman

10 **Mrs Natalie Barnett**

**Claimant
Represented by:
Ms S Shiels -
Solicitor**

15 **Windmills Lanarkshire Limited**

**Respondent
Represented by:
Ms K Hendry -
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The tribunal decided to refuse the claimant's application for a Restricted Reporting Order and an Order in terms of Rule 50 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 28 June 2019 in which she complained of discrimination because of the protected characteristic of disability. The claim was subsequently amended to include pregnancy/sex discrimination and (post-employment) victimisation.
25
2. The respondent entered a response in which is denied the claims.
3. The claimant made an application for a Restricted Reporting Order in terms of section 12 Employment Tribunals Act 1996 and an Anonymity Order in terms of rule 50(3)(b) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules). The respondent opposed the application. Both parties provided written submissions in support of their position.
30

4. The application was discussed at a preliminary hearing on the 20 October 2021 but the Employment Judge decided to reserve her decision regarding the claimant's application pending further information from the claimant regarding whether the tribunal would be required to hear evidence about the sensitive/personal aspects of the claimant's disability; what was meant by the respondent "having a view regarding termination" and whether the claimant's concerns could be addressed by sensitive judgment writing.

Claimant's submissions

5. Ms Shiels made reference to the terms of section 12 Employment Tribunals Act which relates to claims of disability discrimination where evidence of a personal nature is likely to be heard by the employment tribunal. The term "evidence of a personal nature" was defined as meaning evidence of a medical, or other intimate, nature which might reasonably be assumed to be likely to cause significant embarrassment to the complainant if reported. The tribunal may, in those circumstances, make a restricted reporting order.

6. Ms Shiels also referred to the terms of Rule 50 which gave the tribunal extensive powers to make appropriate orders to restrict the public disclosure of any aspect of proceedings so far as they consider necessary in the interests of justice or to safeguard the Convention rights of any person or where evidence given will involve particular confidential information, providing full weight is given to the principle of open justice and the Convention right to freedom of expression. The claimant and her family, including her two young daughters, relied on Article 8 rights to respect for private and family life.

7. Ms Shiels submitted the following information included evidence of a personal nature (as defined) which was likely to cause embarrassment if reported.

- The claimant has Multiple Sclerosis (MS), which is a progressive condition which includes flare ups and relapses resulting in debilitating symptoms, including immobility, muscle weakness, numbness and in the claimant's case incontinence.

- The claimant was first diagnosed with MS during a previous pregnancy. She has two young daughters whose Article 8 rights should be considered alongside the rights of the claimant.
- 5 • The claimant was taking drug treatment for MS which is contraindicated when planning a pregnancy. The claimant's pregnancy was unplanned. The risk to the claimant's health and the pregnancy were significant. Further progression of the claimant's MS could change the course of the disease for the worse.
- 10 • The termination of the claimant's pregnancy is of a personal nature that will cause significant distress and embarrassment to the claimant if reported. It is submitted the above points are central to the claims. Mrs Marsella, about whose conduct the claims are based, is opposed to abortion by reason of her own beliefs. It was submitted that it will not be possible to exclude the subject matter from a Judgment simply by careful and sensitive drafting by the Employment Judge and still produce a decision which makes it clear to the public why the tribunal decided as it did.
- 15 • The claimant and her two children have a right to privacy. It was submitted the tribunal requires to consider the rights of these children. In ***A v Secretary of State for Justice 2019 IRLR 108***, the EAT held that a tribunal had given insufficient consideration to the article 8 rights of a child who was part of the factual matrix of an unfair dismissal claim, in part based on concern that publicity about the case might result in the child seeing press reports concerning her father. It was submitted that promulgating a judgment in this case that identifies the claimant may result in the claimant's children seeing the judgment or news reports. Further, it might lead to the children being identified which may have consequences for them.
- 20 • The claimant and her two children have a right to privacy. It was submitted the tribunal requires to consider the rights of these children. In ***A v Secretary of State for Justice 2019 IRLR 108***, the EAT held that a tribunal had given insufficient consideration to the article 8 rights of a child who was part of the factual matrix of an unfair dismissal claim, in part based on concern that publicity about the case might result in the child seeing press reports concerning her father. It was submitted that promulgating a judgment in this case that identifies the claimant may result in the claimant's children seeing the judgment or news reports. Further, it might lead to the children being identified which may have consequences for them.
- 25 • The claimant and her two children have a right to privacy. It was submitted the tribunal requires to consider the rights of these children. In ***A v Secretary of State for Justice 2019 IRLR 108***, the EAT held that a tribunal had given insufficient consideration to the article 8 rights of a child who was part of the factual matrix of an unfair dismissal claim, in part based on concern that publicity about the case might result in the child seeing press reports concerning her father. It was submitted that promulgating a judgment in this case that identifies the claimant may result in the claimant's children seeing the judgment or news reports. Further, it might lead to the children being identified which may have consequences for them.
- 30 • Mrs Marsella is alleged to have threatened the claimant previously on two separate occasions with publication in both newspapers and on

social media. The former related to the allegations concerning the court stenographer, the latter in text messages sent to other staff.

- 5 • It was submitted there was a continuing risk of verbal abuse from Mrs Marsella and others close to her. The claimant has alleged a number of incidents, including one at Greggs. The claimant reported the incident to the Police. Mrs Marsella was charged with a section 38 offence at her home and given a Police Recorded Warning following the charge. This charge and contents are recorded on her PVG disclosure check. It was submitted that given the previous conduct of Mrs Marsella towards the claimant there is a real risk of further harmful conduct towards the claimant.
- 10 • The claimant suffers from long term poor mental health which in the past has included post-natal depression. The reporting of the case and the publication of the decision without anonymity would likely pose a risk to the claimant's mental health.
- 15

8. Ms Shiels acknowledged matters had previously been reported because of the criminal proceedings, but submitted the fact of previous open proceedings should not be a bar to subsequent privacy (*Tyu v ILA Spa Ltd UKEAT/236/20*)

20 Respondent's submissions

- 9. Ms Hendry acknowledged the 2013 Rules gave extensive powers to tribunals to make appropriate orders to restrict the public disclosure of any aspect of proceedings so far as they consider necessary in the interests of justice to safeguard the Convention rights of any person or where evidence given will involve particular confidential information, but submitted full weight had to be given to the principle of open justice and the Convention right to freedom of expression. This principle assumes that all the details of a case should be made public unless there is some identifiable injury to the claimant's ECHR rights, notably, article 8 (being the right to privacy). The tribunal was referred to the case of *BBC v Roden 2015 ICR 985*.
- 25
- 30

10. Ms Hendry noted the claimant had requested an anonymity order be put in place in respect of the judgment, and a restricted reporting order put in place regarding the claimant's name. The respondent objected to the claimant's application for a restricted reporting order in terms of rule 12 ETA and an
5 anonymity order in terms of rule 50 of the Rules. The respondent considered the claimant had not provided a sufficiently strong reason to override the principle of open justice.
11. The respondent accepted the claimant has a progressive condition and acknowledged there may be sensitive aspects to her disability. However, it
10 was submitted the claimant had not set out whether, and on what basis, the tribunal would be required to hear evidence and make findings of fact about the sensitive/personal aspects of the disability.
12. The respondent acknowledged that whilst the termination of the claimant's pregnancy was of a personal nature, the claimant had not clarified why its
15 publication would cause the claimant significant embarrassment. It was submitted that stigmatisation as a form of reputational damage was insufficient to outweigh the principle of open justice. It was of note there had already been criminal proceedings in open court regarding the claimant and Mrs Marsella. The respondent submitted the sensitive nature of the claimant's
20 disability and termination (in so far as it is relevant to the issues being determined) could be dealt with by careful judgment writing whilst still setting out clearly why the tribunal made its decision.
13. Mrs Marsella's personal views on matters referred to in the claimant's application are irrelevant to this restricted reporting order application. The
25 claimant's application ought to focus on concerns about the publication of personal information pertaining to her, not to any of the respondent's witnesses. In any event, the respondent was content for the hearing to proceed as normal in line with the principle of open justice and for any judgment to make reference to any of the relevant issues being determined.
- 30 14. The respondent submitted that on balance the privacy rights of the claimant's children were not sufficient to depart from the principle of open justice. The

claimant's children may have been able to see any judgment or news reports in relation to the criminal proceedings. The claimant had failed to set out how the claimant's children would be identified by any judgment/reporting and did not set out the consequences for them.

5 15. The respondent, in relation to the allegation Mrs Marsella had threatened the claimant personally on two occasions (including the Greggs incident), had set out its position in the Response to the second claim. The respondent denied there was a continued risk of verbal abuse from Mrs Marsella and others close to her. In any event, if there was a continued risk of verbal abuse, the claimant had failed to explain how a restricted reporting order and an anonymity order 10 would alleviate that risk. Mrs Marsella was clearly already aware of the circumstances of the case and would be able to identify the judgment. Mrs Marsella and others will require to give evidence at the hearing on behalf of the respondent to defend the claim. It was submitted these issues were 15 irrelevant to the tribunal's consideration of the application.

16. Ms Hendry (at the telephone case management preliminary hearing on the 27th June) advised the tribunal that its Judgment dated 9 November 2021 (regarding the application to amend the claim, join a second respondent and the application for a restricted reporting order and an anonymity order) had 20 been put online and this undermined the current application.

Discussion and Decision

17. I firstly had regard to the claims being brought by the claimant. The claims fall under two main categories: (a) disability discrimination in terms of section 26 Equality Act (harassment); section 15 (discrimination arising from disability); 25 section 20 (failure to make reasonable adjustments) and section 27 (victimisation) and (b) pregnancy discrimination/unfavourable treatment in terms of section 18(2) Equality Act and victimisation.

18. I understood the application made by the claimant related to the fact the claimant is a disabled person and had a termination because of the nature of 30 her disability. The claims brought by the claimant include claims asserting Ms

Marsella (of the respondent) made comments regarding the claimant's decision and disclosed it to other members of staff.

19. I next had regard to the relevant statutory provisions relating to the application. Section 12 of the Employment Tribunals Act 1996 is entitled
5 Restriction of publicity in disability cases. The section applies to proceedings on a complaint under section 120 Equality Act, where the complaint relates to disability, and in which evidence of a personal nature is likely to be heard by the employment tribunal hearing the complaint. In proceedings to which this section applies, the employment tribunal may make a restricted reporting
10 order which has effect (unless revoked) until the promulgation of the decision by the tribunal. The term "evidence of a personal nature" means any evidence of a medical, or other intimate nature which might reasonably be assumed likely to cause significant embarrassment to the complainant if reported.
20. Rule 50 of the Rules is entitled Privacy and Restrictions on Disclosure and
15 provides that a tribunal may at any stage of proceedings 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. Such orders may include an order that the identities of specified parties, witnesses or other persons
20 referred to in the proceedings should not be disclosed to the public, by the use of anonymisation.
21. Rule 50(2) provides that 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.
22. I next had regard to Article 6 of the European Convention on Human Rights
25 which provides that *"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 interests or morals, public order or national security in a
30 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.”

23. Article 8 of the ECHR provides: *“Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as it is in accordance with the law and is necessary in a democratic society in the interests of the protection of the rights and freedoms of others”*.
24. The case of ***British Broadcasting Corporation v Roden 2015 ICR 985*** confirmed the principle of open justice was of paramount importance and derogations from it could only be justified when strictly necessary in the interests of justice. It is for the tribunal to carry out a proper balancing exercise, balancing the principles of open justice and the claimant’s rights to privacy under Article 8 ECHR.
25. I noted it is a question of judgment in each case whether the “full weight” of open justice tips the scales against the weight of right to privacy: neither enjoys superiority over the other.
26. I, in carrying out the balancing exercise required of me, started by noting on the one hand, the principle of open justice was of paramount importance. I had regard to the case of ***A v Burke and Hare 2022 IRLR 139*** where the EAT held it was clear from the case law that stigmatisation as a form of reputational damage was insufficient to outweigh the principle of open justice.
27. I further noted, on the other hand, the fact the complaints brought by the claimant involve disability discrimination and evidence of a personal nature was likely to be heard by the tribunal. I did not understand it would be necessary for the tribunal to hear medical evidence regarding the nature of the claimant’s disability, but the tribunal will require to hear evidence of a personal nature involving the need for, and fact of, the termination of the pregnancy.
28. Ms Shiels submitted that if the termination of the pregnancy was reported it would cause the claimant “significant distress and embarrassment”. Ms Shiels

5 did not, beyond making that statement, explain why publication of the information would cause distress and embarrassment. The events which are the subject of the complaint occurred in 2018/2019 and there was nothing to inform the tribunal whether, for example, with the passage of time, friends and family (or people more generally) were aware of the claimant's situation.

29. Ms Shiels submitted Ms Marsella was opposed to abortion because of her own beliefs. I must, at this stage, take that submission at face value. I could not, however, understand, without further submission from Ms Shiels, why that was said to impact on the application made by the claimant. The issue for consideration relates to the publication of certain information relating to the claimant, and not the reason for the alleged actions of Ms Marsella.

30. Ms Shiels also referred to the harmful conduct of Ms Marsella towards the claimant. It was alleged Ms Marsella had on two previous occasions threatened the claimant with publication of the information in newspapers and on social media. It was also alleged there was a continuing risk of verbal abuse of the claimant by Ms Marsella. I acknowledged there is a risk of Ms Marsella acting on those threats (if they were made) but I balanced this with the fact that if Ms Marsella was going to act as threatened, she had already had a significant period of time to do so. There was no indication Ms Marsella had acted on the alleged threats.

31. I also put into the balance the fact the claimant and her witnesses will give evidence remotely. Accordingly the situation where both the claimant and Ms Marsella are in close proximity will not arise.

32. I had regard to the fact the claimant has two young children and that it is appropriate to take into account the Convention rights of third parties, particularly where the third party is a child. Ms Shiels submitted the children may see the Judgment or may be identified, which may have consequences for them. I understood the children to be around 9/10 years old. I again considered there was a lack of information in support of this submission to allow the tribunal to understand what the "consequences" for the children might be.

33. I also considered it appropriate to take into account the level of risk in the children seeing the Judgment or being identified from it. There was no suggestion there had been any publicity arising from the previous Judgment published online (see below), and I took from that, that there was a low level risk of the children seeing the Judgment or being identified from it.
34. The tribunal next had regard to the fact a Judgment dated 9 November 2021, which contained reference to the evidence of a personal nature, had been published online. Accordingly, the subject matter of the application has been in the public domain for over 7 months. The tribunal accepted Ms Shiels' submission, with reference to the case of *Tyu v ILA Spa Ltd* (above) that the fact information has already been mentioned at a public hearing or in a published judgment does not necessarily preclude the engagement of Article 8, but it is likely to be highly significant.
35. The last factor to which the tribunal had regard was Ms Shiels' submission that the claimant suffers from long-term poor mental health and the publication of the decision without anonymity would likely pose a risk to the claimant's mental health. The disability relied on by the claimant in her claim of disability discrimination does not include poor mental health. The tribunal understands Ms Shiels' submission is the first reference to the claimant's mental health. The tribunal considered that without further information having been provided, it was not possible to assess this factor.
36. The tribunal, having put all of the above factors into the balance, and having considered all of the points made in relation to those factors, concluded the claimant had failed to provide a sufficiently strong reason to override the principle of open justice.

37. I considered many of the claimant's concerns could be addressed by sensitive judgment writing. I decided to refuse the claimant's application.

5 Employment Judge: Lucy Wiseman
Date of Judgment: 05 July 2022
Entered in register: 05 July 2022
and copied to parties