Case Numbers: 2206071/2019
2200216/2020

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Mr Damilare Ajao		**(1) Commerzbank AG** **(2) Mr L Vogelmann** **(3) Ms H Jackson** **(4) Mr G Booth** **(5) Ms Y Mehta** **(6) Q**

AMENDED JUDGMENT AND ORDER[1] OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 26 May 2022; 27 May 2022 (in chambers)**

BEFORE: Employment Judge A M Snelson **MEMBERS: Ms C Ihnatowicz, Mr D Clay**

On hearing the Claimant in person and Ms C McCann, counsel, on behalf of the Respondents;
And on reading the submissions dated 19 May 2022 prepared on behalf of the Claimant by Ms S Chan, counsel;
The Tribunal unanimously determines and orders that:

JUDGMENT

The Claimant shall pay to the Respondents a contribution towards their costs limited to the sum of £20,000.

[1] The sole amendment is to substitute the Claimant's name in the title above for 'Z', pursuant to the judgment of the EAT (Kerr J sitting alone), handed down on 12 February 2024.

ORDER

(1) The Claimant's application for the hearing to be postponed, if and in so far as it was persisted with, is refused.
(2) The application in the written submissions of Ms Chan for the Employment Judge to recuse himself, if and in so far as it was persisted with, is refused.
(3) On the Respondents' application the anonymisation and restricted reporting orders made by Employment Judge Brown on 9 September 2021 in respect of the Sixth Respondent and her husband are varied to provide for those orders to have indefinite effect.
(4) On the Respondents' application, the anonymisation and restricted reporting orders made by Employment Judge Brown on 9 September 2021 in respect of the Claimant is revoked.
(5) The Order under para (4) above is stayed until the expiry of the period of three months commencing with the date on which this Judgment and Order is sent to the parties.

REASONS

Introduction

1 Following a hearing from 19-27 October 2021 and two days' private deliberations on 28 October and 23 December 2021 we issued a reserved judgment with reasons on 14 February this year ('the liability judgment') dismissing all of the Claimant's numerous claims under the Equality Act 2010 and the Working Time Regulations 1998. Most of his case failed on the ground that the facts on which he relied were not established in the evidence.

2 An appeal to the EAT was rejected on the 'sift'. We are not entirely clear whether the Claimant has exercised the right to a Rule 3(10) hearing.

3 The liability judgment should be read with these reasons. It is sufficient for present purposes to say that it contains many findings unequivocally rejecting as false complaints and allegations which were central to the Claimant's case. When we use the word "false" we make it clear that we mean that he repeatedly put forward assertions which were completely untrue and which he knew to be completely untrue. Numerous claims had no factual basis whatsoever. The alleged events on which they were premised never happened. They were made up. His most serious inventions were directed at the Sixth Respondent, 'Q', whom he accused of sexual harassment including sexual assault. He had no possible ground to make any complaint against her, let alone allegations of such gravity. We found him a witness "contemptuous of his duty to tell the truth and unworthy of belief" (para 96). We also found that he had manufactured evidence in the form of a 'work diary' purporting to contain a contemporary record corroborative of some of his allegations (para 102).

4 On 4 March this year the Respondents presented applications for costs on three bases:

(a) that the Claimant has acted vexatiously, abusively, disruptively, or otherwise unreasonably in the bringing and conducting of the proceedings; and/or
(b) that the Claimant's claims had no reasonable prospect of success; and/or
(c) that, given the Tribunal's findings on the one allegation in respect of which a deposit had been ordered and paid, he was statutorily deemed to have acted unreasonably in pursuing that allegation.

5 The Claimant's observations were sought. He resisted the costs application on a number of grounds.

6 On 15 March this year the Respondents presented two further applications, for:

(a) the anonymity and restricted reporting order made by Employment Judge ('EJ') Brown on 9 September 2021 in respect of the Sixth Respondent, 'Q' and her husband to be varied so as to have effect indefinitely;
(b) the anonymity and restricted reporting order made by EJ Brown on 9 September 2021 in respect of the Claimant to be revoked.

7 The Claimant opposed these applications too.

8 Procedural management of the three applications fell to EJ Snelson ('the judge'). He attempted to deal with them on paper. A two-day hearing (expanded from one day) was fixed for 26 and 27 May and the parties were urged to prepare co-operatively. A predictable avalanche of correspondence followed, as a result of which the judge fixed a case management hearing for 14 April.

9 Repeated applications by the Claimant for the hearings on 14 April and 26-27 May to be vacated or postponed were refused, for reasons given.

10 The hearing of 14 April was duly held and an order made which, together with the accompanying commentary, should be read with these reasons.

11 On 25 April, the Claimant made yet another application for the hearing on 26-27 May to be postponed. Owing to an administrative oversight, it was not seen by the judge and was first drawn to the attention of the Tribunal on 26 May. We will return to that application shortly.

12 The Claimant did not comply with the order of 14 April, which (among other things) required him to state by a specified date whether he intended to rely on his means as a ground for resisting the costs application and, if so, to make disclosure by a specified date of the documents to which he proposed to refer for that purpose. Very shortly before the hearing he disclosed a small selection of documents said to be relevant to his means.

13 Also prior to the hearing on 26 May the Respondents applied for permission to deploy a medical report concerning Q subject to the condition that it would not be shown to the Claimant. The judge stood that application over to the hearing.

14 The matter was called on for hearing on 26 May by CVP. The Claimant attended in person and the Respondents were represented, as before, by Ms McCann, counsel.

15 The Claimant drew attention to the outstanding application of 25 April, which had sought amendments to the order of 14 April and postponement of the May hearing on the grounds that (a) he needed time to arrange *pro bono* representation; (b) the refusal to postpone the 14 April hearing had exacerbated his mental health condition necessitating an increase in medication and referral for psychotherapy; and (c) he had not been in a position to engage with the hearing on 14 April owing to technical difficulties and the fact that he had his children with him. Although it was not entirely clear, we understood that he wished us to consider and determine the application. We did so and dismissed it. As to ground (a), he had had ample time to prepare for the hearing and, if so advised, arrange representation. Moreover, he had received specialist advice from counsel, whose submissions addressing the application referred to in para 6(b) above were before us. As to ground (b), there was no evidence that the Claimant was medically indisposed, much less that he was unfit to proceed with the hearing and represent himself. He did not make that case. As to ground (c), the order and commentary of 14 April can speak for themselves. That was a routine procedural hearing to ensure that suitable preparations were made for the hearing on 26 May. Straightforward, unremarkable directions were given. The Claimant ceased to participate without providing a good reason. The outcome was sent to the parties without delay. In all the circumstances, we were satisfied that no ground for postponing the hearing was given and that it was in accordance with the overriding objective to proceed.

16 In the submissions of Ms Chan to which we have just referred it was suggested (paras 14-19) that the judge/Tribunal should recuse himself/itself on the ground that the reasons accompanying the judgment sent out on 14 February included (para 7) the Claimant's date of birth which, it was said, placed the Tribunal in breach of the anonymity and restricted reporting order in respect of the Claimant of 9 September 2021. We were clear that no arguable ground for recusal was shown but advised the parties that, pursuant to the 'slip rule', an amended version of the judgment and reasons would follow, deleting the Claimant's date of birth and correcting the details of the hearing (which was wrongly shown as having been held in 2019 rather than 2021). Shortly afterwards the judge gave instructions for this to be done. We do not accept that a fair-minded and informed observer would conclude, on the strength of the inclusion of the date of birth in the reasons, that there was a real possibility that the Tribunal (or the judge alone) was biased. It was included in accordance with the judge's standard drafting practice and there was no ulterior purpose behind it. On reflection, however, and without objection from Ms McCann, we agree that the detail is better excluded given the concerns raised on behalf of the Claimant.

17 We turned next to other procedural matters. After discussion we set a timetable, allowing for pre-reading on the morning of 26 May (which gave the Claimant a further half day to prepare), evidence and submissions that afternoon and private deliberations on 27 May.

18 As to the Claimant's late disclosure, we were not at all impressed by his suggestion, as a seasoned litigator, that he had not regarded himself as continuing to be bound by the 14 April order following delivery of the application of 25 April, but we nonetheless considered it just to allow him to rely on it.

19 On the other hand, we did not accede to the Claimant's proposal, at the end of his evidence on the afternoon of 26 May and immediately before we were due to hear submissions, that he be permitted to collate and present additional documentary evidence. The directions had been clear and indulging him as asked would delay our decision-making, inflate the Respondents' costs further and place an added burden on the Tribunal's overstretched resources. In all the circumstances, we were satisfied that it would not be in accordance with the overriding objective to grant the application.

20 On the Respondents' application relating to medical evidence on Q, we suggested that a redacted form of the document be shared with the Claimant. Ms McCann agreed to explore the idea and in the course of the morning the parties agreed that the redacted version would be placed before the Tribunal. The unredacted original was not shown to the Claimant or the Tribunal.

21 In accordance with the agreed timetable, we reserved judgment at the end of 26 May and devoted a substantial part of 27 May to our private deliberations.

The Legal Framework

Costs

22 The power to make costs awards is contained in rule 76 of the Employment Tribunals Rules of Procedure 2013 ('the 2013 Rules'), the material parts of which are the following:

> **(1) A Tribunal may make a costs order … , and shall consider whether to do so, where it considers that –**
>
> **(a) a party … has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or**
> **(b) any claim or response had no reasonable prospect of success**

As the authorities explain, the rule poses two questions: first, whether the Tribunal has power to make an order; second, if so, whether the discretion should be exercised.

23 Once an Employment Tribunal is satisfied that the relevant tests under rule 76 have been satisfied, the Tribunal's discretion to make a costs award against a party is wide and unfettered: see *Barnsley Metropolitan Borough Council v Yerrakalva* [2012] IRLR 78 CA.

24 The 2013 Rules, r84 provides, relevantly, as follows:

> **In deciding whether to make a costs … order, and if so in what amount, the Tribunal may have regard to the paying party's … ability to pay.**

25 We are mindful of the fact that orders for costs in this jurisdiction are, and always have been, exceptional. Employment Tribunals exist to provide informal, accessible justice for all in employment disputes. We recognise that, if Tribunals resorted to making costs orders with undue liberality, the effect might well be to put aggrieved persons, particularly those of modest means, in fear of invoking the important statutory protections which the law affords them. It would be contrary to the purpose of the Tribunals if parties to disputes declined to exercise their right to bring (or contest) proceedings as a result of unfair economic pressure. On the other hand, we also bear in mind that, when our rules of procedure were revised in 2001, the Tribunal was for the first time not merely permitted, but obliged, to consider making a costs order where any of the prescribed conditions (vexatiousness, abusiveness etc) was fulfilled, and a new and wider criterion of unreasonableness was added. It seems to us that these innovations, preserved in subsequent revisions of the rules, indicate a policy on the part of the legislature to encourage Tribunals to exercise their costs powers where unmeritorious cases are pursued or where the manner in which litigation is conducted is improper or unreasonable.

Privacy orders

Rule 50 powers

26 By the 2013 Rules, r50, it is provided, so far as relevant, as follows:

> **(1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.**
>
> **(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.**
>
> **(3) Such orders may include –**
>
> **…**
> **(b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymization or otherwise, whether in the course of any hearing or 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 … of the Employment Tribunals Act 1996.**

27 The Employment Tribunals Act 1996 ('the 1996 Act'), s7 includes

> **(1) The Secretary of State may by regulations ("employment tribunal procedure regulations") make such provision as appears to him to be necessary or expedient with respect to proceedings before employment tribunals.**

28 By s11 of the 1996 Act, it is provided that:

> **(1) Employment tribunal procedure regulations may include provision—**
>
> **(a) for cases involving allegations of the commission of sexual offences, for securing that the registration or other making available of documents or decisions shall be so effected as to prevent the identification of any person affected by or making the allegation, and**
>
> **(b) for cases involving allegations of sexual misconduct, enabling an employment tribunal, on the application of any party to proceedings before it or of its own motion, to make a restricted reporting order having effect (if not revoked earlier) until the promulgation of the decision of the tribunal.**

29 In *Fallows v News Group Newspapers Ltd* [2016] ICR 801 Simler J, then President of the EAT, considered arguments concerning the sources and scope of the powers of Employment Tribunals to make privacy orders. She said:

> **41. Provided an order is considered necessary in the interests of justice or necessary to protect Convention rights, and the Tribunal considering whether to make an order gives full weight to the principle of open justice and the right to freedom of expression, Rule 50(1) enables an order to be made in circumstances that do not fall strictly within sections 11 and 12 ETA 1996, or that extends beyond the end of the proceedings (whether they otherwise fall within sections 11 and 12 or not). This is not to create a power in order to give effect to the Article 8 rights of parties to Tribunal proceedings; but is a question of the proper construction of an express power given in Rule 50(1) of the 2013 Rules.**
>
> **42. Like the Employment Judge I recognise that reporting restrictions which last indefinitely are a much more substantial restriction on freedom of expression than restrictions imposed for a limited period. Permanent protection may or may not be appropriate in a given case, but where it is sought it requires particularly careful consideration. It is likely to be a rare case where the Article 8 rights at stake are so strong that it is necessary to grant indefinite restrictions as the means of striking the balance between Article 8 rights on the one hand and the principle of open justice and rights of freedom of expression on the other. … such cases are likely to be the exception and not the rule. …**
>
> **43. … [The] power [under the 1996 Act, s7(1)] to make regulations considered "necessary or expedient with respect to proceedings" in the Employment Tribunal is wide and includes the regulation of any aspect of such proceedings. That necessarily includes making orders "with a view to preventing or restricting the public disclosure of any aspect of those proceedings" under Rule 50(1). In my judgment, whether read alone or construed with section 3 Human Rights Act as a power that must be exercised compatibly with Convention rights, section 7(1) ETA 1996 provides the vires for the wider privacy order making power contained in Rule 50(1), notwithstanding the more specific, restrictive powers in sections 11 and 12 ETA 1996.**

30 The open justice principle demands hearings before open and publicly accessible courts and freedom to report publicly on proceedings and their outcomes (*Khuja v Times Newspapers Ltd* [2017] UKSC 49, [2019] AC 161, para 16, Lord Sumption JSC). It is grounded in the public interest irrespective of any particular public interest in the facts of any individual case (*Fallows*, para 48(iii)). It serves to reinforce the Article 10 right to freedom of expression and stands as a

key feature of the Article 6 right to a fair trial. The principle requires that any restriction of public access is the least that can be imposed consistently with the protection of competing rights (*Fallows*, para 59).

31 The Article 8 right to respect for private life has many aspects and is not amenable to concise definition. The European Court of Human Rights has held that preservation of mental stability is an indispensable precondition to effective enjoyment of the right to respect for private life (see *Bensaid v United Kingdom* (2001) 33 EHRR 10, para 47).

32 In *In re Guardian News and Media Ltd* [2010] 2 AC 697, Lord Rodger, having reviewed the authorities, remarked (para 52):

> **In the present case M's private and family life are interests which must be respected. On the other side, publication of a report of the proceedings, including a report identifying M, is a matter of general, public interest. … the question for the court accordingly is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies M to justify any resulting curtailment of his right and his family's right to respect for their private and family life.**

At a later point (para 63), he said this:

> **What's in a name? 'A lot', the press would answer. This is because stories about particular individuals are simply more attractive to readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected. … The judges [have recognised] that editors know best how to present material in a way that will interest the readers of their particular publication, and so help them to absorb the information. A requirement to report it in some austere abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.**

Elsewhere, the learned Justice pointed out that the identities of claimants "may not matter particularly to the judges. But the legitimate interest of the public is wider than the interests of judges qua judges or lawyers qua lawyers" (para 38). Furthermore, the fact that the parties have agreed to anonymity cannot absolve the court from balancing the interests at stake for itself. Indeed that is when there is the greatest need for vigilance (para 2).

33 In *Khuja*, Lord Sumption JSC stated with reference to *In re Guardian News and Media Ltd* that the public interest in the administration of justice may be sufficiently served as far as lawyers are concerned by a discussion which focusses on the issues and ignores the personalities, but (para 57) "the target audience of the press is likely to be different and to have a different interest in the proceedings, which will not be satisfied by an anonymised version of the judgment. In the general run of cases there is nothing to stop the press from supplying the more full-blooded account which their readers want". But in the same judgment the learned Justice also observed (para 30):

> **None of this means that if there is a sufficient public interest in reporting the proceedings there must necessarily be a sufficient public interest in identifying the individual involved. The identity of those involved may be wholly marginal to the public interest engaged. Thus Lord Reed JSC remarked of the Scottish case *Devine v Secretary of State for Scotland* (unreported) 22 January 1993, in which soldiers who had been deployed to end a prison siege were allowed to give evidence from behind a screen, that "their appearance and identities were of such peripheral, if any, relevance to the judicial process that it would have been disproportionate to require their disclosure": *A v British Broadcasting Corpn* [2015] AC 588, para 39. In other cases, the identity of the person involved may be more central to the point of public interest, but outweighed by the public interest in the administration of justice. This was why publication of the name was prohibited in *A v British Broadcasting Corpn*. Another example in a rather different context is *R (C) v Secretary of State for Justice (Media Lawyers Association intervening)* [2016] 1 WLR 444, … involving the disclosure via judicial proceedings of highly personal clinical data concerning psychiatric patients serving sentences of imprisonment, which would have undermined confidential clinical relationships and thereby reduced the efficacy of the system for judicial oversight of the Home Secretary's decisions.**

34 In *Fallows*, at paras 48-49, Simler J gave general guidance on the correct approach to be taken where competing Convention rights are in play. She set out a number of propositions, including the following[2].

(1) The burden of establishing any derogation from the fundamental principle of open justice or full reporting lies on the person seeking that derogation. 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.

(2) No Convention right has precedence over any other.

(3) Where Convention rights are in conflict, an "intense focus" on the comparative importance of the specific rights is required.

(4) Justifications for interfering with or restricting any right must be taken into account.

(5) Proportionality must be weighed in the balance.

The Sexual Offences (Amendment) Act 1992

35 Alongside the 2013 Rules, r50 and the 1996 Act, ss 7 and 11, the Sexual Offences (Amendment) Act 1992 ('the 1992 Act') supplements the privacy protection available to persons who are alleged to have been subjected to sexual offences. By s1 it provides:

> **(1) Where an allegation has been made that an offence to which this Act applies has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of**

[2] Points (2)-(5) are drawn directly from the opinion of Lord Steyn in *In re S (A Child)* [2004] 3 WLR 1129 HL.

the public to identify that person as the person against whom the offence is alleged to have been committed.

(2) Where a person is accused of an offence to which this Act applies, no matter likely to lead members of the public to identify a person as the person against whom the offence is alleged to have been committed ("the complainant") shall during the complainant's lifetime be included in any publication.

(3) This section—

(a) does not apply in relation to a person by virtue of subsection (1) at any time after a person has been accused of the offence, and
(b) in its application in relation to a person by virtue of subsection (2), has effect subject to any direction given under section 3.

(3) This section—

(a) does not apply in relation to a person by virtue of subsection (1) at any time after a person has been accused of the offence, and
(b) in its application in relation to a person by virtue of subsection (2), has effect subject to any direction given under section 3.

(3A) The matters relating to a person in relation to which the restrictions imposed by subsection (1) or (2) apply (if their inclusion in any publication is likely to have the result mentioned in that subsection) include in particular—

(a) the person's name,
(b) the person's address,
(c) the identity of any school or other educational establishment attended by the person,
(d) the identity of any place of work, and
(e) any still or moving picture of the person.

36 The protection under s1 of the 1992 Act is subject to s3, which includes:

(2) If at a trial the judge is satisfied—

(a) that the effect of section 1 is to impose a substantial and unreasonable restriction upon the reporting of proceedings at the trial, and
(b) that it is in the public interest to remove or relax the restriction,

he shall direct that that section shall not apply to such matter as is specified in the direction.

(3) A direction shall not be given under subsection (2) by reason only of the outcome of the trial.

…

(6) In subsections (1) and (2), "judge" means—

(a) in the case of an offence which is to be tried summarily or for which the mode of trial has not been determined, any justice of the peace ... ; and
(b) in any other case, any judge of the Crown Court.

37 The general effect of s6(3) is that a person is "accused" of a relevant offence when he or she is charged with it or committed for trial on it.

38 In *A & another v X & others (No.1)* [2019] IRLR 620 EAT Soole J remarked (para 70) that it was routine for judgments in criminal cases covered by the 1992 Act to be anonymised and Tribunal judgments "can be in no different position." There appears, however, to be no direct authority on whether, and if so how, the Tribunal should endeavour to give effect to the 1992 Act.

Variation of case management orders

39 The Tribunal has a wide power to make case management orders under the 2013 Rules, r29. The same rule further states:

> **A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.**

40 In *Serco Ltd v Wells* [2016] ICR 768 It was held by the EAT (HHJ Hand QC) that the power under r29 to vary, suspend or set aside case management orders must be narrowly construed as applying only where there had been a material change in circumstances or for some other special reason.

Oral Evidence and Documents

41 The Claimant gave evidence based on his statement of 25 May 2022 containing 21 numbered paragraphs. The statement consisted more of argument than evidence, much of which was directed to challenging the Tribunal's findings in its original reasons, but it did also briefly address the question of his means.

42 The Respondents produced the original trial bundle (for reference) and an 'Additional Bundle' of 754 pages. The Claimant supplied an 8-page bundle which he had prepared.

43 In support of the application relating to Q we had before us her signed statement and the redacted version of the medical report already mentioned.

44 We also had the benefit of the written submissions of Ms McCann and Ms Chan.

Analysis and Conclusions

Costs

45 The Respondents limited their application to £20,000, the maximum sum awardable without a detailed assessment. The costs which they actually incurred up to the end of the trial came to many times that sum.

46 The burden of the costs application was that the Claimant had dishonestly and cynically pursued a series of complaints based on evidence which he knew to be false and that in so doing he had brought claims which had no reasonable prospect of success and/or had acted unreasonably in bringing them and/or in his conduct of them.

47 The Claimant resisted the application. He argued that he had been entitled to bring his claims and the fact that he had lost should not result in him being condemned in costs. An award of costs was an exceptional measure. He also challenged a number of the findings in our judgment and reasons, although we tried to explain that those matters were closed and could not be revisited. In addition, he advanced the argument that we should somehow be guided by a decision of the Dartford County Court refusing the Respondents costs following their successful defence of a short-track claim which he had brought against them in that court. Finally, he contended that, in view of his very limited means, the Tribunal should make no, or no substantial, costs order, even if it would otherwise judge a substantial award to be appropriate.

48 In our view, the Claimant's conduct in bringing and persisting with his claims, or at least a large proportion of them, was not merely unreasonable but disgraceful. To concoct, as he did, allegations of sexual harassment by Q was beneath contempt. As serious (although not calculated to cause pain and distress to any individual) was his act of manufacturing evidence. More generally, time and time again, he rested claims on alleged facts which were at best so distorted or exaggerated as to bear no relation to real events and at worst simply invented. It is, we think, hard to imagine a more obvious case of unreasonable conduct in the bringing and pursuit of litigation. So much for the 2013 Rules, r76(1)(a).

49 We prefer to leave r76(1)(b) to one side. A cynical manipulator might make up claims so skilfully that the Tribunal might struggle to say, after the event, that they had had no reasonable prospect of success. The fact that they had ultimately failed would not by itself warrant that assessment. We prefer not to wrestle with the question whether, on an objective analysis, the claims, which the Claimant knew to be bogus, were doomed to fail.

50 Our reasoning under r76(1)(a) determines the first question identified in para 22 above. The Tribunal has jurisdiction to make a costs order.

51 Should we exercise the jurisdiction and, if so, how? Subject to the question of means, we are quite satisfied that the Claimant's conduct merits a costs order and that it would be unjust to the Respondents to decline to make one. We might ask, if this is not a proper case for the exercise of the discretion, what is?

52 Should we take account of means? The documentary evidence provided by the Claimant as to his means was minimal. His answers to questions from Ms McCann and the Tribunal were short on detail and uninformative. We are unable to place confidence in his evidence, although we are careful not to make the mistake of assuming that, because of our findings at trial, he cannot be believed on anything. On balance, we find that he has been out of work since his dismissal by the Respondents in November 2019 and is living wholly or very largely on state benefits. It seems that he has separated from his wife and is living in private rented accommodation. He has two school-age children to support. We treat him as currently cash-poor, albeit with a substantial earning capacity as someone with financial sector experience who commanded an annual salary of some £50,000 when with the Respondents. The capital picture is much less clear. He told us that

he had co-owned a property with his wife and that he had transferred his share to her and that she had paid him "a contribution". We were shown no documents relating to this transaction.

53 We have decided not to have regard to the Claimant's ability to pay. This is because he has not supplied us with sufficient information backed by evidence to enable us to make a reasonable assessment of his capital position. In the commentary accompanying the order made on 14 April, the judge included these remarks:

> **9. The question of ability to pay is important. I draw attention to the Employment Tribunals Rules of Procedure 2013, rules 74-84. Rule 84 says that, in considering whether to make a costs order and, if so, how much to award, the Tribunal *may* have regard to the paying party's ability to pay. If the Claimant wishes the Tribunal to take that factor into account he must follow my Order ...**
>
> **10. If the Claimant's means are in issue, it is for him to decide what information he wishes to share with the Respondents and put before the Tribunal. The Tribunal cannot advise, but it is a statement of the obvious that sparse or selective disclosure will carry less weight than comprehensive disclosure.**

It is a matter of regret that he did not heed the guidance offered.

54 If he finds himself in due course facing enforcement proceedings in relation to our costs judgment, the Claimant will have a fresh opportunity to argue (at that stage in the county court) that his means should be taken into account. There again, sparse and selective disclosure will not serve his interests.

55 Ability to pay not being a 'live' consideration, what sum should be awarded? In our judgment, the answer is plain. If the Claimant's means do not bear on the decision, the proper award is the sum sought, £20,000, which represents a small fraction of the costs to which, entirely without justification, the Respondents have been put.

56 In view of our conclusion on the r76(1)(a) application, we do not think that it would be helpful or proportionate to engage with the much narrower costs application based on the Claimant's election to persist with a particular claim in respect of which EJ Brown made a deposit order. This application would not necessarily have succeeded (it is questionable whether the relevant claim failed for substantially the reason given in the deposit order (*cf* the 2013 Rules, r39(5)) and even if it had, it would have attracted no separate award.[3]

The privacy orders applications

57 We will consider the two applications in turn.

The application relating to Q

[3] Rightly no doubt, Ms McCann did not seek an award based on the deposit order *over and above* the £20,000 sought pursuant to her primary application.

58 While very properly recognising the central importance of the principle of open justice, Ms McCann submitted that there had been a change of circumstances which warranted a variation of EJ Brown's order and that it was necessary in the interests of justice to vary it by extending the anonymisation of Q indefinitely.

59 The Claimant took a neutral stance, raising no challenge to the application.

60 We must say at the outset that the fact that the Claimant raises no challenge is not determinative or even persuasive. The principle of open justice must be jealously guarded and where parties agree that some derogation from it is justified (or do not disagree on the matter) it is all the more incumbent on the court or tribunal to subject what is proposed to close and sceptical scrutiny. We have the observations in *In re Guardian News and Media Ltd*, para 2 very much in mind.

61 That said, following conscientious reflection, we are satisfied that it is necessary and in keeping the interests of justice and the overriding objective to make the order which the Respondents seek. We have several reasons.

62 First, it is clear on the authorities discussed above that the Tribunal has jurisdiction in principle to make the order, under r50(1) read with the 1996 Act, s7.

63 Second, despite the constraints of *Serco Ltd v* Wells, the Tribunal is free to re-visit the original order. There have been several material changes of circumstances, including in particular, the delivery of the Tribunal's reasoned judgment on liability and the presentation of fresh evidence in the form of Q's statement and the supporting evidence of the psychiatrist.

64 Third, it is material that, as the record shows, EJ Brown envisaged at the time of making her order that an application to extend the duration of Q's protection might be made and might be entertained.

65 Fourth, while the open justice principle and freedom of expression rights are certainly engaged, Q's Article 8 rights are too. We must balance her right to be protected in her honour and reputation and the risk to her mental health and stability to which her evidence adverts.

66 Fifth, while we are far from thinking that a restriction on the freedom to publish the name of a key witness is a trifling matter (we have Lord Rodger's remarks in *In re Guardian News and Media Ltd* very much in mind), we consider that the interference with the open justice principle and freedom of expression for which Q contends is relatively minor here, largely because the other Respondents, and in particular, the corporate First Respondent, have not been anonymised at any point. The full context in which the events recounted in our reasons occurred has thus been in the public domain throughout and the request for one name (among many) to be kept from view permanently is not likely to result in any press coverage being in "some austere abstract form, devoid of much of its human interest" (to quote again from Lord Rodger) or to cloud any third party's understanding of the story or its implications, particularly as the Tribunal has now adjudicated upon the claims and its material findings are all to the effect that

allegations made against Q were false and the wrongful acts of which she stood accused never happened. It is not a matter of real public interest that Q did not do this or that act. (As we will observe below, it is potentially of much greater interest that the Claimant ran a bogus case based on countless inventions.) By contrast with what we see as a minor interference with the open justice principle and freedom of expression, the unchallenged and entirely plausible evidence of and on behalf of Q, which we can only take at face value, points to a significant risk to her health and wellbeing, and thus her Article 8 rights, if the temporary protection of EJ Brown's order is not extended. We are in no doubt that, on the facts of this case, the balance of prejudice comes down firmly in favour of granting the application.

67 Sixth, in arriving at our finding on the balancing exercise, we have not overlooked the obvious thought that, given that our judgment leaves Q fully vindicated, disclosure of her name might be seen as no longer liable to expose her to any harm. Certainly we would accept that, in the usual case, such vindication would be all that was required. But this is not the usual case, as the cogent and powerful evidence of Q and her medical witness clearly shows.

68 Seventh, we agree with Ms McCann that, in performing the balancing exercise, we must have regard to the fact that the events which have happened were not of Q's choosing. She is the wholly blameless victim of his conduct. He forced her into the litigation by making false allegations against her and by naming her as a party. He also rejected the First Respondents' requests to release her on their undertaking not to run the 'statutory defence'. Asked to exercise a discretion, we consider that Ms McCann's appeal to broad considerations of fairness is both apposite and compelling.

69 For all of these reasons, the Respondents have satisfied us (the burden being upon them) that this dispute falls into the rare category of case in which post-promulgation protection is necessary and that EJ Brown's order must be varied as set out in our Order above, para (3).

The application relating to the Claimant

70 Has there bee a material change of circumstances sufficient to enable the Tribunal to consider revoking the original anonymity order? Plainly, there has. The exceedingly serious allegations on which the Claimant based his application for anonymity have been considered, comprehensively dismissed and found to be false and, in large part, made up. The foundation on which EJ Brown necessarily approached the application, namely that the Claimant was relying on sincere allegations advanced in good faith, has been exploded.

71 Ms Chan submitted that the Tribunal had no power to revoke the anonymisation order in respect of the Claimant because the 1992 Act contained no such power. We disagree. The order itself was not made under the 1992 Act (which does not have anything to do with Employment Tribunals) but under the 2013 Rules, r50. The power to revoke lies under the 2013 Rules, r29. The

argument that no direction has been made under the 1992 Act, s3(2)[4] and therefore there is no power to revoke under r29 is misconceived.

72 We agree with Ms McCann that the correct approach is to exercise our case management powers under r29 in light of, and in keeping with the spirit and intention of, the 1992 Act. This approach recognises that the protection under the 1992 Act is automatic and, in principle, permanent. The underlying policy objective is clear: to ensure that victims of sexual offences are not discouraged from making complaints for fear of facing distressing publicity. Eloquent of that purpose is the express stipulation that a s3 direction is not to be given only because of the outcome of the trial (s3(3)). A complainant in a rape case must not be at risk of losing her anonymity simply because the Defendant is acquitted. We agree with Ms McCann (submissions, para 27) that great care must be taken before any inroads are made into the s1 protection. But we also agree with her further contention that our procedural rules enable us remove or relax that protection in special circumstances. We cannot accept the contrary view, namely that any allegation ostensibly within the reach of the 1992 Act attracts protection which is lifelong and irrevocable regardless of a judicial finding subsequently made following a comprehensive hearing that it was false to the point of being simply made up. Such was and is our finding and the necessary logic, from which we do not shrink, is that the application for privacy orders made on the strength of it was equally dishonest and the resulting orders were secured on the basis of gross and wilful misrepresentations. We simply cannot accept that the law is powerless to separate the Claimant from a protection to which, as is now apparent, he was never entitled. It is to us unthinkable that our procedural law, founded on the overriding objective of deciding cases justly, could contemplate such a bizarre and unjust result. We cannot disagree with Ms McCann that if it did, it would make a mockery of the protection which the 1992 Act is designed to enshrine.

73 If we are right so far, the next question is, How should we resolve the balancing exercise between competing interests? We agree with Ms McCann that it is material here that the privacy orders secured by the Claimant involved derogating from the open justice principle and freedom of expression. We have explained why, in our view, extending the anonymisation protection the case of Q would entail a minor derogation. By contrast, we do not consider that permitting the Claimant's protection to last indefinitely could sensibly be seen as having a similar effect. His is a most unusual story and we can well see why it would be of considerable interest to the press and the public. His identity would be a matter of legitimate interest given the Tribunal's findings, in the way that Q's would not. Against the interests of open justice and freedom of interest, we see no countervailing argument based on the Claimant's Convention rights. If, as we have held, he did not have a sustainable right to litigate anonymously, it cannot be said that his right to respect for his private life would be violated as a consequence of the anonymity being lost.

74 Would revoking the anonymity order in the Claimant's case undermine the vital interest which the 1992 Act seeks to protect? In our judgment, it would not. To

[4] Such direction may only be made "at a [criminal] trial" by a justice of the peace or Crown Court judge (s3(6)). There has been no criminal trial. Indeed, not surprisingly, no criminal charge was ever brought against Q (see generally ss1(2) and (3) and 6(3)).

be clear, we regard this as a wholly exceptional case and we see no possible reason for fearing that our decision could affect public confidence in the principle that those who raise complaints of sexual offences can do so without their identities becoming known.

75 For all these reasons, we conclude that the Respondents have demonstrated that the exceptional measure sought by their application referred to in para (4) of our Order above is both proper and necessary.

Outcome

76 The Respondents' applications succeed as explained in our reasons above.

77 The Tribunal's administrative staff will be instructed to implement our rulings in three months' time unless the Tribunal or EAT extends that period in the interim (Order, para (5)). In view of the pressure under which the Tribunal is currently operating, it may be advisable for the parties to check at the appropriate time that the stay has been duly lifted and our Order, para (4) implemented by publication on the website of the (further) revised version of the liability judgment.

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EMPLOYMENT JUDGE SNELSON

19 April 2024

Judgment entered in the Register and copies sent to the parties on 26 April 2024

..... for Office of the Tribunals