EMPLOYMENT TRIBUNALS

Claimant: Ms X

1st Respondent: The Cabinet Office
2nd Respondent: Mr M Bourke
3rd Respondent: Mr S Case
4th Respondent: Mr A Chisholm
5th Respondent: Ms S Harrison

RECORD OF A HEARING

Heard at: London Central in public and by CVP **On: 18 April 2024**

Before: Employment Judge Nicolle and non-legal members Mr R Baber and Ms K Dent

Appearances:

For the Claimant: Ms N Gyane
For the Respondents: Mr M Purchase KC and Mr N Roberts
For Media Organisations representing Guardian News and Media Limited, PA Media Limited, Sky News and Telegraph Newspapers Limited: Mr J Bunting KC.

CASE MANAGEMENT SUMMARY

1. The Tribunal made the following Orders:

2. The pleadings, which appeared between pages 14 and 127 in the trial bundle, (the Pleadings) were not already in the public domain given that the Tribunal had directed that they be provided to various media organisations in attendance on the opening day of the scheduled hearing on Monday, 15 April 2024 (the Media Organisations) for the sole purpose that those organisations had the opportunity to familiarise themselves with the relevant issues so that if applicable they were able to exercise their entitlement pursuant to Rule 50 (4) of the Employment Tribunals (Constitution & Rules of Procedure) Relations 2013 (the Rules) to make representations before any Order pursuant to Rule 50 was made.

3. That notwithstanding the above the Media Organisations were entitled to access to the Pleadings in accordance with the principle of open justice and absent what are Tribunal considered clear and cogent evidence on behalf of the Claimant as

to why the Media Organisations should not be entitled to continuing access, with a view to proper journalistic purposes, of the Pleadings.

4. That the use by the Media Organisations, whether directly or indirectly, to include any circumstances where the Media Organisations provide the Pleadings to any other party, shall be subject to a restriction pursuant to Rule 50 (3) that they should not directly, or indirectly, refer to an alleged incident on 1 November 2021 where the Claimant contends that she was subject to a sexual assault (the Alleged Incident).

5. This Order precludes any reference to the Alleged Incident, its circumstances, location or the individuals involved, to include the Claimant and the Alleged Perpetrator, which has the effect that the Claimant and the Alleged Perpetrator are identified as being party to the Alleged Incident, and includes not reporting any subsequent procedures, grievances invoked or followed by the Claimant or the Respondents which directly or indirectly made reference to the Alleged Incident or would otherwise identify the Alleged Incident, the Claimant and/or the Alleged Perpetrator.

6. In accordance with Rule 50 (5) (b) this Order shall apply indefinitely for the purposes of the Tribunal proceedings but only subject to it not being inconsistent with any criminal proceedings which may be brought in relation to the Alleged Incident.

7. The above was contained in a case management order which was not promulgated online.

8. Oral reasons were given and written reasons have been requested and will be provided.

9. I wrote to the parties as follows:

> I do not consider that the ruling given constituted a judgment as defined in Rule 1 (3) (b). Nevertheless, given that there was considerable interest in the ruling, given the public interest element of open justice, I consider that it would be contrary to this principle if the ruling was not promulgated online. I do, however, acknowledge the potential tension between this and the Claimant's wish to avoid any publicity regarding the Alleged Incident. I therefore propose that a solution to this issue would be that the written reasons for the ruling are promulgated online but with the claimant's name being anonymised to Ms X.

The Claimant’s solicitor agreed with this proposal and it has therefore been adopted.

Reasons

Background and chronology

10. It is relevant to set out the background facts giving rise to this application. This The hearing commenced on Monday 15 April 2024. It was originally scheduled for a 22 day hearing. The parties attended but no evidence was given. In approximately one hour of Tribunal time the main focus was on timetabling, clarifying that the list of issues was agreed, the reading list for the Tribunal, referring to opening skeleton arguments and Ms Gyane indicating that an application would be made pursuant to Rule 50 on the basis that the claimant had alleged a sexual offence. Her assertion was that the prohibition on publicity arose automatically as a result of relevant provisions of the Sexual Offences (Amendment) Act 1992 (the SOAA). Mr Purchase whilst broadly neutral said that there should be reciprocity in that the alleged perpetrator of that offence should have the same protection.

11. As indicated the Tribunal did not hear any evidence but the hearing had commenced. There were a number of journalists in attendance, given that there was to be an adjournment for Tribunal reading time until Wednesday 17 April 2024 when the Rule 50 application was to be heard, I raised with the journalists in attendance whether they wanted to make any representations regarding the Rule 50 application. Mr Kirk on behalf of the Evening Standard took advantage of that and it was agreed by the Tribunal that it would be appropriate for the news organisations in attendance to be provided with the pleadings. This was facilitated by the Respondents' legal team with email addresses being provided to them by the relevant journalists and the pleadings were then sent to them on Monday 15 or Tuesday, 16 April 2024.

12. The provision of the pleadings was subject to the tribunal's interim oral order that they were provided solely for the purposes of the recipient media organisations potentially having an interest, and a legal entitlement pursuant to Rule 50 (4) of the Rules to make representations as to the effect and extent of any anonymity and/or restricted reporting order.

13. There was further discussion with the attending news organisations regarding future access to and use of the pleadings and other documents within the your witness statements and trial bundle for when the hearing proceeded. That including some emails sent to the Tribunal by both journalists and interested members of the public requesting that the hearing should take place by CVP as well as being in person. I instructed the Tribunal administrative staff to write to the parties to ascertain whether they

would have any objection to the hearing being by CVP as well as in person. There was no such objection.

14. It was agreed that if the hearing continued post the Rule 50 application that arrangements would be made for the provision of relevant documents as seen by the Tribunal to interested parties through that electronic medium.

15. It is not necessary to go into detail in terms of the allegations made by the Claimant. What is relevant is that after some delay the Tribunal was advised on Wednesday 17 April that there was going to be a dismissal on withdrawal of the claim in its entirety. The Tribunal issued a dismissal on withdrawal pursuant to Rule 52.

16. The journalists in attendance, including one from the Guardian, were given the opportunity by me to make any submissions regarding the status of the pleadings and other case material. The Guardian representative argued that there was a public interest in the matters contained within the pleadings and that they considered that there was an entitlement for them and the issues within them to be publicly reported. The journalist said that she was not legally qualified and requested an opportunity for the Guardian, and potentially other interested news organisations, to instruct counsel. The Tribunal agreed to this request and the hearing was deferred until 10am on Thursday, 18 April 2024.

17. The Guardian, Sky News, PA Media and Telegraph Media Group instructed Mr J Bunting KC via Media Organisation and we are thankful to him for his detailed submissions and comprehensive bundle of authorities prepared at short notice. Mr Kirk of the Evening Standard attended via CVP.

18. I will deal with the submissions in more detail subsequently but it is relevant to refer to some background facts as referred to by Mr Bunting. He that the Claimant's identity and the names of some of the Respondents are already in the public domain. He referred specifically to a case management order dated 8 March 2023, and whilst this was a private hearing as a result of an inadvertent oversight it was promulgated online, and whilst it has subsequently been taken down it still remains on the internet and has been widely referred to. Mr Bunting referred to contemporaneous news reports from April 2023, to include on the BBC News website and in the Evening Standard, which identify not just the Claimant but the broad nature of the issues and some of the higher profile individual Respondents.

The Law

<u>The Claimant's allegation of a sexual assault</u>

19. I will start by addressing the Claimant's contention as to the automatic applicability of anonymity given an alleged sexual offence based on the SOAA read in conjunction with the Sexual Offences Act 2003.

20. Mr Bunting made submissions, which are not disputed, that there is a lacuna in the law in that the relevant legislation does not apply in Scotland. He says that this arose as a result of an oversight by the Scottish National Assembly as was in 1997 it was intended to be a devolved power but was never actually implemented. He took us to the relevant sections of the Acts concerning sexual offences. Specifically the Sexual Offences (Scotland) Act 2009 which was not covered by the SOAA and as such an alleged sexual assault taking place in Scotland was not a sexual offence under the Employment Tribunals Act 1996 s.11. As this analysis was not disputed by the claimant there is no automatic anonymity as a result of that legislative oversight.

Presidential Guidance (Interim Non-Disclosure Orders) 2012

21. We take account of the Presidential Guidance On Interim Non-Disclosure Orders from 2012. This was promulgated in response to what had become a common practice of so called super injunctions particularly taken out by high profile public figures seeking to prohibit any publication of potentially embarrassing or compromising material.

22. Paragraph 9 provides that open justice is a fundamental principle. Paragraph 10 states that derogations from the general principle can only be justified in exceptional circumstances where they are strictly necessary as measures to secure the proper administration of justice. Derogations should, where justified, be no more than strictly necessary to achieve that purpose. Paragraph 20 provides that applicants will need to satisfy the Court that all reasonable and practicable steps had been taken to provide advance notice of the application. I will return to paragraph 24 later as it relied on by Mr Bunting as to whether an express irrevocable undertaking should be provided to the Court by any interested parties receiving access to court documents.

The Employment Tribunal Rules of procedure

23. There is a distinction between the Rules and the equivalent CPR Rules. In summary under Rule 59 any final hearing shall be in public subject to Rules 50 and 94. Under Rule 44 any witness statement which stands as evidence in chief shall be available for inspection during the course of the hearing. Paragraph 17 of The Presidential Guidance provides that because it is a public hearing the Tribunal will enable persons, including the press and media present at the hearing, to view documents referred to in evidence before it (unless it orders otherwise).

General legal principles regarding the principle of open justice and possible derogations from it

Rule 50

24. In summary:

25. Rule 50 provides that a Tribunal may of its own initiative 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 interest of justice or in order to protect the Convention rights of any person in the circumstances identified in s.10A of the Employment Tribunals Act 1996 (the ETA).

26. Rule 50 sets out what the order may specify and includes matters whose publication can be prohibited as being likely to lead to that person's identification. The duration of the order shall be specified.

27. Rule 50(3) sets out what such orders may include. Potentially relevant are an order that the identities of specified parties should not be disclosed to the public by the use of anonymisation or otherwise whether in the course of any hearing or in the documents entered on the register or otherwise forming part of the public record and a restricted reporting order within the terms of S.11 or 12 of the ETA.

28. Rule 50, which is headed 'Privacy and restrictions on disclosure', provides as follows:

> '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;

The European Convention on Human Rights (the Convention)

29. Article 6(1):

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

30. Article 8:

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

Applicable case law pertaining to the Convention

31. Where Convention rights give rise to competing interests, the House of Lords in Re S (a child) (identification: restrictions on publication), [2004] UKHL 47, [2004] 4 All ER 683 said:

'… neither article has as such precedence over the other … where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary … the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each …', per Lord Steyn.

32. Where Convention rights are relied on as a reason for restricting public access to judicial proceedings or pronouncements, the tribunal must first consider whether the particular Convention right is engaged. If not, that is the end of the matter: see Ameyaw v Pricewaterhousecoopers Services Ltd [2019] ICR 976 at para 46, per Eady J.

> Article 8 rights may be engaged where a person's reputation may be damaged as a result of the publicity. In assessing this question the issue will include the extent of the likely interference with that person's rights by their being identified in a public hearing and judgment and whether the impact is such as to justify restricting the very important principle of open justice and freedom to receive and impart information of public interest under Article 10.

Applicable case law pertaining to the balance between open justice and protecting confidentiality

33. 'The rationale for a general rule that hearings should be held in public was trenchantly stated by Lord Shaw of Dunfermline in the leading case of Scott v Scott [1913] AC 417 at 477, [1911–13] All ER Rep 1 at 30. He quoted first from Jeremy Bentham:

> "'In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.' 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.' 'The security of securities is publicity.'"

34. Further, in Scott v Scott, Lord Atkinson acknowledged the importance of the principle in the following terms:

> '… The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect …'

35. Lord Steyn also quoted the observations of Lord Woolf MR on criminal trials in R v Legal Aid Board, Ex p Kaim Todner [1999] QB 966:

> "The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be

> subjected to the full glare of a public hearing. It is necessary because the public nature of the proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely ... Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it. However Parliament has recognised there are situations where interference is necessary."

36. As emphasised in the Supreme Court's decision in Guardian News and Media Limited Ltd [2010) UKSC 1 and other cases open justice is a principle at the heart of our system of justice and vital to the rule of law. The Supreme Court stated that decisions should be determined depending on the particular facts.

37. In R (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates' Court [2012] EWCA Civ 420, the Court of Appeal described the principle of open justice as follows:

> 'Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed? … In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse."

And further:

> 'The purpose of the open justice principle .. is not simply to deter impropriety or sloppiness by the judge hearing the case. It is wider. It is to enable the public to understand and scrutinise the justice system of which the courts are the administrators."

38. In BBC v Roden [2015] IRLR 627, Simler J sitting in the EAT held at paragraph 22:

> "The principle of open justice is accordingly of paramount importance and derogations from it can only be justified when strictly necessary as measured to secure the proper administration of justice."

Simler J continued at paragraphs 50 and 51:

> 50 … "The default position in the public interest is that judgments of tribunals should be published in full, including the names of parties.

> That principle promotes confidence in the administration of justice and the rule of law. The reporting of court proceedings in full without restriction is a particularly important aspect of the principle and withholding a party's name is an obvious derogation from it, requiring cogent justification for its restriction. Even in In re S, where the Article 8 rights of an innocent 10-year-old were engaged, anonymity for his mother, charged with murdering one of her other children, was refused by the House of Lords as not outweighing the public interest in open justice. The mere publication of embarrassing or damaging material is not a good reason for restricting the reporting of a judgment, as the authorities make clear."

39. The Supreme Court has said that 'in many, perhaps most cases, the important safeguards secured by a public hearing can be secured without the press publishing or the public knowing the identities of the people involved… There is a balance to be struck. The public has a right to know, not only what is going on in our courts, but also who the principal actors are.' (R (on the application of C) v Secretary of State for Justice) [2016] UKSC 2, per Baroness Hale.)

40. Where a privacy order is sought: (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 employment tribunal 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 tribunal can mitigate the risk of misunderstanding by making clear it has not adjudicated on the truth or otherwise of the damaging allegations: Fallows v News Group Newspapers Ltd [2016] ICR 801, EAT.

41. Cases such as A and B v X and Y and Times Newspapers UK EAT/2018/0113 emphasise the importance of the balancing exercise between competing rights.

42. In Millicom v Michael Clifford [2023] IRLR 295 the Court of Appeal's judgment set out the basis upon which derogations can potentially apply with the relevant test to be applied in a sequential order comprising the interest of justice, the Convention rights and confidentiality.

Cape Intermediate Holdings Ltd v Dring

43. The Tribunal had of its own volition, and then referred to by the parties, taken account of Lady Hale's judgment in the Supreme Court's decision in Cape Intermediate Holdings Ltd v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK) [2019] UKSC 38. This involved an application made by a forum representing asbestos victims, but not a party

to the proceedings, for access to documents to include not just the pleadings but also a bundle of approximately 5000 pages. There is a distinction between the CPR and the Tribunal Rules. That primarily relates to the fact that under CPR Rule 5.4C there is a general entitlement for any person who is not a party to proceedings to obtain from the court records a copy of a statement of case. There is no equivalent provision in the Tribunal Rules.

44. The Media Lawyers Association intervened in the Dring case to argue that there was a public interest in the open accessibility of documentation pursuant to the general principle of public accessibility and justice being seen to be done in accordance with the basic legal principles.

45. The Supreme Court said:

> 'There should be no doubt about the principles. The question in any particular case should be about how they are to be applied.
>
> The principal purposes of the open justice principle are two-fold and there may well be others. The first is to enable public scrutiny of the way in which courts decide cases - to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly.
>
> But the second goes beyond the policing of individual courts and judges. It is to enable the public to understand how the justice system works and why decisions are taken. For this they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases.'

46. In paragraph 32 there was reference to documents being read or treated as read in open court being made available.

47. The principle of open justice was referred to at paragraph 34 to include, there can be no doubt at all that the court rules are not exhaustive of the circumstances in which non-parties may be given access to court documents. However, case after case has recognised that the guiding principle is the need for justice to be done in the open and that courts at all levels have an inherent jurisdiction to allow access in accordance with that principle . Reference was made to the judgment of Lord Justice Toulson in the Guardian News and Media case.

48. At paragraph 36 Lady Hale said the requirements of open justice applied to all tribunals exercising the judicial power of the state and by implication Employment Tribunals would be included within that.

49. Paragraph 38 where access is sought for a proper journalistic purpose the case for allowing it will be particularly strong. In evaluating the grounds for opposing access, the court would have to carry out a fact specific proportionality exercise.

50. At paragraph 44 reference was again made to the Guardian News and Media case and that the default position is that the public should be allowed

access not only to the parties' written submissions and arguments but also the documents which have been placed before the court and referred to during the hearing.

51. At paragraph 45 an applicant has no right to be granted access. It is for them to explain why it is sought and how granting access would advance the open justice principle.

52. At paragraph 46 the need to consider any legitimate interest of others.

53. At paragraph 47 it may be relevant to consider the practicalities and the proportionality of granting the request.

54. At paragraph 49 that courts had jurisdiction to make a wider order if it were right to do so. Where a privacy order is sought 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.

55. Where full reporting of proceedings is unlikely to indicate whether a damaging allegation is true or false the Tribunal should credit the public with the ability to understand that unproven allegations are no more than that.

Fallows v Newspapers Fallows v News Group Newspapers

56. Where such a case proceeds to a judgment the Tribunal can mitigate the risk of misunderstanding by making it clear it has not adjudicated on the truth or otherwise of the damaging allegations, in accordance with paragraph 48 of the judgment of Justice Simler in Fallows v Newspapers Fallows v News Group Newspapers [2016) ICR 801. Ultimately it involves the balancing of competing rights.

57. Paragraph 47 discuses the balancing exercise between Article 8 and Article 10 Convention Rights.

Goodley v The Hut Group Ltd

58. Mr Bunting referred us to paragraph 39 of the High Court's judgment in Goodley v The Hut Group Ltd [2021] EWHC 1193. This was an application made seven years after the trial had concluded. The court held that the default position was that access to a report referred to in the trial should be permitted on the open justice principle and where access is sought for a proper journalistic purpose the case for allowing it will be particularly strong.

59. Paragraph 43 in the judgment of Mr Justice Calver made reference to the direction of travel, subsequent to cases such as Guardian News and Media, as being to allow a journalist access to a document which has been referred to an open court, and which is requested for journalistic purpose, unless a affording access to the document is outweighed by the risk of harm which its

disclosure may cause to the maintenance of an effective judicial process or to the legitimate interest of others.

Guardian News and Media v EFG Private Bank Ltd

60. Mr Bunting further referred to the EAT's decision in Guardian News and Media v EFG Private Bank Ltd [2022] ICR 973. And specifically at paragraph 91 the legitimate considerations which the EAT concluded the tribunal had failed to have proper regard to include to enable a better understanding of the matters referred to in the judgment, to ensure that any reporting of the matter was fair and accurate, for stimulating informed debate and to obtain further information about the matter to insist further enquiries.

R (Marandi) v Westminster Magistrates Court

61. In R (Marandi) v Westminster Magistrates Court [2023] 2 Cr App R 13 the Kings Bench Division 2023 specifically at paragraph 43 (3) said that when considering an application for derogation the judge was right to identify and apply a test for necessity, this was and remains an exception of narrow scope as referred to in Clifford v Milicom Services UK Ltd [2023) EWCA Civ 50.

62. And at paragraph 43 (4) the threshold question is whether the measure in question, here allowing the disclosure of the claimant's name and consequent publicity, would amount to an interference with the claimant's right to respect for his private and family life. This requires proof that the effects would attain a "certain level of seriousness".

63. And at paragraph 43 (6) it is in that context the judge rightly addressed the question of whether the claimant had adduced clear and cogent evidence. The cases all show that this question is not to be answered on the basis of rival generalities but instead by a close examination of the weight to be given to the specific rights that are at stake on the facts of the case that is why clear and cogent evidence is needed.

The parties' submissions

64. I will address these briefly to the extent to which not already covered in the case law authorities.

The Media Organisation

65. Mr Bunting asserts that there is no specific prohibition on the use of the pleadings. He says that they are lawfully in the public domain, that there is considerable press interest and speculation, the hearing had opened, there was an analysis and consideration of the pleadings, that the pleadings were mentioned in open court and that the only restriction was the interim order up until the Rule 50 application being. He says that there is justifiable public interest in how the senior civil service operates. He refers to the need for the

public to understand what the case is about to prevent uninformed speculation.

66. He says that there is no automatic anonymity for the Claimant as result of the lacuna regarding the Scottish implementation of equivalent legislation to the SOAA.

67. He says that the press is subject to independent regulation and he referred us to the IPSO Code which provides that all victims of sexual offences are automatically guaranteed anonymity for life from the moment they make an allegation that they are the victim of a sexual offence and that includes sexual assault. The PA and Telegraph are subject to the IPSO Code and will comply with it. He says that the Guardian News and Media Organisation has its own editorial code and they would not identify individuals where a sexual offence had been alleged and that Sky is subject to the Ofcom Code. So, he says that none of his clients would identify the Claimant as being someone who had been subjected to an alleged sexual assault.

68. Whilst slightly more equivocal in terms of the position of the alleged perpetrator he said primarily as a result of the need to avoid jigsaw identification that his name would also not be mentioned. He says that all the rest of the material in the pleadings is lawfully reportable.

69. He says the Tribunal gave the media organisations the pleadings with no irrevocable undertakings being given. He says that in any event, on the basis of Dring, the presumption of access applies given that there are legitimate journalistic purposes. He says there is nothing by way of counter balance with no arguments have been advanced on behalf of the Claimant containing clear and cogent evidence. He says that her contention for a derogation is based on a bare assertion. He says it is a concomitant of open justice that it leads to a degree of intrusion and quoting Lord Sumption “the price of open justice”.

70. Mr Kirk was given the opportunity on behalf of the Evening Standard to make any additional representations. He had nothing in addition to add and said that that he agreed with the representations made by Mr Bunting.

<u>Claimant</u>

71. Ms Gyane said it would have a chilling effect on cases settled before cross examination. She asserts that the pleadings are private documents and that they remain private documents. She referred to the relevant Tribunal Rules, to includes the Presidential Guidance, and in particular paragraph 17 which provides that at a public hearing the Tribunal will enable persons, including the press and media, present at the hearing to view documents referred to in evidence before it unless it orders otherwise. She says that prior to evidence being given at a public hearing the only data in the public domain are the names of the parties and the type of claim being brought from the

information on Court Serve or the notice board. Pleadings are not in the public domain. That is not a position which is disputed.

72. She says at the point which evidence is called that is when entitlement to access to documents begins. She asserted the Claimant's right to privacy, and referred to the obvious serious impact on her of that privacy being compromised. Whilst the Claimant acknowledges and appreciates the importance of open justice she is the only individual who has sued the Cabinet Secretary and she says that the potential ramifications to her would be serious if there was no anonymity granted in terms of the use of that material. She says there is an ongoing police investigation into the alleged sexual assault and talks of her article 8 right to privacy and in the alternative requests that her name is anonymised pursuant to Rule 50 (3) (b) of the Rules.

Respondents

73. Mr Purchase had originally asserted that he was broadly neutral on the issue. Nevertheless the position had changed as he said the ground is shifting. He opposes a general anonymity order. However, if a general anonymity order were to be granted he says it should be reciprocal which would involve a balancing exercise not just in terms of the individual named Respondents but approximately 30 Respondent Civil Servants in more junior positions who may suffer adverse consequences or upset in the event of their names being referred to in any press reports and referred to their article 8 rights. He refers to paragraph 46 in Dring and the legitimate interest of others. He says that they are serious allegations made against senior Civil Servants and most of those Civil Servants had minor and peripheral roles. In particular the allegations against Mr Case and Mr Chisholm are particularly vacuous.

74. He says that the pleadings were not discussed in any detail, they were merely referred to. He referred to potentially analogous situations of implied undertakings, whether pursuant to the CPR Rules 31 and 32 or legal professional privilege albeit he accepts that they do not directly apply.

75. He says the sexual offence allegation is only a tiny part of the overall story. Any anonymity must be balanced against general anonymity in the whole case. He is concerned not just about journalists but potentially individual bloggers who may obtain access to the pleadings.

Mr Bunting's reply

76. Mr Bunting by way of reply says the Claimant's name is already in the public domain. No authority has been quoted for the reasonable expectation of privacy. He says that the assertion that it is only when evidence is called that the principles in Dring apply is wrong. He says that as soon as a document is

referred to in open court it would be a matter which the parties were entitled to have access to.

77. He says its only access to the pleadings at this stage which is being sought. He says there needs to be a presumption that the media will act fairly, accurately and lawfully in reporting matters. He says that the media would respect a restricted reporting order in relation to the sexual offence allegation. He acknowledges that under Rule 50, notwithstanding the lacuna in the Scottish legislation regarding sexual offences, that the Claimant's Convention rights could be relied on if the Tribunal were to grant an order.

78. Mr Purchase had referred to whether any undertakings would be required. Mr Bunting says that this was unnecessary.

Discussion and conclusions

Are the pleadings already in the public domain?

79. There are three main issues for the Tribunal to consider. First, has there already been a de facto disclosure of the pleadings to the media where the media are already entitled to report on those matters on the basis that no undertakings were given as to the future use of those materials. Mr Bunting referred to paragraph 24 of the Practice Guidance. It involves a situation where any material supplied to a non-party by an applicant shall be supplied upon the applicant receiving the irrevocable written undertaking to the Court that the material and the information contained within it, or derived from such material or information, will only be used for the purposes of the proceedings.

80. We consider that a somewhat different situation exists in this case. First, in the Employment Tribunals, there is a greater degree of informality. We have to consider the overriding objective and proportionately. Further, the parties requesting the documents were here in hearing and this was not an application made by a non-party outside the court. It was clearly stated that the documents were provided solely for the purpose of those interested media organisations having the opportunity in advance to know what the case was about in broad terms so they could exercise their legitimate interest pursuant to Rule 50 (4) to make any representations regarding the extent to which, if at all, any restricted reporting order should be granted. It was then intended, and there were discussions on this on 15 April 2024, about what steps would be taken to facilitate access to the bundle of documents, witness statements etc as referred to in evidence during the hearing. So, the presumption and expectation of all parties was that that was an interim order prior to the Rule 50 application being determined. Of course no one was anticipating that the case would be dismissed on withdrawal prior to the Rule 50 application being heard.

81. There is further a more practical consideration. None of the media representatives in the tribunal would necessarily have been in a position to

give binding written undertakings as they would almost certainly not have legal authority to do so. There would be a practical consideration as to who would have such authority and how long this will take. This could have resulted in a delay in the proceedings which would be contrary to considerations of proportionality and the overriding objective.

82. There is also the more practicable consideration as to how this process would have operated in practice. Would induvial lawyers or others having the requisite level of authority send such undertakings in writing to the Tribunal, would the Tribunal have time to process them and then send out copies of the pleadings. The Tribunal in my opinion correctly adopted a more informal approach to which the parties agreed that the Respondents' legal team took email addresses of the interested journalists and provided electronic copies of the pleadings on the basis of the interim oral order.

83. As such we do not consider that the pleadings are already in the public domain and the major organisations are not entitled to enter into journalistic reporting of their contents.

<u>Should the pleadings be made available in accordance with the open justice principle?</u>

84. We then need to go on and consider the argument that there is a basic presumption in accordance with the open justice principle, and in particular the principles enunciated by LJ Hale in Dring, that the pleadings should be provided with the media organisations having the entitlement to report on them for journalistic purposes. We identified a potential tension between the wider principles enunciated by LJ Hale and the arguably more restrictive interpretation in the Presidential Guidance. The Presidential Guidance refers to documents referred to in evidence. No evidence has been given in this case. However, we take the view that that would impose an unnecessarily restrictive approach. We can envisage a situation where, for example, there could be the first two days of a lengthy case spent addressing matters such as the list of issues. Whilst not required in this case because they were agreed often they are not or alternatively preliminary applications may be made to include, for example, a strike out application or issues of jurisdiction where no evidence would be given. In this situation any journalist in the tribunal on the basis of a strict interpretation of the Presidential Guidance would not have the entitlement to see the pleadings. We consider that would be inconsistent with the open justice principle and the proposition clearly outlined by LJ Hale that it has applicability not just in the Higher Courts but also in all tribunals and courts. We take the view that the pleadings whilst not referred to in detail were nevertheless referred to. You cannot discuss the list of issues and the possibility of a Rule 50 application without the background of the pleadings.

85. In any event there are many cases where the pleadings are barely referred to in evidence. The documents witnesses are taken to in evidence are generally those in the bundles. The pleadings represent the umbrella or overarching statement of the parties' cases and are not necessarily documents which are

significantly referred to during the course of the evidence and sometimes not at all.

86. Had the hearing hypothetically started on 15 April it is unlikely that either party would have taken issue with those in the room having access to the pleadings prior to a witness taking the stand. Had this been otherwise it would have the unfortunate consequence that parties can see individual pages in the trial bundle and individual witness statements, but not the pleadings which enable observers to obtain an overall understanding of the case, because they have not yet been referred to in evidence. Therefore we take the view that that in accordance with the overarching principles of LJ Hale as enunciated in Dring that the pleadings became documents to which interested members of the public, to include media organisations, acquired a right of access at the commencement of the hearing when those documents were referred to in open court.

What, if any, anonymity should be granted to the Claimant?

87. We then need to consider absent any automatic application of lifelong anonymity as result of an alleged sexual offence. What, if any, restriction should be applied under Rule 50? We take account of the fact that relevant case law makes it clear that any restriction should be no more draconian than is required to protect legitimate interest of confidentiality. We accept that the Claimant has a legitimate interest in the alleged sexual offence not being reported. Equally the alleged perpetrator has an interest in that allegation not being reported. We take account of the respective convention rights as we are entitled to pursuant to Rule 50 (1).

88. We do not consider that it would be appropriate for full anonymity to be granted to the Claimant or any other party. In a case where allegations are made and a hearing commences it is a necessary, albeit possibly from a claimant's perspective sometimes unfortunate expectation, that as referred to by Lord Sumption it is the price of open justice that there is a degree of intrusion. That applies equally if the case has gone its entire distance and a judgment has been entered to the situation where the hearing commences and is discontinued prior to judgment being entered. There is some loss of the privacy which would otherwise apply if a case had not been brought or indeed had been settled or withdrawn in advance of the hearing.

89. That is the price of open justice. There are many cases where there is potentially a degree of damage to future employability as result of an individual raising allegations of discrimination or whistleblowing and that does not provide justification in most incidences for a privacy ruling. As has been asserted there needs to be cogent and persuasive evidence for such a derogation from the principle of open justice and we are not satisfied that such has been provided. In making this decision is relevant to state that had we been in a different situation, and there had been media reporting on the opening day of the hearing on Monday 15 April, which there could have been because the media were in attendance, they heard arguments, they had access to the pleadings, and if there had been no notice of a Rule 50

application, there would in our opinion be no basis for the Tribunal or the parties saying that matters in the pleadings could not be reported.

90. Equally the named individual Respondents will be named in public. As Mr Bunting has said there needs to be balanced reporting.

91. The Claimant's name is already in the public domain. The generalities of the allegations generalities, but not the specifics, are in the public domain. This was partly a result of a private case management hearing being erroneously promulgated online but it is also an inevitable product of allegations being made of a serious nature involving high profile individual and institutional Respondents.

92. So, finally what is the scope of the order which we are making. Under Regulation Rule 50 (5) (a) we are required to 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. The specific matter we are seeking to protect is any reference to the allegation made by the Claimant that she was the subject of an alleged sexual assault on 1 November 2021 (the Alleged Incident). So the media are prohibited from referring to the Alleged Incident and that they are not able to identify either the Claimant or the alleged perpetrator of that incident. That restriction will apply indefinitely unless as a result of any criminal prosecution pertaining to the Alleged Incident the Rule 50 prohibition is in any way lifted in so far as the position of either the Claimant or the alleged perpetrator subject to the Scottish criminal rules of anonymity in terms of sexual offences would justify reference to those individuals in accordance with those proceedings but as far the Employment Tribunal proceedings are concerned that restriction has indefinite application.

93. Requirement to comply with these orders and procedure for seeking variation to these orders.

93.1 The above orders were made and explained to the parties at the hearing. All orders must be complied with even if this written record of the hearing is received after the date for compliance has passed.

93.2 Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible following circumstances arising that prompt the application.

94. Other important points to note.

94.1 The attention of the parties is drawn to:

94.1.1 the Tribunal's Rules of Procedure, which can be found at https://www.gov.uk/courts-Tribunals/employment-Tribunal.

94.2 The parties are reminded of Rule 92: "*Where a party sends a communication to the Tribunal (except an application under Rule 32) it shall send a copy to*

all other parties, and state that it has done so (by use of "cc" or otherwise) …". **If, when writing to the Tribunal, the parties do not comply with this Rule, the Tribunal may decide not to consider what they have written**.

94.3 The parties are also reminded of their obligation under Rule 2 to assist the Tribunal to further the overriding objective and to co-operate generally with other parties and with the Tribunal.

94.4 Whenever they write to the Tribunal, the Claimant and the respondent must copy their correspondence to each other.

94.5 You can appeal to the Employment Appeal Tribunal if you think a legal mistake was made in an Employment Tribunal decision. There is more information here: https://www.gov.uk/appeal-employment-appeal-Tribunal

94.6 Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings. You can access the Direction and the accompanying Guidance here:

Practice Directions and Guidance for Employment Tribunals (England and Wales) - Courts and Tribunals Judiciary

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Employment Judge Nicolle

24 April 2024

Sent to the parties on:

15 May 2024

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For the Tribunal: