EMPLOYMENT TRIBUNALS

Claimant: **XY**

Respondent: **AB**

Heard at: **East London Hearing Centre**

On: **2 October 2023**

Before: **Employment Judge A Russell**

Representation
Claimant: **In person**
Respondent: **Mrs L Banerjee (Counsel)**

RECONSIDERATION JUDGMENT

It is not necessary in the interests of justice for the Judgment sent to the parties on 9 March 2023 to be varied or revoked. The Judgment is confirmed.

REASONS

1. At the hearing on 6 March 2023 I refused to order the Claimant to pay the costs of the Respondent and made a permanent order under rule 50 that the name of the Respondent should be anonymised. I gave my reasons orally (now sent to the parties in writing) for concluding that:

(i) There had not been unreasonable conduct by the Claimant in bringing the claims.

(ii) There had been unreasonable conduct by the Claimant in the way in which she had pursued those complaints, in particular the threat to go to the press, but it had not been vexatious.

(iii) I declined to exercise my discretion to order the Claimant to pay costs having considered the conduct of the parties in the round, including the Respondent's own conduct which was in certain respects also unreasonable and caused the parties to incur costs.

(iv) After giving oral Judgment, I expressed a view that both the claimant and respondent had sought to use the tribunal's time and resources to continue their own dispute arising primarily out of the breakdown of their relationship. For those reasons, I did not order costs and I encouraged both parties to move on.

(v) The interim rule 50 anonymisation for the Respondent would be made permanent. No rule 50 Order was made in respect of the Claimant.

2. Following the hearing, correspondence from the parties raised a number of issues which caused me to decide to reconsider the Judgment of my own initiative, both in respect of the costs order and the rule 50 Order.

Reconsideration of the Refusal to Order the Claimant to pay costs

3. On 21 March 2023, the Claimant wrote to the Respondent's new employer to advise them that she had won her sexual harassment complaint and she made threats to go the press. On 24 March 2023, the Claimant also wrote to a friend of the Respondent again making threats to go to the press with details of the relationship and her allegations of sexual harassment.

4. On 30 March 2023, the Respondent made an application that written reasons for the Judgment should not be provided, or at least not published because of the Claimant's continued attempts to embarrass the Respondent and apparent breach of the rule 50 Order. The Claimant's conduct potentially called into question my finding that her previous threats to go to the press had not been vexatious and had been in part due to her mental health at the time.

5. At the hearing today, the Claimant and the Respondent have submitted large numbers of documents essentially criticising each other's conduct and essentially seeking to call new evidence to support or undermine the allegations at the heart of the original claim. The Claimant has vehemently made a number of serious allegations against the Respondent. The Respondent has vehemently denied them all and has made serious allegations against the Claimant. It is essential to bear in mind, no matter how vehemently each feels in the righteousness of their position, that the Claimant's claims were withdrawn before there had even been disclosure or exchange of witness statements, far less any testing of the evidence and determination by the Tribunal. Insofar as the Claimant suggests today, that she won her claim or that there was any findings of sexual harassment or any misconduct by the Respondent, this is simply wrong.

6. Having heard submissions today, and applying rule 70, I am not satisfied that it is necessary in the interests of justice for me to vary or revoke my original decision. The Claimant's conduct following the hearing on 6 March 2023 makes more reasonable the Respondent's reluctance to agree to a mutual non-derogatory comments clause given his belief that the Claimant would not comply with its terms. However, it does not affect my conclusions that other aspects of his conduct in the settlement negotiations was unreasonable and contributed to the costs which he incurred. My reasons for not ordering costs were not based solely upon whether or not

the Claimant's initial threat to go to the press in November 2021 was an isolated incident. For these reasons, I am not satisfied that the Judgment refusing to order costs requires revocation or variation.

Application not to provide written reasons

7. Rule 62 provides that a Tribunal shall give reasons for its decision on any disputed issue, including an application for an order for costs. Rule 62(3) states:

> **"Where reasons have been given orally, the Employment Judge shall announce that written reasons will not be provided unless they are asked for by any party at the hearing itself or by a written request presented by any party within 14 days of the sending of the written record of the decision."**

8. At the hearing on 6 March 2023, I gave oral reasons and announced that written reasons would not be provided unless requested. No request was made at the hearing but the Claimant did make an application in writing within the specified 14-day period. The Respondent is concerned that given the Claimant's conduct since the last hearing has been such that publication of the written reasons would be to perpetuate the reputational damage to him caused by the repeated assertions of sexual harassment despite the fact that the claims were withdrawn.

9. I took into account the wording of rule 62 and I am not satisfied that I have any discretion to refuse to provide written reasons if a timely application is made. The broad powers of rule 50 cannot be stretched so far as to prevent publication of reasons given orally in a public hearing. I consider that such a decision would be disproportionate and in breach of the paramount principles of open justice and the Convention right to freedom of expression.

Rule 50 anonymity orders

10. In correspondence since the last hearing, the Claimant has challenged both the making of a permanent rule 50 anonymity Order in favour of the Respondent and the fact that no equivalent Order was made in her favour. Whilst no such Order was sought by the Claimant's Counsel at the last hearing, I nevertheless considered it in the interests of justice to consider her arguments on such an important point of principle and indicated that I would do so at this reconsideration hearing.

11. Rule 50 provides that the Tribunal may at any stage of proceedings, on its own initiative or 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.

12. Rule 50(2) provides that in considering whether to make an Order under this rule, the Tribunal should give full weight to the principle of open justice and to the Convention right to freedom of expression.

13. In **Millicom Services UK Ltd and others v Clifford** [2023] IRLR 295, Warby LJ sets out at paragraphs 2 to 10 the legal framework that applies in applications of this

sort. At paragraphs 31 to 33, Warby LJ held that:

> **31. … the appropriate starting point is the common law. This holds that open justice is a fundamental principle. But it also contains a key qualification: that every court or tribunal has an inherent power to withhold information where it is necessary in the interests of justice to do so: see *Khuja v Times Newspapers Ltd* [2017] UKSC 49, [2019] AC 161 [14] (Lord Sumption), citing the foundational common law authority of *Scott v Scott* [1913] AC 417, 446. I see nothing in Rule 50 or the context to suggest that when enacting the "interests of justice" limb of the Rule the draftsman intended to extend or to restrict the scope of the common law principle. On the contrary, the language of Rule 50(1) coupled with that of Rule 50(2) suggests that the principal intention was to reflect the common law, expressly authorising the ET to derogate from open justice to the extent that would in any event be permitted at common law, whilst emphasising the strength of the open justice principle.**
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> **32. The EJ should therefore have begun by asking herself whether the derogations sought were justified by the common law exception to open justice. This has been put in various ways in the authorities. In *Scott v Scott* at 439 Lord Haldane spoke of the need to show "that the paramount object of securing that justice is done would be rendered doubtful of attainment if the order were not made". Earl Loreburn said, at 446, that the underlying principle that justified the exclusion of the public was "that the administration of justice would be rendered impracticable by their presence". In *Attorney General v Leveller Magazine Ltd* [1979] ACT 44, 550 Lord Diplock spoke of the need to depart from the general rule "where the nature or circumstances … are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice". Usually, the court's concern will be with the requirements of the due administration of justice in the proceedings before it. That is the focus of attention in the present case.**
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> **33. The qualification is certainly of wider application, as Eady P noted at [69] [**of the EAT Judgment below]**. It certainly permits derogations that are required for the protection of the administration of justice in other legal proceedings or even to secure the general effectiveness of law enforcement authorities: see Lord Reed's discussion of the point in *A v BBC* at [38]-[41]. It may go further. But this appeal does not require us to identify the boundaries of the common law exception to open justice."**

14. At paragraph 42, Warby LJ endorsed the relevant factors identified by Eady P in the EAT Judgment below. These include the extent to which the derogation sought would interfere with the principle of open justice, the importance to the case of the information which the applicant seeks to protect and the role or status within the litigation of the person whose rights or interest are under consideration. He added that also relevant considerations were the harm that disclosure would cause, conversely the extent to which the order sought would compromise the purpose of open justice and the potential value of the information in advancing that purpose. The main purposes of the open justice principle were identified by Baroness Hale in **Dring v Cape Intermediate Holdings Ltd** [2019] UKSC 429 at paragraphs 42 and 43 as being: (1) to enable public scrutiny of the way in which courts decide cases – to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly and (2) to enable the public to understand how the justice system works and why decisions are taken.

15. At paragraphs 49 and 50, Warby LJ held that:

> **49. That is not the end of the decision-making process on the 'interests of justice' limb of r 50. As indicated by Lord Reed in *A v BBC* at [57], a court or tribunal that has struck the common law balance will need to check its conclusions against relevant human rights. The ET will need to undertake this task when the r 50 application is remitted for redetermination. Here, there is an added reason for doing so. Rule 50 is delegated legislation which must be construed and given effect compatibly with Convention rights: ss 2, 3 and 6 of the HRA all apply. And for good measure r 50(2) expressly requires the tribunal to give effect to the Convention right to freedom of expression.**
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> **50. A decision to grant a derogation would therefore need to be reviewed for compatibility with the art 6 and 10 rights of the parties and the art 10 rights of the press and public. Under art 6 the question would be whether the restrictions on disclosure are justified because 'the protection of the private life of the parties so require' or whether they are 'strictly necessary' because 'publicity would prejudice the interests of justice'. On the facts of this case the relevant justifications under art 10(2) would seem to be 'for the protection of the … rights of others' and 'for preventing the disclosure of information received in confidence'.**

16. I start by considering the Respondent's position in respect of a rule 50 Order. The Respondent did not bring these proceedings, he was named in them by the Claimant. He did choose to defend the claim but given his vehement denial of the serious allegations of sexual harassment, he had little real choice to do otherwise. The Claimant has exercised her right to withdraw the claim before any substantive hearing. This has deprived the Respondent of the ability to put evidence before the Tribunal refuting the claims and of the opportunity to have a Judgment clearly stating whether the claims succeeded or were dismissed. The Claimant continues to repeat her allegations, contacting the Respondent's new employer, his friends and current partner, and even wrongly informing them that she has won her claim. If the Respondent's identity were not anonymised, the administration of justice would be frustrated as the Claimant could maintain her allegations freely naming the Respondent but with him rendered unable to defend himself due to a decision to withdraw which was entirely within her power.

17. In terms of the **Dring** factors, the main purposes of the principles of open justice are not engaged as there are no decisions on the merits to be subject to public scrutiny or for a judge to be held to account. As for understanding how the justice system works and why decisions are taken, again, this is a claim that was withdrawn without any substantive decision on the merits being made.

18. For these reasons, I am satisfied that it is necessary in the interests of justice to make an Order to protect the Respondent's identity and his reputation. On the facts of the case, the need for a limited anonymity order is a proportionate derogation to the principle of open justice.

19. Such a derogation is not incompatible with Convention rights. There is evidence before me to show a real risk to his Article 8 rights if he is named and the detail of the claim enters the public domain without any testing of the merits. The Claimant has shared her allegations with others, and threatened press involvement during the proceedings and even after withdrawing and avoiding a costs order despite her unreasonable behaviour, has contacted the Respondent's new employer, his friends

and even his current partner. These are claims that were withdrawn without any final hearing but where the Claimant still, wrongly, maintains that she has won her claim of sexual harassment. Applying articles 6 and 10, the restrictions on the disclosure of the Respondent's identity is justified because the protection of his private life requires it and publicity would undermine faith in the justice system.

20. I turn then to the Claimant's application for a Rule 50 order in respect of her own identity. The Claimant is in a very different position to the Respondent. She chose to bring these claims. She chose to make the allegations. She has actively threatened publicity by going to the press. She chose to withdraw before the merits of her claim could be tested by the Tribunal. She has shared the details of her allegations and falsely claimed to have won with the Respondent's new employer, friends and current partner. The Claimant requested written reasons for the costs judgment given orally even after I explained that if provided they would be published. The interests of justice do not require a derogation from the principle of open justice.

21. I have some sympathy for the Claimant's submissions that publication of her name in connection with these proceedings has had an adverse effect on her private life, and indeed that of her family given that her surname is not common in this country. However, the only Judgments in the public domain are those dismissing the claims upon withdrawal and the Judgment refusing to award costs (albeit now with written reasons detailing the Claimant's conduct as a result of her decision to exercise her right to the same). For these reasons, I am not satisfied that her article 8 rights justify a restriction on the disclosure of her name in order when balanced against the rights under articles 6 and 10.

Employment Judge A Russell
Dated: 19 December 2023