



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss P Sullivan

**Respondents:** Isle of Wight Council

**Heard at:** Bristol (decision on papers in Chambers)

**Before:** Employment Judge Midgley  
Mr E Beese  
Mrs C Lloyd-Jennings

## JUDGMENT ON APPLICATION FOR AN ORDER PURSUANT TO RULE 50

The claimant's application for a Rule 50 Order is refused.

### REASONS

#### The Application

1. In a letter dated 4 January 2023 attached to an email of the same date, the Claimant applied for an Order pursuant to Rule 50(3)(b) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("the Rules") that any information relating to a number of third parties in the Judgment and Reasons dated 3 February 2023 should be redacted.
2. Specifically, the claimant sought redaction of any reference to the following corporate entities: AM Labels Ltd, Kettering; Solent Composite Systems Ltd; Southampton Hospital; Gurit UK Ltd; and BD Marine Ltd.
3. Additionally, the claimant sought redaction of the circumstances in which she had reported to Hampshire Police her concerns that her brother was possibly missing.

4. An usual feature of this application is that it was made before the claimant had received the written Reasons so as to assist her in identifying whether reference, if any, had in fact been made to those corporate entities, and if so what it was.

### **The Grounds**

5. The grounds of the application are somewhat difficult to identify from the application itself. The claimant has referenced her right to private life enshrined in Article 8 of the European Convention of Human Rights (“ECHR”) and the Human Rights Act 1998, and the rights of freedom from torture or inhuman or degrading treatment (Article 3) and to a fair trial (Article 6).
6. Doing the best we can, it appears that the claimant is concerned that reference to the corporate entities permits the reader to make inquiries which will reveal matters relating to her private and personal life. In the application she details what she says those are; it is unnecessary to rehearse them hear.

### The Judgment references

7. The Judgment refers to each of the corporate entities as follows:
  - 7.1. Gurit UK Ltd (“Gurit”) is referred to most extensively (paragraphs 60, 61, 63 and 89, 95 and 96). The references in paragraphs 60-63 detail the extent to which Gurit was referred to in the claimant’s interview and the content of a document the claimant sent to the respondent which she relied upon in relation to her victimisation claim. The references in paragraph 89 detailed what the claimant said had occurred when Gurit was discussed during the interview; paragraph 95 details what was said during the internal investigation by the respondent’s employees, and paragraph 96 details what PC Massey told Mrs Betts about the claimant’s allegations against Gurit in a Police Report.
  - 7.2. The only reference to AM Labels Ltd is in paragraph 96, describing what PC Massey told Mrs Betts about that report.
  - 7.3. Solent Composite Systems Ltd (“Solent”) is referred to in paragraph 1, describing in broad terms the nature of the allegations in the ET1; in paragraph 49 providing the context for those allegations when detailing the reference to Solent in the claimant’s interview; in paragraph 63 reporting the reference the claimant made to Solent in the document she sent to Miss Martin after her interview; and in paragraph 85 clarifying which Tribunal claim the claimant had referred to in her email of 9 July 2020.
  - 7.4. There is a single reference to Southampton Hospital and BD Marine in paragraph 63, referencing the detail of the claimant’s complaint against

the Hospital and how she sought to connect it to BD Marine in the document the claimant sent to Miss Martin.

- 7.5. Lastly the only reference to the claimant making a police report to her brother is in paragraph 96 in which we detailed what PC Massey told Mrs Betts about the claimant.

The Claimant's Arguments

8. In her application the claimant suggests that the reports she made to the Police about her brother and Gurit were private matters (by implication falling within Article 8) and were not the subject of any Tribunal claim. Additionally, although the claimant does not identify it, we understand that the claimant says that the allegations she made against Gurit included allegations of sexual harassment, which would fall within Article 8.
9. In so far as the claimant has identified anything that might fall within Article 6 and the right to a fair trial, it appears to be as follows: PC Massey wrongly and falsely described events when suggesting she made false reports to the Police, that she raised a complaint to the IOPC about that conduct and in consequence he is no longer a serving police officer (although we note that she does not say whether he was subject to disciplinary action which resulted in that outcome).
10. We therefore understand the claimant's argument to be developed in this way:
- 10.1. PS Massey's account to Mrs Betts was false;
- 10.2. There was information within the bundle which showed that that was the case in the form of correspondence to the claimant from the IOPC;
- 10.3. That information was not referred to in the Judgment, despite the claimant's request, after Judgment was handed down, that it should be;
- 10.4. Therefore, in order for there to be a fair trial the references to the corporate entities and the report the claimant made to the police should be redacted.

**The Relevant Law**

11. It is a fundamental cornerstone of the common law that justice should be open (see Scott v Scott [1913] AC 417 and Global Torch Ltd v Apex Global Management Ltd [2013] 1 WLR 2993).
12. 'Open justice' requires the public to be able to attend hearings and enables the press to report on proceedings contemporaneously, including the identities of the parties and witnesses. There have been many higher court

iterations of the principle, one of the most seminal of which is that of R v Legal Aid Board (ex parte Kaim Todner) [1999] QB 966 per Lord Woolf MR:

“It is necessary because the public nature of the proceedings deters inappropriate behaviour on the part of the court. It also maintains the public’s confidence in the administration of justice. It enables the public to know that justice is being administered impartially. 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. If secrecy is restricted to those situations where justice would be frustrated if the cloak of anonymity is not provided, this reduces the risk of the sanction of contempt having to be invoked, with the expense and the interference with the administration of justice which this can involve.”

13. Those dual purposes were summarised by Lady Hale in in Cape Intermediate Holdings v Dring [2019] UKSC 38 at paras 42-43, as follows:

13.1. ‘to enable public scrutiny of the way in which courts decide cases - to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly’; and

13.2. ‘to enable the public to understand how the justice system works and why decisions are taken’

14. The reporting of judgment without restriction is part and parcel of the principle of open justice (BBC v Roden at para 50).

15. However, the administration of justice is not merely subject to the common law but also to the Convention rights contained within the European Convention of Human Rights. The relevant rights which are engaged in the current case are as follows: Article 6, Article 8, and Article 10.

16. Article 6 concerns the right to a fair hearing and provides:

“In the determination of his civil rights and obligations..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial Tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the public life parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

17. Article 8 concerns the right to respect for private and family life. It is a qualified right which provides that everyone has the right to respect for their

private and family life, their home and their correspondence. The right is qualified by the exception 'except such as is in accordance with the law and is necessary in a democratic society... For the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedom of others.'

18. Article 10 provides for the freedom of expression and is the article prayed in aid by the broadcast media and written press. The right is qualified in the same manner as the Article 8 right.

19. Those competing rights find their focus in the Tribunal process in the wording of Rule 50. That provides in so far as is relevant:

**“(1)A Tribunal may at any stage of the proceedings, on its own motion 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;**

**(d) a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act.**

**(4) Any party, or other person with a legitimate interest, who has not had a reasonable opportunity to make representations before an order under this rule is made may apply to the Tribunal in writing for the order to be revoked or discharged, either on the basis of written representations or, if requested, at a hearing.**

**(5) Where an order is made under paragraph 3 (d) above –**

**(a) it shall specify the person whose identity is protected; and may specify particular matters of which publication is prohibited is likely to lead to that person’s identification;**

**(b) it shall specify the duration of the order;**

**(c) the Tribunal shall ensure that a notice of the fact that such an order has been made in relation to those proceedings is displayed on the noticeboard of the Tribunal with any list of the proceedings taking place before the Tribunal, and on the door of the room in which the proceedings affected by the order are taking place; and**

(d) the Tribunal may order that it applies also to any other proceedings being heard as part of the same hearing.

(6) 'Convention rights' has the meaning given to it in section 1 of the Human Rights Act 1998."

20. S.10A is ostensibly limited to cases of confidential information as defined in s.10A(1); that does not apply to the circumstances of this case.

21. S.11 ETA 1996 relates to cases involving allegations of the commission of sexual offences and those involving allegations of sexual misconduct. Sexual harassment would fall within the definition of sexual misconduct in s.11(6) ETA 1996, as would the claimant's allegations of sex discrimination. However the power provided by s.11 is to make a restricted reporting order which has effect "until the promulgation of Judgment." It follows that the claimant cannot rely upon it in this application, as Judgment has been promulgated.

22. It is now well recognised that a Restricted Reporting Order ("RRO") can be made in a broad spectrum of cases even where sections 11 or 12 are not engaged (see Fallows v News Group Newspapers [2016] ICR 801 and F v G UKEAT/0042/11/DA where Underhill P, reviewing X v Commissioner of Police for the Metropolis [2003] ICR 1031 and A v B [2010] ICR 849, noted:

".. In a case where anonymisation or restricted reporting orders are sought in order to protect article 8 rights, which will in practice cover most cases caught by rules 49 and 50, the Tribunal's powers do not have to be derived from those rules. On the contrary, it has wide powers to take appropriate steps, unconstrained by their specific terms."

23. However, just because a complaint of party falls into one of the categories does not mean that an order will be justified, even if both sides consent. The question is always whether the balance between the ss. 11 and 12 protection and the principle of open justice actually justifies the making of such an order (see X v Y [1998] ICR 43).

24. The balancing exercise to be conducted in a case involving these conflicting rights was described by Lord Steyn in re S (A Child) (identification: Restrictions on Publication) [2004] 3 WLR 1129 (at paragraph 17) as follows:

"... What does, however, emerge clearly from the opinions are four propositions. First, neither article [8 and 10] 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. Generally, the issue may be straightforwardly determined without the need for a complex or lengthy hearing:

“I should add that Lord Steyn’s reference to ‘an intense focus’ [in Campbell v MGN Ltd [2004] AC 457] does not mean that every time a litigant waves an article 8 flag in support of an application for a private hearing there will have to be a protracted and expensive hearing to determine the issue. Often, indeed usually, experience suggests that the application can be determined very quickly. It also shows that, in most cases falling outside the area of recognised exceptional circumstances ..., the open justice principle will prevail.”

Per Kay LJ in Global Torch, supra.

26. In the context of sexual harassment or misconduct allegations the starting point is always that judgments should be published in full (including the names of the parties) with departure from that principle only where there is cogent justification and “the mere publication of embarrassing or damaging material is not a good reason for restricting the reporting of the judgment, as the authorities make clear” - see British Broadcasting Corporation v Roden [2015] IRLR 627, per Simler J at paragraph 50.

27. 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 (see Global Torch per Maurice Kay LJ at paragraph 13).

28. 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 by the Supreme Court in A v British Broadcasting Corporation [2014] 2 WLR 1243 in which Lord Reed said at [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 R (Guardian News and Media Ltd) v City of Westminster Magistrates’ Court (Article 19 intervening) [2012] EWCA Civ 420; [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.”

29. However, a distinction may properly be drawn between a party who initiates the proceedings and is thus to be treated as having accepted the embarrassment and reputational damage involved in litigation and a witness who has no interest in the proceedings, who has a stronger claim to be protected by the courts if liable to be prejudiced by publicity (see R v Legal Aid Board, ex parte Todner at 978F)

## Discussions and Conclusion

30. This is not a claim in which any concern about confidential information (within the definition in s.10A) and whilst the complaints of direct discrimination, in our judgment, fall within the definition of sexual misconduct in s.11(6) ETA 1996 because of the nature of the comments the claimant says were made, s.11 ETA 1996 affords the Tribunal no power to make an order redacting sections of the Judgment after its promulgation.
31. In any event, the claimant does not seek redaction of her complaints or matters relating to them, she seeks redaction of the names of corporate identities which are not of direct relevance to those complaints.

### The right not to be subjected to torture or degrading treatment or punishment

32. The claimant has not articulated any basis on which Article 3 would be engaged, let alone infringed, through the publication of the Judgment and Reasons without redaction. It appears that her complaint is the PC Massey subjected her to degrading treatment in the email he sent to Mrs Betts about her. That is not a matter which she can pray in aid in relation to the promulgation of the Judgment and Reasons.

### The right to a fair trial

33. The claimant has not identified any basis on which that right to a fair trial has been infringed.
34. In so far as we have recorded the content of PC Massey's email to the respondent in the reasons, it was necessary to do so because it explained the conclusion reached by Mrs Betts, which was endorsed by Mrs Gaudion and considered by Mrs Shands. That was relevant to our conclusion in relation to the victimisation claim. It forms no part of our findings or our conclusions that PC Massey's description of the mental state of the claimant or her mother, or of the truthfulness of any police report that they made, was itself accurate or true. That matter was irrelevant to our conclusions.
35. Reporting the fact of PC's Massey's views without referencing documents which themselves were not referred to in evidence and which may have cast his views in a different light did not prevent the claimant from receiving a fair trial of her complaints of sex discrimination and victimisation, nor did it subject her to torture or degrading treatment.
36. The argument that the claimant's Article 3 or 6 rights were infringed in the hearing or would be infringed by the publication of the reasons is therefore misconceived.

### The right to a private and family life



37. In so far as the claimant asserts that if the Judgment is published in full matters about her private and family life will be placed into the public domain, we make three observations.
38. First, the claimant has already knowingly placed those matters in the public domain by making a Police complaint about them, writing to the respondent about them, and addressing them in her witness statement for these proceedings (see paragraphs 12, 15, 29 of the statement). That horse, if the metaphor may be excused, has already bolted. Secondly, the claimant chose to bring the claim and to place reliance on the matters that she now seeks to have redacted and removed from the public record. Lastly, the claimant was informed that one consequence of requesting written reasons would be that the Reasons, including the background facts, would be published to the Tribunal's website. She requested written reasons in full knowledge of that fact.

The balancing exercise

39. We consider the factors to be weighed in conducting the necessary balancing exercise between the claimant's Article 8 rights on the one hand and the principle of open justice and Article 10 on the other. We note first that the act of publishing the Judgment without redaction does not impinge upon the claimant's right to a fair trial and does not constitute torture or degrading treatment. Secondly, in so far as there is any infringement of the claimant's right to a private and family life it is minimal. Thirdly, the claimant chose to place matters about her private life into the public domain and must be taken to have accepted the normal impacts of the public nature of Tribunal proceedings. Fourthly, that the public airing of those matters may cause embarrassment to the claimant is not enough to justify a Rule 50 order (Global Torch).
40. Weighing those factors, the only reasonable conclusion in this case is that the claimant has failed to demonstrate that a Rule 50 Order is necessary to protect her Convention rights or is otherwise in the interests of justice. The application is therefore refused.

Employment Judge Midgley

Dated 3 February 2023

JUDGMENT SENT TO THE PARTIES ON

8 February 2023

FOR THE TRIBUNAL OFFICE