Case No: EA-2022-000295-LA

Neutral Citation Number: [2023] EAT 92

EMPLOYMENT APPEAL TRIBUNAL

7 Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 1 June 2023

Before:

HIS HONOUR JUDGE AUERBACH

- -

Between:

F	**Appellant**
- and –	
J	**Respondent**

- -
- -

F the Appellant in person
Akua Reindorf KC (instructed by Eversheds Sunderland (International) LLP) for the Respondent

Hearing date: 1 June 2023

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JUDGMENT

SUMMARY

Practice and Procedure – Anonymity Order

The employment tribunal erred in refusing an application by the claimant for an anonymity order, in particular because it erroneously made the assumption that the issuing of his claim caused the subject matter relating to his disability to pass into the public domain.

HIS HONOUR JUDGE AUERBACH:

1. The claimant in the employment tribunal is a university lecturer. In July 2021 he presented a claim form to which the respondent was the university by which he was at that time employed, although his employment has since ended. He was acting as a litigant in person and brought multiple complaints of disability discrimination of various kinds in respect of various matters under the **Equality Act 2010**.

2. The Claimant's disability, which the respondent does not dispute, can be described under the umbrella term "autism spectrum disorder" (ASD). He also refers to having had a diagnosis of anxiety and major depressive disorder, although these are not relied upon as distinct disabilities. For the purposes of this appeal, I do not need to go into any detail as to the subject matter of the complaints or the respondent's defence to them. But, in summary, the issues raised relate mainly to the respondent's handling of an internal grievance and grievance appeal by the claimant. There are also issues related to him having for a time being subject to a disciplinary investigation, and allegations by him about what he says is the discriminatory impact of certain of the respondent's procedures on people who, like him, have ASD. It is also part of the claimant's case that he has a hidden disability which is not obvious to people with whom he comes into contact unless they are told about it; and that he had generally chosen not to reveal it to the respondent or to predecessor employers until, in the case of the respondent, he became obliged to do so.

3. In August 2021 solicitors acting for the respondent put in a response admitting the disability of ASD but defending the claims on their merits. A preliminary hearing then took place on 23 February 2022 before Employment Judge Brewer sitting at Nottingham, conducted by telephone. The claimant appeared in person and the respondent was represented by a solicitor.

4. The matter was listed for a multi-day full merits hearing to open on 19 June 2023, various directions were given and the complaints and issues to be considered at that hearing were reviewed

and set out. There were also applications by the claimant for witness orders, with which this appeal is not concerned, and for an anonymity order pursuant to rule 50 **Employment Tribunals Rules of Procedure 2013** which was refused. It is to that decision that this appeal relates.

5. I will set out in full what the judge said in relation to that application, at [8] – [14].

> "8. In relation to the application for anonymity the claimant said that he had a hidden disability which he did not wish to be disclosed and he had only disclosed it to the respondent. The claimant said that he believed that his employability would be destroyed without anonymity and he said that there was no public interest in his name being in the public domain. The claimant said he relied upon his right to privacy in the Human Rights Act and he also referred to the Equality Act in support of his application.
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> 9. For the respondent Mr Mordue objected to the application. He said that the basic principle is one of open justice and that the threshold to meet to interfere with that principle was high and not met in this case. He made the point that disability discrimination cases are very common and there is no general principle of anonymity even in cases of mental health disability. He said that the Equality Act is not a ground for departing from the principle of open justice.
>
> 10. The material part of rule 50 is as follows:
>
> > **Privacy and restrictions on disclosure**
> >
> > **50.**—(1) A Tribunal may at any stage of the proceedings, 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.
>
> 11. In Ameyaw v PricewaterhouseCoopers Services Ltd [2019] IRLR 611, EAT, HHJ Eady QC (as she then was) summarised the applicable principles derived from the existing case law where a party's art 8 rights are engaged.
>
> > "(i) the burden of establishing any derogation from the fundamental principle of open justice or full reporting lies on the person seeking that derogation;
> >
> > (ii) it must be established by clear and cogent evidence that harm will be done by reporting to the privacy rights of the person seeking the restriction on full reporting so as to make it necessary to derogate from the principle of open justice;
> >
> > (iii) where full reporting of proceedings is unlikely to indicate whether a damaging allegation is true or false, the ET should credit the public with

> the ability to understand that unproven allegations are no more than that; and
>
> (iv) where such a case proceeds to judgment, the ET can mitigate the risk of misunderstanding by making clear it has not adjudicated on the truth or otherwise of the damaging allegations."

> 12. The principle of open justice is extremely important in a democratic society but that has to be balanced against an individual's right under the ECHR and in this case in particular Article 8 the right to respect for private life. However, this is a case in which the claimant has chosen to air his grievances in a public forum and although I do not go as far as to say that in doing so he has given up his right to respect for his private life in respect of it becoming known that he has a disability, what the claimant said as part of his application was that he would not wish to tell his future employer that he was disabled, presumably, even if he was asked the direct question and I do not consider that the right to respect for private life encompasses the right to enable someone to be less than candid.
>
> 13. The claimant may fear that he would become less employable in the future if it was known that he was disabled but that is not sufficient in my judgement to displace the open justice principle. The claimant is protected by the Equality Act 2010 from discrimination in respect of a disability. But that fell significantly short of clear and cogent evidence that he would be done harm by his name being in the public domain as the claimant in a claim of disability discrimination against this respondent. I would note that this claim is in the public domain. The claim was brought in July 2021 and as I understood the claimant's submission to me he left the respondent's employment in September 2021 and has since gained further employment which rather goes against his argument but if this matter was in the public domain, which it is, he would be significantly impaired in relation to his employability. His own argument would suggest that that is not the case.
>
> 14. Balancing open justice against the claimant's convention rights I find the balance falls in favour of open justice in this case, and I refuse the application."

6. The claimant, again acting as a litigant in person, presented his notice of appeal in April 2022. The judge who considered it on paper directed that there be a preliminary hearing and this came before HH Judge Katherine Tucker on 15 February 2023. On that occasion the claimant was represented by Mr Rajgopaul of counsel under the ELAAS scheme. Three amended grounds of appeal tabled by him were permitted by the judge to proceed to a full appeal hearing in substitution for the grounds set out in the original notice of appeal. The judge also, in view of the issue raised by the appeal, made an anonymity order in respect of the ongoing EAT proceedings.

7. On 14 March 2023 the respondent's solicitors wrote to the EAT stating that, having considered the amended grounds of appeal, the respondent conceded the appeal in so far as it accepted that

grounds 1(b), 2 and 3(i) were well-founded, but made no admissions as to the remaining grounds. They invited the EAT to allow the appeal and return the matter to the employment tribunal, as evidence would need to be heard when considering the issue afresh.

8. The EAT's Practice Direction provides at paragraph 17.3:

> "If the parties reach an agreement that the appeal should be allowed by consent, and that an order made by the Employment Tribunal should be reversed or varied or the matter remitted to the Employment Tribunal on the ground that the decision contains an error of law, it is usually necessary for the matter to be heard by the EAT to determine whether there is a good reason for making the proposed order. On notification by the parties, the EAT will decide whether the appeal can be dealt with on the papers or by a hearing at which one or more parties or their representatives should attend to argue the case for allowing the appeal and making the order that the parties wish the EAT to make."

9. In **Dozie v Addison Lee Plc** UKEAT/0328/13, 13 August 2013, at [20] HH Judge David Richardson explained why the EAT does not allow appeals by consent without scrutiny:

> "Firstly, judgments and orders of the Employment Tribunal and of Employment Judges are entitled to respect. It is in the interests of justice and good order that they should stand unless there is good reason for upsetting them. Secondly, parties sometimes agree to the setting-aside of judgments or orders for purely tactical reasons. These are not in themselves good reasons for setting aside judgments and orders. Thirdly, parties do not always think through the consequences of allowing an appeal. There may easily be misunderstanding as to the effect of doing so or the scope of what the Tribunal will decide after the appeal is allowed. Two issues of this kind have arisen today, and I shall mention each of them in a moment. Fourthly, there is sometimes a wider public interest in a judgment beyond the interests of the parties to the litigation in question."

10. In the present case, in correspondence following the respondent's solicitors 14 March 2023 letter, the parties were unable to agree the terms of a draft consent order disposing of the appeal for consideration by the EAT and they took conflicting stances as to the way forward. At my direction the EAT then informed the parties that, if a draft agreed consent order was put forward, the EAT would be able to consider it, but it was not appropriate for the EAT to take any other course in advance of the hearing listed for today.

11. I have heard the appeal today. The claimant has appeared in person and the respondent has been represented by Ms Reindorf KC. I had the advantage of reading the skeleton arguments from

them both. The claimant adopted the skeleton argument relied upon by Mr Rajgopaul at the preliminary hearing, to which he then added a number of further submissions of his own.

12. I spent time with the parties at the start of today's hearing discussing how it would be conducted, bearing in mind that the claimant is a litigant in person and his disability, and ensuring that all of us had access to the materials to which reference might be made. I also drew the attention of both parties to the fact that one of the cases in respect of which I had a copy of the EAT's decision in my bundle, **Millicom Service UK Ltd v Clifford**, had, since the preliminary hearing took place, been the subject of a decision on further appeal by the Court of Appeal: [2023]EWCA Civ 50; [2023] ICR 663; and both parties were given access to it.

13. I heard oral argument from both sides this morning. I have considered all the written and oral arguments that were presented to me, although I will not refer to every aspect of these in the decision I am now giving. As the matter has come before me at a full appeal hearing in the circumstances that I have described, and in view of the arguments presented, and bearing in mind the first and the third of the four points mentioned in **Dozie**, I will review each of the grounds of appeal in turn.

14. I start by noting that in support of his application the claimant invoked his Article 8 Convention rights. Article 8, headed "Right to Respect for Private and Family Life", provides 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 wellbeing 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."

15. Although the authorities commonly speak of the first question in such a case being whether the Article 8 rights of the party seeking the restriction on publicity are engaged, as the Court of Appeal has pointed out in **Millicom**, more precisely the first question is whether the public disclosure of the

information in the proceedings in question would entail an interference with their Article 8 rights. If so, the second question is whether that interference would be justified in accordance with Article 8(2).

16. In this case the tribunal plainly accepted that the claimant's Article 8 rights would be infringed by the public disclosure of his disability, if not already in the public domain. At paragraph 11 the tribunal cited **Ameyaw v PricewaterhouseCoopers Services Limited** [2019] IRLR 611 as a pertinent authority, being a case "where a party's Article 8 rights are engaged". At [12] the tribunal referred to the present case as one in which the Article 8 right of the claimant had to be put in the balance. The principal issue of substance which the judge had to decide was whether not granting the anonymity order would entail an infraction of the claimant's Article 8 rights which was outweighed by the derogation that granting the order would entail, from the principle of open justice at common law and as articulated in the corresponding countervailing Convention rights.

17. Against that backcloth, I will start with ground 2 and, because it overlaps with it, I will at the same time consider ground 1(b). These parts of the grounds both contend that the judge erred by relying upon his assumption to that the claim, and the contents of it, were already in the public domain, when that was not in fact the case.

18. As to that, my conclusions are as follows. First, I note that, at one time in the past there was a requirement on the then Secretary of the Office of Industrial Tribunals to maintain, on a register open to public inspection a record of, among other things, applications to the tribunal, although, even then, this did not include a copy of the application or claim form itself. However, today regulation 14(1) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** simply provides that:

> "The Lord Chancellor shall maintain a register containing a copy of all judgments and written reasons issued by a Tribunal which are required to be entered in the register ..."

19. Accordingly, the existence of a claim does not automatically enter the public domain by virtue of it being presented as such, still less the contents. Nor indeed does it enter the public domain by virtue of it not being rejected upon initial consideration, and the respondent being notified of it. Nor does that occur by virtue of the entering of a response to it, as such. As and when there is a hearing, essential details, including the parties' names, will be published on the tribunal's hearing list, but not substantive details of the contents of the claim itself. The position will, however, subject to any order the tribunal makes under rule 50, change as and when there is a public hearing. However, case management hearings in the employment tribunal are, as this one was, ordinarily conducted in private.

20. In his decision at [12] the judge said that the claimant had "chosen to air his grievances in a public forum" which appears clearly to be a reference to him having presented his employment tribunal claim. At [13] the judge stated: "I note that this claim is in the public domain" and went on to refer to it having been presented in July 2021. It does not appear to have been suggested or found that anything else had occurred to cause the fact or contents of the claim to enter the public domain.

21. The judge appears to have proceeded on the basis that the fact of the claim having been presented itself caused it to pass it into the public domain, and that this had a bearing on the significance for the claimant's Article 8 rights of granting or not granting an anonymity order at the point when the judge was considering whether to do so. The judge's assumption that, by virtue of the claim having been presented it had passed into the public domain, was wrong. This was an error of principle, or a taking into account of an irrelevant, because mistaken, consideration, which plainly materially influenced the judge's decision. For that reason grounds 1(b)(i) and 2 succeed.

22. Ground 1(b)(ii) contends that in any event an anonymity order can be made even after a judgment is published following a public hearing. As to that, it is correct, as such, that the authorities indicate that, even where the matters in issue have been ventilated at a public hearing to some degree, it does not necessarily follow that for that reason alone an anonymity order would be of no utility and

should not be granted. However, the judge in the present case does not appear to me to have proceeded on the footing that the matters in question had been ventilated at a public hearing, as no such hearing had yet taken place, nor was the hearing before him such a hearing. So I do not think that in this case that strand of ground 1(b) adds a material point of challenge.

23. I turn to ground 3. This contends that the judge erred by reaching a decision on the application without permitting the claimant to adduce or give evidence in support of it, but (i) concluding nevertheless that there was "a lack of clear and cogent evidence"; and (ii) not making any reference to statistical evidence to which the claimant referred.

24. My conclusions on this ground are as follows. In this particular case, as the judge identified at [8], the claimant's case was that he had a particular concern and fear about the impact which not granting an anonymity order would have on his future employability or employment. The judge correctly relied, as such, upon the point made in the passage from **Ameyaw** that he cited, at (ii) of that passage, that "it must be established by clear and cogent evidence that harm will be done" by the matter in question being reported without restriction. But, that being so, it was also incumbent on the tribunal to ensure that the claimant had a fair opportunity to present what he might contend was such clear and cogent evidence on that point, before the point was adjudicated.

25. This is a fact and context-sensitive matter. In this particular case, bearing in mind how the claimant put his case as to why an anonymity order should be granted, that he was a litigant in person, and also the nature of his undisputed disability, in my judgment fairness required that the tribunal take proactive steps to explain to him the onus on him to support this particular contention by evidence, and then allow him a fair opportunity to advance such evidence. Ideally, that would have been done by permitting and directing him in advance of the hearing to produce a witness statement and to table any relevant documentary evidence on which he wished to rely. Of course, the respondent

would then be entitled to challenge and test that evidence at the hearing and, indeed, also, if it wished to do so, to present such evidence of its own, subject to testing by the claimant at the same hearing.

26. At the very least, in this case, fairness would have entailed drawing this point to the claimant's attention at the start of the hearing and allowing him the opportunity to give sworn oral evidence and/or to indicate whether there might be documentary evidence that he would wish to have the opportunity to provide, for the tribunal's consideration, before the matter was adjudicated. It appears to be common ground before me, and there is nothing in the minute of the tribunal's hearing to suggest otherwise, that this did not happen. Ground 3 is, in that regard, therefore well-founded. I note also before leaving this aspect, that the Court of Appeal's decision in **Millicom** also contains a useful discussion of the approach to be taken when evaluating evidence of this type.

27. Specifically as to strand (ii) of this ground, the underlying starting point is that, provided that he was given a fair opportunity to do so, the onus would indeed be on the claimant to present evidence in support of his particular contention for the tribunal's assessment. The tribunal would, in those circumstances, be entitled to attach little or no weight to an assertion that was not supported by evidence. Strand (ii), therefore, does not add anything of substance to the wider point raised by this ground which I have upheld, which was that the claimant was not given that fair opportunity.

28. Allowing the claimant to give evidence would have enabled him to explain in evidence why he feared that his future employability would be impacted by the anonymity order not being granted, including whatever he wished to say about what knowledge or information might have fuelled that fear. Allowing him to present documentary evidence would enable him, if he wished, for example, to present any relevant medical evidence relating to his own disability, or any relevant research for similar material that he might contend was relevant to the issue and added weight to his case.

29. I turn to ground 1(a). This has two sub-strands. Strand (a)(i) asserts that the judge improperly made an assumption that the claimant was intending to be less than candid in a hypothetical future scenario. As to that, once again the wider context is that the claimant did not have a fair opportunity to present evidence. It was, in my judgment, not fair to draw the inference from his statement in submissions that he "would not wish to tell his future employer that he was disabled", that he would be "less than candid" if asked a direct question by a prospective employer, when he had not had the opportunity to give sworn evidence. That is because he had neither given evidence to that effect, nor had he had the suggestion put to him, when giving evidence, for his response.

30. Strand (a)(ii) contends that the tribunal failed to give any, or sufficient, weight to the claimant's Article 8 right "to keep his mental health confidential" and protections given by domestic law in this regard. I do not think this strand is entirely well-founded or adds anything of substance to the other grounds as such.

31. As I have noted, the judge plainly understood that the claimant was invoking Article 8 and proceeded on the basis that his Article 8 rights would be infringed by the fact of his disability coming into the public domain, other than by his own choice. The judge also correctly understood that, in principle, he needed to assess and weigh in the balance to what extent not granting the anonymity order would result in such an infraction. This part of the ground also refers to domestic law. In some cases, the common law analysis may not be identical to the Convention rights analysis – a point discussed by the Court of Appeal in the unusual factual context that arose in **Millicom**. But in this case, I cannot see that it would materially differ from the Convention rights analysis.

32. For all of the foregoing reasons, however, the tribunal erred in law and so the appeal is allowed and the tribunal's decision not to grant the anonymity order sought must be quashed. As Ms Reindorf KC confirmed in oral argument, the respondent did not dispute that the whole decision must be

quashed, including the findings of fact and/or factual inferences which the judge drew as part of it. The entire matter must be considered and decided afresh.

33. The claimant invited me not to remit the matter to the tribunal but to substitute my own decision granting the anonymity order. However, as authorities such as **Jafri v Lincoln College** [2014] EWCA 449; [2014] ICR 920 establish, it is the role of the employment tribunal to consider and evaluate the evidence and to make findings of fact and, even had both parties consented to the EAT exercising that power on behalf of the tribunal, I agree with Ms Reindorf KC that the EAT simply would not be in a position to do that in this case. One of the reasons I have allowed this appeal is because there now needs to be a fair opportunity for the claimant and, indeed, the respondent if it wishes, to gather and present evidence in the form of a witness statement or statements and/or other documentary evidence that may be sought to be relied upon. That is a process that will have to take place before, and then lead to a fresh decision by, the employment tribunal.

34. The claimant in his skeleton and submissions this morning invited me, in the event that it was my decision to remit the matter to the employment tribunal, to direct that it should be remitted to be heard other than at Nottingham – that is to say, not in the Midlands East Region. He proposed London or, alternatively, asked me to direct that, if it remains in the Midlands East Region, the matter be remitted to be considered afresh by a judge other than Employment Judge Brewer.

35. The claimant seeks a direction on either scenario that this should apply not only in respect of the fresh consideration of the application for an anonymity order – assuming that that is considered and determined in advance of the full merits hearing by a judge sitting alone – but also that the same direction should be given by the EAT in respect of where the full merits hearing should take place and/or, if it is not transferred out of the Midlands East Region, whether Employment Judge Brewer should be the judicial member of the three-person panel at that full hearing.

36. As to this, first, it may be as a matter of practicality that there will now be insufficient time or opportunity for the anonymity order issued to be considered afresh at a separate hearing listed to take place in advance of what is currently scheduled to be the first day of the full merits hearing. In any event, I accept Ms Reindorf KC's submission that my powers on this occasion are limited to giving directions about how the anonymity order issue should be dealt with upon remittal. Under section 35 **Employment Tribunals Act 1996** the EAT only has the power to do things that the tribunal could do, for the purposes of the EAT disposing of the appeal. This appeal relates only to the matter of an application for an anonymity order.

37. Further, and in any event, I do not consider that there are any good grounds that have been advanced for directing that the matter be transferred out of region, whether for the purposes of fresh consideration of the anonymity order issue or, even if I had the power to direct it, more generally. The claimant refers to the fact that, following Employment Judge Brewer's decision, he complained about it to the Regional Employment Judge (REJ). That complaint was unsuccessful for reasons set out by the REJ in a letter of 5 April 2022. The claimant contends that the REJ's decision on his complaint was wrong and says he is, in so many words, very troubled by it. In light of that, he submits that not to direct that the case be heard elsewhere than in Nottingham would undermine public confidence in the judiciary.

38. I disagree. As the REJ explained in his letter of 5 April 2022, his only powers in this matter are the delegated power to investigate and report on complaints of judicial misconduct in accordance with the applicable rules. He was of the view that the complaint did not evidence misconduct. He, rightly, expressed no view in the course of his decision about the different question of whether EJ Brewer had in his decision erred or, arguably, erred in law. The REJ rightly noted that that would be a matter for the EAT in the event of an appeal.

39. The claimant's position amounts in substance to the contention that there would, in view of the REJ's decision on his complaint, be what lawyers would call an appearance of bias, were the anonymity issue not to be freshly determined, and/or the substantive hearing not to be held, elsewhere than in Nottingham. As was established in **Magill v Porter** [2001] UKHL 67; [2002] 2 AC 537 at [103] the test to be applied when considering such a contention is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased, hence in this case that a trial tribunal sitting in Nottingham would be biased. Importantly, the authorities established that the fair-minded and informed observer is not the litigant himself, as his subjective perception is liable inevitably to be affected, consciously or not, by his close involvement in the matter in that capacity.

40. In this case, the fair-minded and informed observer would, in my judgment, understand that the REJ was solely concerned with the limited jurisdiction he had under the rules relating to complaints in relation to matters of conduct, and had come to no view about the substantive issue raised by the anonymity-order application. While the nature of the complaint required him to consider EJ Brewer's decision, he was doing so from the point of view of his role under the complaints procedure.

41. The Claimant in oral submissions to me this morning said that anyone, as he put it, "working under" REJ Swann would be influenced by his decision. However, the informed observer would understand that each and every judge is independent of each and every other judge, including the Regional Employment Judge in their region, who will play no part in, and have no influence over, the judicial decisions by judges or tribunal panels sitting in that region. Understanding that point, the fair-minded and informed observer would not consider that there was any cause for concern that any judge or panel deciding the anonymity point afresh sitting in Nottingham would be influenced by the REJ or the REJ's decision on the complaint.

42. Ms Reindorf KC also suggested that if the matter were to be assigned to another region this could result in the trial date being put back to 2024 or 2025. The claimant agreed, but submitted that, even if so, he would be prepared to accept that consequence in order to be reassured that he would get a fair hearing; and he submitted that there was no reason not to direct a transfer. As to that, I am not in any position to say when the trial would proceed, were the matter to be transferred elsewhere. I leave aside also the point that the respondent, as well as the claimant, has the right to a fair trial as soon as the matter can reasonably be fairly heard. The short answer to this point is that, even if I had the power to direct a transfer, it would be wrong for me to purport to do so, as it is not, in fact, necessary to do so in this case in the interests of justice.

43. I turn to the question of whether I should direct that, upon remission to the employment tribunal, the matter should not be considered by the judge who took the decision first time around – that is to say, EJ Brewer. That issue gives rise to different considerations which are summarised and discussed in the EAT's decision in **Sinclair Roche & Temperley v Heard & Fellows** [2004] IRLR 763. In this case the claimant, as I have noted, seeks a direction that upon remission the matter not be considered by EJ Brewer. The respondent, through Ms Reindorf KC, takes no position about that. The claimant writes in his skeleton:

> "Judge Brewer appears to believe that no one should have protections under Article 8 of the ECHR. This is so antithetical that his judgment must surely undermine public confidence in the judiciary".

44. I appreciate that this is what the claimant sincerely believes, but there is, respectfully, no good basis for him to believe that. The judge has said nothing in his decision to the effect that no one should have protections under Article 8 of the ECHR or such that his judgment must undermine public confidence in the judiciary. The fact that, as I have found, the judge reached a decision in error of law does not itself equate to apparent bias.

45. However, in argument this morning the claimant expressed his concern, differently, as being that, as a matter of human nature, the judge might hold to the view that his original decision was, in principle, right and come to the same decision as before, even if by different reasoning. He also referred to the fact that he had applied to EJ Brewer for a reconsideration but this had been declined. Although I have not seen the original correspondence relating to that, this is referred to in the REJ's letter of 5 April 2022. He notes there that the judge responded to that application, that he had no power to consider a reconsideration as such, as the application did not relate to a judgment, although it appears the judge made further points about his decision in that response and also to REJ Swann in response to enquiries made by him, when considering the claimant's complaint.

46. The point raised by the claimant here directly echoes a point that is discussed in **Sinclair Roche & Temperley** at [46.5] where it is described as the "second bite of the cherry" point. The EAT said there:

> "If the Tribunal has already made up its mind, on the face of it, in relation to all the matters before it, it may well be a difficult if not impossible task to change it: and in any event there must be the very real risk of an appearance of pre-judgment or bias if that is what a tribunal is asked to do. There must be a very real and very human desire to attempt to reach the same result if only on the basis of the natural wish to say 'I told you so'. Once again, the appellate tribunal would only send the matter back if it had confidence that, with guidance, the tribunal because there were matters which it had not, or had not yet, considered at the time it apparently reached a conclusion, would be prepared to look fully at such matters, and thus be willing or enabled to come to a different conclusion, if so advised."

47. This is a point that the **Sinclair Roche** guidance suggests needs to be given very careful consideration. That said, the final of the six points made in that passage made, under the heading of "Tribunal Professionalism", is that:

> "... unless it appears that the tribunal has so thoroughly committed itself that a rethink appears impracticable, there can be the presumption that it will go about the tasks set them on remission in a professional way, paying careful attention to the guidance given to it by the appellate tribunal".

48. In this case, though I have no reason to doubt that he would approach the task conscientiously to the best of his ability if asked to do so, given the conclusion reached by EJ Brewer first time around

and the reasons that he gave for doing so, I think it would be a tall order to expect him to put his previous view of the matter completely out of his mind and to come to the issue entirely afresh, as a judge who had not considered it before would be able to do. I will, therefore, direct that, upon remission, the anonymity question be considered by a judge other than EJ Brewer.