Neutral Citation Number: [2022] EAT 196

Case No: EA-2021-000509-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 September 2022

Before :

HER HONOUR JUDGE TUCKER

- -

Between :

LQP

Appellant

- v -

(1) CITY OF YORK COUNCIL
(2) CITY OF YORK TRAINING LIMITED (T/A WORK WITH YORK)

Respondents

- -
- -

George Molyneaux for the **Appellant**

Sam Healy for the **Respondent**

Hearing date: 28 September 2022

- -

JUDGMENT

Revised

SUMMARY

Practice and Procedure, Disability Discrimination

The Appellant (Claimant before the Tribunal) contended that an Employment Judge had erred in law in refusing an application to amend so as to permit him to bring a claim of disability discrimination based upon perceived, rather than actual, disability, and, in respect of the refusal of an anonymity order. The appeal was allowed in respect of both grounds of appeal. The Judge erred in his approach to the application for amendment by, arguably, 'short-cutting' the required analysis and evaluation of the relative hardship of granting or refusing the amendment. In respect of the anonymity order, the Judge erred in that he failed to have proper regard to new evidence and consider and balance the Claimant's Article 2.

HER HONOUR JUDGE TUCKER:

Introduction

1. This is an appeal against a Case Management Decision of Employment Judge Little dated 3rd March 2021. The Case Management Decision was made within Tribunal proceedings which are ongoing, and which are due to be heard at a final hearing in the early part of 2023, with a final Case Management Hearing listed to take place in approximately ten days' time.

2. Two grounds of appeal are pursued before the EAT today.

3. First, that the Employment Judge erred in refusing permission for the Claimant to amend his claim to include a claim of direct discrimination because of perceived disability, ('the amendment ground'). That application was made after the Tribunal had determined that the Claimant did not, at the material time, have a disability within the meaning of section 6 of the **Equality Act 2010, ('**EqA 2010'). I proceed today, however, on the basis that, despite that determination and whilst the claim of disability discrimination contrary to s.15 of the EqA 2010 was withdrawn by the Claimant and dismissed on withdrawal, there was no Judgment dismissing all of the Claimant's disability discrimination claims.

4. The second ground of appeal is that the Employment Judge erred in refusing to grant an anonymisation order ('the anonymisation ground'). The Claimant had previously applied for such an order. That application was refused. The Claimant made a further application, supported by additional evidence in the form of letters from the Claimant's GP. That second application was refused by EJ Little and (as set out below) the subsequent appeal in respect of that decision progressed only to the sift stage of the EAT procedure.

5. In this Judgment I refer to the Appellant as the Claimant and to the Respondents as the First

and Second Respondents, as they all are before the Tribunal.

The facts

6. As noted above, the final hearing has yet to take place. Many factual issues are in dispute between the parties. However, the facts about which it appears there is no dispute are as follows:

(i) The Second Respondent is a recruitment agency and is a wholly owned subsidiary of the First Respondent.

(ii) The Claimant was engaged by the Second Respondent to work for the First Respondent over various periods of time between March 2015 to May 2019.

(iii) On 7 May 2019 the Claimant was informed, by letter, that his assignment with the First Respondent would be extended to 30 September 2019.

(iv) On 8 May 2019, the Claimant informed the Second Respondent that he suffered from anxiety and/or had a mental health condition.

(v) On 13 May 2019 the Claimant called in sick, citing mental health and anxiety.

(vi) On 15 May 2019 a decision was made to terminate the Claimant's assignment with immediate effect and the Claimant was informed of this the next day.

7. The Claimant issued proceedings on 30th July 2019 for disability discrimination, victimisation and detriment for having made a protected and qualifying disclosure. He alleges that the termination of his assignment was one of several detriments to which he was subjected by the Respondents, alternatively because of disability/his mental health condition. His pleaded case is that he was subjected to that treatment because of the alleged protected disclosures he made, and/or because of his disability, a mental health condition. In his original claim the Claimant, acting in person, framed his disability claim as follows:

> **"I am bringing the complaints of direct discrimination on grounds of disability."**

Lawyers will immediately recognise that the phrasing of a claim of direct discrimination by reference to 'on grounds of disability' uses wording which is no longer used in the **Equality Act 2010**; direct discrimination now being described as being 'because of' that disability. The Claimant added that he was claiming discrimination arising from disability and other claims. At paragraph 42 of the lengthy document in which he pleaded his claim, he set out some matters about informing the Respondent of his mental health condition. At paragraph 52 he stated:

> **"It is clear that the termination of my assignment was made because of**
> **a) Me raising protective qualifying disclosures**
> **b) My mental health condition disclosure"**

7. A Case Management Hearing took place and, as a result of that hearing, a Preliminary Hearing was listed to take place in December 2019 before an Employment Judge. That hearing was listed to determine whether or not the Claimant was, at the material time, a disabled person within the meaning of the EqA 2010. The Judge (EJ Eeley) held that the Claimant was not and provided a draft Reserved Judgment and Reasons on 1 July 2020, (the Disability Judgment). The Disability Judgment refers to issues about the Claimant's mental health and includes some references to his personal life, including his sex life.

8. After the circulation of the draft Disability Judgment, the Claimant made an application under Rule 50 of the Employment Tribunal Rules for an anonymisation order. That application was refused at a hearing on 30 June 2020. Reasons for that decision were set out in a Judgment dated 3 August 2020. In that Judgment the Judge made it clear that she accepted that the Claimant's rights under Article 8 of the European Convention on Human Rights (ECHR) were engaged, but, held that those rights were not outweighed by the principle of open justice. She noted, in particular, that there was no medical evidence before her that the absence of an anonymisation order would lead to, or cause, a deterioration in the Claimant's mental health. After the hearing, on further reflection, EJ

Eley, made an interim anonymisation order to be effective pending an appeal against her decision

9. The appeal, however, was unsuccessful. Bourne J's decision regarding that proposed appeal is dated 3 February 2021. He too noted that there was no medical evidence before the Tribunal. He also referred, however, to some further information which was before him in the form of a letter dated 2 July 2020 from the appellant's GP. (I am not clear whether that had been before EJ Eley). That letter referred to a deterioration of the Claimant's condition and to suicidal thoughts. The letter noted that the Claimant felt that a refusal to grant of an anonymity order could result in further deterioration in his mental health and, possibly, a risk to his life. Bourne J stated, significantly in my view, that the doctor who wrote the letter, did not state whether he shared that view. Bourne J concluded that, therefore, the letter did not constitute medical expert opinion which materially supported the application.

10. The matter was then listed for a further Case Management Hearing before the Tribunal on 19 February 2021. In advance of that hearing the Claimant submitted an agenda in which he identified one of his complaints as, "Direct (perceived) disability discrimination" and stated that he wished to discuss a summary of the causes of action he had originally produced pursuant to an Order dated 25 September 2019, and provided an amended version of that document. That also set out that he wished to advance a complaint of direct discrimination based on perceived disability, by reference to the same allegations and facts he had originally pleaded as allegations of direct disability discrimination but based on actual disability. He set out his view that he considered that the discrimination he alleged was an act which had continued over a period of time.

11. Further, in advance of the Case Management Hearing he also made a fresh application for an anonymisation order. He provided two letters from his GP. The first letter is dated 2 July 2020. In that, the GP stated that the Claimant had been consulting him regularly since May 2020, with a background of anxiety and low mood, 'dating back several years' and that it had deteriorated during the tribunal proceedings. It also reported the Claimant's own views as set out above.

12. However, the second letter included the following passage,

> *"Further to my latter dated 2.7.2020, I understand the most recent case in relation to his anonymity has also been refused and the anonymity order has now lapsed. This has led to a great deal of distress for the patient and is directly impacting on his mental health, with him reporting low mood and anxiety symptoms.*
>
> *My previous letter stated that "[the Claimant] is of the opinion that refusing to grant him anonymity could result in further worsening of his mental health, including a possible risk to his own life should matters deteriorate significantly". Clearly, I cannot predict the future, but I have no reason to disagree with the patient and it is my opinion that if the anonymity order is continued to be refused, this will have a direct negative impact on the patient and his mental health, possibly leading to further consequences such as self-harming or suicide attempts including loss of life".*

The law

Amendment

13. The legal principles regarding the two grounds of appeal before me are, now, relatively well established. In respect of amendment, the principles are set out in several authorities, in particular the well-known case of **Selkent Bus Company v Moore** [1996] ICR 836 ("**Selkent**") which has been considered more recently in decisions of **Vaughan v Modality Partnership** [2021] ICR 535 ("**Vaughan**") and **Abercrombie v AGA Rangemaster Limited** [2014] ICT 209 ("**Abercrombie**"). I accept the submission made today on behalf of the Claimant that one particularly important principle set out and emphasised within these authorities is the need, in each individual case, to balance competing factors in order to reach a decision regarding an application to amend; to balance the injustice/ hardship of, on the one hand, allowing an amendment, against the competing injustice/ hardship of, on the other, refusing it.

14. There are, in my judgments, no permissible shortcuts. That balancing exercise must be undertaken in respect of each application to amend which arises in any particular case. That is because, in determining whether to grant the application or not, the paramount considerations are the relative injustice and hardship which flows from the decision, having regard, in particular, to the practical consequences of refusing or allowing the amendment.

15. Some of the factors which arise are common to most cases, others may be unique to the case before the Tribunal. In **Selkent,** Mummery J identified some of the factors which frequently arise, and which it may be relevant to consider. In **Vaughan** the point was made that 'labelling' those different factors, or the cases in which some arise, is not the correct approach. That labelling exercise should not be used as a shortcut around, or in lieu of the balancing exercise of those different factors. I agree. The risk of doing so, in my view, is that, all too easily, impermissible 'short cut' decision making can take place: for example, a so called 're-labelling' case (one where the same facts are relied upon in respect of a proposed amended head of claim) is likely to lead to an application to amend being granted, or a 'new facts'/ 'new cause of action' case will not, without a proper balancing exercise having been undertaken. Rather than focusing on the type of case, or label ascribed to it, it is far more important to look at the practical consequences of allowing, or, on the other hand, refusing an amendment. That same point is made, albeit in different terms in the **Abercrombie** decision. In that decision, parties, representatives and Tribunals were encouraged to focus on the extent to which a new amendment would be likely to involve different areas of enquiry over questions of formal classification. Again, I agree.

16. Two further points which are made in the authorities cited above are, in my judgment, relevant. First, when a party is unrepresented, Tribunal's should be live to the potential need to adopt a "more inquisitorial approach" in order to ascertain where the balance of hardship and injustice lies.

See in particular, **Vaughan,** paragraph 19. Secondly, amendments which might have been avoided had more care been taken when the claim was originally drafted are, evidently, best avoided given the costs and delay they are likely to cause (which, of themselves, may be relevant considerations in respect of an application to amend). However, the key consideration remains the balance of justice and hardship. See **Vaughan,** paragraph 28.

17. When a claim of directed discrimination based on perceived disability is pursued, the putative discriminator must believe that all of the elements in the statutory definition of disability are present, even if they do not attach to those elements the label of 'disability'. See **Chief Constable of Norfolk Constabulary v Coffey [2020] ICR 145, at paragraph 11.**

Anonymity Order

18. Rule 50 of the Employment Tribunal rules of procedure sets out the primary basis for an anonymisation Order. That rule also establishes the structure of analysis which should be adopted when considering such applications. Rule 50 provides as follows:

> **Privacy and restrictions on disclosure**
>
> **50.**—(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—
>
> (a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;
>
> (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;
>
> (c) an order for measures preventing witnesses at a public hearing being identifiable by members of the public;
>
> (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 as 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 notice board 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.

19. The rule has been considered in several cases including **Millicom Services UK Limited v Clifford** [2022] ICR; **TYU v ILA Spa Limited** [2022] ICR 287 and **X v Y** [2021] ICR 147.

20. Article 2 of the ECHR sets out the right to life. Article 2 is sometimes described as an unqualified, or 'absolute' right, as distinct from a qualified right, such as the rights set out in Articles 8 and 10 of the European Convention. Both of the latter two rights may be subject to interference as set out within Article 8(2) and 10(2) of the ECHR.

21. Article 2 provides as follows:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection

22. Articles 8 and 10 ECHR provide as follows:

ARTICLE 8: Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his

> correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
>
> ARTICLE 10 Freedom of expression
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary

23. It was submitted that when an "absolute" right is required to be balanced with a qualified right such as that in Article 10, the "absolute" right should take precedence. Further, that when two qualified rights are in conflict, neither right has precedence and a fact sensitive balancing exercise or analysis must be undertaken.

The Tribunal's decision

24. Before I set out the detail of that decision which was the subject of this appeal, I wish to acknowledge and pay tribute to the work of Tribunals, Employment Judges and Tribunal staff being undertaken at the time the decision under appeal was made, i.e., in February 2021. February 2021 fell during the midst of the third lockdown during the COVID pandemic. Not only did Tribunal Judges and Tribunal staff keep work going, hearing and managing cases, they did so in difficult times and in difficult working conditions. Often they were working from places where they would not normally work, from home, and using with technology which was being, or had just been, developed and refined for use in contentious litigation. Judges, lawyers, and litigants in person were having to develop new skills in order to participate in hearings. Working wholly remotely is arduous. Conducting remote hearings and mastering large volumes of documents on screens can be difficult

and tiring and, at times, frustrating when, for example, electronic devices do not work, or other problems occur, such as particular pages not loading properly or internet connectivity drops out.

25. In this case, it was abundantly clear that there was a large volume of documents before the Judge. I accept, as Mr Healy for the Respondent has described, that the Judge in this case was clearly seeking to exercise effective case management and move the case on. The case had been issued in 2019. In February 2021, the Judge's, reasonable, perception was that very little progress had been made in respect of the substantive claim, and that aspects of it still remained unclear. What the Judge sought to do at the preliminary hearing was to manage the case into a sensible state so that it could proceed to a trial. He was proactive. He undertook to produce a supplemental list of issues to clearly identify the claims, did so, and set them out within the Order.

26. In addition, at that Case Management Hearing, which was undoubtedly a lengthy and difficult one, the Judge was required to consider the two applications the Claimant made. The judge dealt with the two applications very swiftly. Turning first to the application to amend. The Judge stated as follows:

> **"<u>Reasons for refusing the amendment application in respect of discrimination based on perceived disability</u>**
>
> **This application, in so far as it was made formally, is set out in the Claimant's agenda. Clearly the Claimant would need to have his claim amended because he has never before suggested that the discrimination, he alleged was on the ground of perceived, rather than actual, disability. It appears to me that the claimant is seeking to be opportunistic and is simply trying to change the basis of his case to avoid the finding against him in respect of actual disability status. On that basis the application is properly to be considered as an abuse of process. In any event, m understanding is that the claimant could not in law, have proceeded with his complain of reasonable adjustments based upon perceived rather than actual disability and so, at most, this application only applies to the direct discrimination complaint, in so far as there is still such a complaint after the finding of non-disabled status.**
>
> **I also took into account that although the claimant is a litigant in person he is now a law graduate. When the claimant presented his claim in July 2019 it was accompanied by particulars of claim which ran to 47 pages. I see no good reason why the claimant could not have included the alternative complaint of perceived disability discrimination within that lengthy document."**

27. In respect of the application for an anonymity order, under the heading **"Reasons for refusing the claimant's new application for an anonymity order"** the Judge referred to the history of the proceedings and the fact that the Claimant had originally made an application under Rule 50 "in the context of the disability status issue". He continued:

> **"His new application is directed at the same issue and alleged mischief. The claimant believes that a letter dated 9 February 2021 from his GP constitutes "new evidence" which he had hoped would persuade me to make the Order he seeks. I have explained to the Claimant that there is no realistic or sensible need for an anonymity order as matters stand. The disability issue has been decided against the Claimant and subject to him taking anything further in terms of an appeal, it will never again feature in these proceedings. I explained to the Claimant that it was not appropriate for me to be asked in effect to make some kind of retrospective orders. That would be an invitation to go behind the reasoned decision of Employment Judge Healey, a judgment which has been upheld by the EAT."**

The appeal

28. The Claimant submitted that there were a number of faults with the Judge's reasoning. It was submitted that the Judge was wrong to characterise the application to amend as an abuse of process. Further, that the Judge failed to direct himself properly, or at all, to the need to balance the injustice and hardship of refusing or allowing the amendment and that the Judge failed to take into account a relevant considerations (the prejudice caused to the Claimant in refusing the amendment and the real consequences of the Claimant acting for himself when he issued the claim) and took into account an irrelevant one (that the Claimant was a law graduate). It was submitted that the Judge's decision was plainly wrong and that a proper consideration and balance of the competing hardship and justice in the case could only lead to a decision that the amendment should be granted.

29. In respect of the application for an anonymisation order, it was contended that the Judge was wrong to suggest that the application sought to go behind the prior decision of EJ Eeley, and that further events had occurred (the deterioration of the Claimant's health) and that further evidence was

available, both of which had not been the case before Judge Eeley. Further, the Judge was wrong to consider it inappropriate to make a retrospective anonymisation order (relying in particular upon the decision in TYU v ILA Spa Ltd [2022] ICR 287 EAT. It was submitted that the Judge had failed to consider properly the risk to life and the relevance, potentially of Article 2 or Article 8 ECHR, and that the Judge was wrong to conclude that there was no proper need for an anonymity order

30. The Respondents clarified through submissions that, whilst no issues were conceded, they wished to focus upon the grounds of appeal in respect of the application to amend and, in respect of that ground of appeal, invited the EAT to focus on a number of matters. First, that in appeal cases concerning a case management decision and, particularly where there is an application to amend, the EAT should be slow to interfere with the broad discretion afforded to Employment Judges. Secondly, against that background, it was submitted that it was important to focus on three matters. First, the EAT should be conscious of the claims and the complaints that were before the Tribunal at the time that the decision was made; secondly, the EAT must be astute to consider the stage at which the proceedings were when the application to amend was made; and, thirdly, the EAT must be alive to the nature of the hearing at which the decision was made. Each of those points, in my judgment, were valid points to raise.

31. In this case there were a number of claims before the Tribunal. It was submitted that it was entirely appropriate that the Judge was proactive in case managing the case and sought to achieve clarity about the claims in respect of protected disclosures and other issues, such as the Claimant's employment status. Furthermore, the two applications were made some way into the proceedings and after a number of hearings had taken place: the claim was lodged in 2019, an initial preliminary hearing took place on 25 September 2019 which led to the preliminary hearing to determine disability. I accepted the submission made that, had the Claimant put his claim of direct disability discrimination both on the basis of actual disability and perceived disability from the outset, it is possible that the

separate preliminary hearing may not have been listed. That was legitimately identified as prejudice to the Respondent. It was submitted that, similarly, the Respondent was entitled to raise the need to respond to the application for reconsideration and the appeal, and the subsequent delay and cost consequences. Further, the outcome of the preliminary hearing in December 2019 was known shortly after that date, as were the reasons, but the application to deal with the anonymisation order was a matter which was left until the summer of 2020.

32. Finally, turning to the nature of the hearing, the Respondents drew attention to the fact this was a two hour preliminary hearing which took place by telephone when all were working under the COVID restrictions. There were a significant volume of issues to get through during the hearing. It was submitted that the EAT should have some sympathy and understanding for the situation that the Judge found himself in, and consider the brevity of the reasoning within that context. I was invited to conclude that the Judge was aware of the general legal principles in respect of amendment and that, although succinctly stated, the Judge provided sufficient expression of his conclusions.

Analysis and conclusions

Amendment

33. I am satisfied that I should allow the appeal in respect of the application to amend. Judges have a wide discretion in respect of case management decisions. No appellate court should too meticulously examine such a decision; rather, what is required is to read the decision and judgment as a whole and within in its proper context, which, in this case, includes those matters referred to by the Respondents in their submissions. Just as importantly, however, an appellate court should not, when doing so, strive to make good a defective decision where required analysis or reasoning is missing

34. In my judgment, the reasoning of the Judge in this case was not merely succinct; it was

insufficient. The Judge has not evidenced within the short paragraph in which the reasons for refusing the application are given, nor, within that paragraph placed within the discussion as a whole, that he had identified the correct principles of law or considered all of the relevant circumstances. The fact that Selkent is not referred to anywhere within the decision is not necessarily indicative of a failure to identify the correct legal principles. However, in addition, there is no reference to, or identification of, the different and relevant competing factors the Judge considered. Nor is there any analysis which could have led me to conclude that the Judge had the correct legal principles in mind, applied them, and carried out the relevant balancing exercise.

35. In addition, the Judge whilst identifying that the Claimant was a litigant in person, appears to have ascribed to him more legal expertise than, arguably, was appropriate. The Claimant clearly had legal knowledge. That is however, not the same as being a qualified lawyer, and still less, one experienced in discrimination law. Further, the Judge also appeared to have focused on whether or not there was a good reason why the Claimant's perceived disability discrimination was not included at the outset. That factor appears both at the beginning and the end of his analysis. He attributed to the Claimant an improper motivation without any explanation or exploration as to why he had reached that conclusion It is possible that somebody could seek to make an application to amend for an improper reason which might amount to abuse of process. However, to plead your case in a different way because you think that that is something that is more likely to find favour with the Tribunal is not, in my judgment, of itself an abuse of process. The Judge does not, for example, appear to have given any consideration to the possibility that the Claimant simply had not understood that the case could be advanced on the basis of perceived disability as opposed to actual disability at the time he issued his claim.

36. Further, the judge does not engage with the fact that by refusing the amendment he was preventing the Claimant from relying on his claim of disability discrimination. It does not appear

that the judge went back to the documents at the beginning to see how the Claimant originally framed his claim of disability discrimination. That may be because claims of perceived disability are relatively rare, and it may be that it was something that was not explored within the earlier case management decisions. I am satisfied therefore that I should allow the appeal in respect of the application to amend.

Anonymity order

37. I also consider that the Judge erred in the way he approached this application. Rule 50 is not set out. None of the relevant authorities are referred to. That, again, would not necessarily be determinative of the appeal, provided that it was clear from the reasoning that the Judge had considered and applied the correct legal principles. However, in this case, the Judge did not self-direct himself to the need to consider the principle of open justice and then, to consider whether or not there was a reason for departing from that important principle. I also consider that the Judge failed to properly take account of the new evidence from the GP. Had he done so, I doubt that he would have stated that there was 'no realistic or sensible need for an anonymity order as matters stand'. The letters from the Claimant's GP were different to that which had been before the Employment Judge who had originally refused the anonymity order. First, the Claimant's GP not only reported that which the Claimant had said to him, but then went on to set out his own opinion that he considered that the lack of anonymity order had led to a worsening of the Claimant's mental health to such an extent that there was a risk of self-harm or suicide attempts, including loss of life. What was before the court in February 2021 then, was a letter from the Claimant's GP which stated that the lack of an anonymity order had led to a great deal of distress for the patient, was directly impacting his mental health and gave rise to a risk of further consequences including self-harm or suicide attempts. That had not been before the Judge who considered the initial application for an anonymity order.

38. That evidence clearly engaged the rights protected by Article 2 of the ECHR. Article 2 is

indeed an unqualified right, i.e., it is not subject to similar provisions as Articles 8 and 10 are in Art 8(2) and Art 10(2) respectively. In addition, under the ECHR the State has positive duties within Article 2 to protect life or to take steps to prevent the threat to life from materialising. Further, even if the evidence of a threat to physical safety is not sufficient to engage Article 2, the facts may engage Article 8, an individual's mental health being an aspect of private life protected by that provision (See Bensaid v UK (2001) 33 EHRR 10). I consider that the Judge erred by failing to take into account relevant matters when determining the Claimant's fresh application for an anonymity order, namely the information from the Claimant's GP and the GP's view that the Claimant was at risk of self harm, making suicide attempts and that, as a result, his life was at risk.

39. I have not been asked to make a decision in respect of that order, but simply to remit the application to the Tribunal. I do so. When considering an application for an anonymisation order pursuant to r.50, there is a clear structure to be adopted. It is necessary to identify relevant Convention rights and then carry out the requisite balancing act between those rights. Open justice is a very important founding principle of our judicial system The identities of parties to litigation are important, integral aspects of the principle of open justice. However, sometimes, other important rights place a limit upon that principle of open justice. Exceptions need to be properly evidenced. In this case, the exception applied for is that the identity of one party is kept confidential for the reasons set out above.

40. I consider that the approach adopted by the Respondent to this aspect of the appeal, is measured, and, in my view, appropriately so. It may be difficult, in my judgment, for the Respondent to challenge the evidence advanced by the Claimant about the impact of these proceedings upon him. If an individual informs their GP that the consequence of a particular matter is that they are considering self-harm or suicide, it may be difficult for anyone, or any party, to effectively assert that that is anything but the truth. If there is any degree of scepticism about that, I consider that it is worth taking a step back and to reflect upon what has occurred: an individual has reported to their GP that

their mental health is not good, to the extent that they have considered self-harm or suicide. Those are significant matters which, in my judgment, should be given appropriate respect and consideration. Society's awareness and understanding of mental health has evolved and continues to develop. The risk of self harm and the risk suicide to those involved in challenging events should not be too readily dismissed, even within hotly contested litigation. That approach is consistent with the decision of Mammadov v Azerbaijan (2014) 58 EHRR 18 at para. 115: the threat of suicide should be treated with utmost seriousness.

41. The only matter that remains is how to dispose of the successful appeal in respect of the amendment application. The EAT should only make the decision in respect of the application if there is, or could be, only one outcome on the amendment application. See for example Jafri. I have considered this carefully. Ultimately, I have decided that an Employment Tribunal, properly directing themselves, could only reach one outcome in this case.

42. In particular, applying the principles set out above, it is noteworthy that the claim of disability discrimination was pleaded, initially, by the Claimant as being, 'on the grounds of disability'. The Claimant asserted, from the outset, that the dismissal was because of his mental health disclosure or, alternatively, the public interest disclosures he made. The Respondent have, therefore, been aware of that the Claimant asserts that the termination of his assignment is causally connected to his disclosure regarding his mental health. That is a factor which militates, in my judgment, clearly, in favour of granting the application because, it indicates that the Respondent is less likely to be unfairly prejudiced by granting the amendment. Further, the timings set out in paragraph 6 above suggest, in my judgment, that there is some evidence before the Tribunal which relatively closely connects in time the termination of his assignment and the disclosure of his mental health challenges to the Respondents. Again, that factor militates in favour of granting the application, because, to refuse it would appear to prevent the Claimant from advancing a case which is reasonably arguable, and in

respect of which the Respondent has known about the facts asserted to support the claim when it was initially lodged. In addition, the reason why the Claimant's assignment was terminated will be before the Tribunal as part of the consideration of his public interest disclosure application.

43. Weighing in the balance against the granting of the application is the fact that the Respondent believed that the Claimant's claim was based on actual, rather than perceived, disability. Although the issues which will needed to be addressed in evidence will be similar, they are not identical. In addition, if the application were refused, the parties and Tribunal would not need to engage, at all, with any issues regarding the significance, or otherwise of that which the Claimant informed the Respondents about his mental health. The Respondent will be required to provide evidence regarding the documents specifically relating to the Claimant's mental health condition and what the individuals who took the decisions thought about that and its involvement in their decision to end his assignment. Whilst that evidence may not be particularly lengthy, the fact that it will be required and will take time to prepare, is a practical consequence of allowing the amendment which will cause some hardship to the Respondent and militates against granting the application. amendment application. Conversely, if the amendment is not allowed the Claimant is prohibited from exploring these matters at all. He is prevented from pursuing that, which on the documents, appears to be a reasonably arguable head of claim. He cannot take his claim of disability discrimination any further.

44. There is other prejudice to the Respondent if the application is allowed: had the case been pleaded as direct discrimination based on actual disability and/or perceived disability from the outset, the preliminary hearing to determine disability may well not have taken place, and the Respondent would have been saved the expense and time of litigating that issue at that time, and in that way. However, even if the case had been advanced on an alternate basis from the outset that evidence would have to have been heard and that decision would have to have been made. Further, the way in which the application to amend has been made has led to delay. Additional costs have also been

incurred, some in relation to this appeal, and some in relation to the earlier appeal. Finally, if the application to amend were allowed, the Respondent would have to meet a claim which otherwise would not be litigated.

45. Having considered this matter carefully, and, in particular the points raised by the Claimant in his skeleton argument, I am satisfied that, properly directing itself there could only be one outcome: that the balance of hardship falls firmly in favour of allowing the appeal.

46. I would encourage the Claimant, however, to try to express himself in a more concise/ succinct manner. I recognise that the ability to do so is a real skill. Reducing the length of the relevant documents is likely to assist both parties. The risk in not doing that is key points may become missed in amongst the large volume of documents.

47. Finally, I consider that an anonymity order should be made in respect of the appeal before the EAT. In this case I consider that principle of open justice must give way to the Claimant's Article 2 rights. The appropriate order, in my judgment, is one which ensures that the Claimant is not identified in Orders and Judgment the EAT judgment. I sought further submissions regarding the duration of the order, and, having heard those submissions, made an order of indefinite duration, with liberty to apply.