Neutral Citation Number: [2026] EAT 161

Case No: EA-2023-000569-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 29 October 2026

HIS HONOUR JUDGE JAMES TAYLER
(DEPUTY PRESIDENT)

- -

Between :

MC

Appellant

- and -

Ms G

Respondent

- -
- -

James Williams (instructed by Anthony Gold Solicitors LLP) for the **Appellant**
Ms G, the **Respondent**, in person

Hearing date: 28 July 2026

- -

JUDGMENT

SUMMARY

Practice and Procedure

The Employment Tribunal erred in law in its consideration of whether to grant a Restricted Reporting Order.

HIS HONOUR JUDGE JAMES TAYLER, DEPUTY PRESIDENT:

The Issue

1. The issue in this appeal is whether an Employment Tribunal erred in law in refusing to make a permanent Restricted Reporting Order to protect an individual respondent after the dismissal of complaints of sexual harassment, sex related harassment and victimisation; the Employment Tribunal having concluded that the claimant and an individual respondent had engaged in private consensual messaging of a sexual nature. This judgement considers confidentiality and privacy in the context of deciding whether to make an order derogating from the open justice principle.

The judgment appealed

2. The appeal is against a judgment of Employment Judge Gardiner, sitting with members. The judgment was sent to the parties on 18 April 2023. The hearing took place on 9-12 August 2022; 13-14, 18-19 October 2022; and 28 November 2022 by video from the East London Hearing Centre. The Employment Tribunal met in chambers on 12 October 2022; 29-30 November 2022; 4-5 and 30 January 2023 and 12 April 2023. The Employment Tribunal made a temporary Restricted Reporting Order for the period of the Employment Tribunal hearing and up to the date of the promulgation of the judgment but refused to make it permanent after the hearing. The Restricted Reporting Order was extended pending an appeal, and when an appeal was brought, the EAT put in place an equivalent Restricted Reporting Order.

The parties

3. The first respondent in the Employment Tribunal was a small business. The second respondent was the first respondent's majority shareholder and sole Director. The claimant was employed by the first respondent as National Contracts Manager. I shall refer to the parties as the claimant, first respondent and individual respondent. The first respondent in the Employment Tribunal has been liquidated and so was removed as a party to the appeal.

The complaints in the Employment Tribunal

4. The claimant became an employee of the first respondent in September 2015.

5. From 2015 to 2019, the individual respondent exchanged messages of a sexual nature with

the claimant, mainly on Snapchat, with the joint expectation that the messages would be deleted and not seen by anyone other than the first respondent and the claimant.

6. The claimant resigned on 10 September 2020. The claimant submitted a claim form that was received by the Employment Tribunal on 21 October 2020. So far as is relevant to this appeal, the claimant brought complaints of sexual harassment, sex related harassment and victimisation in relation to the sexual messages sent to her by the individual respondent. Those complaints failed on the basis that the exchange of messages was consensual.

Restricted reporting in the Employment Tribunal

7. On 10 August 2022, the Employment Tribunal made a Restricted Reporting Order because the "case involves an allegation of sexual misconduct". The Order was stated to have been made pursuant to "section 11 of the Employment Tribunals Act 1996 and rules 50(1) and (3)(d) of the Employment Tribunals Rules of Procedure 2013". There were no written reasons for the Order.

8. The Employment Tribunal sent its judgment to the parties on 18 April 2023. The Employment Tribunal found that the exchange of sexual messages between the first respondent and the claimant was consensual and so the discrimination complaints failed.

9. The Employment Tribunal declined to extend the Restricted Reporting Order indefinitely, but extended it to allow for an appeal.

The appeal

10. The respondents lodged an appeal on 30 April 2023. The appeal initially was treated as not properly instituted because the ET3 response of the individual respondent was not submitted. On 2 July 2024, the Registrar granted an extension of time for the appeal to be properly instituted.

11. The EAT has put in place a Restricted Reporting Order until the determination of the appeal.

12. The appeal was considered at the sift stage by His Honour Judge Auerbach who was of the opinion that the first two grounds were not arguable but directed that the third ground of appeal should proceed to a full hearing.

13. The respondents challenge the dismissal of the first two grounds pursuant to Rule 3(10) **EAT Rules**. On 23 April 2025, His Honour Judge Shanks permitted the first two grounds of appeal to

proceed.

The relevant law

14. At the relevant time, the power to make a Restricted Reporting Order was set out in Rule 50 **Employment Tribunal Rules 2013** ("**ET Rules 2013**"):

> 50.—(1) **A Tribunal may** at any stage of the proceedings, or on application, **make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act**.
>
> (2) In considering whether to make an order under this rule, **the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression**.
>
> (3) Such orders may include—
>
> (a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;
>
> (b) **an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed** to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;
>
> (c) an order for measures preventing witnesses at a public hearing being identifiable by members of the public;
>
> (d) a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act.
>
> (4) Any party, or other person with a legitimate interest, who has not had a reasonable opportunity to make representations before an order under this rule is made may apply to the Tribunal in writing for the order to be revoked or discharged, either on the basis of written representations or, if requested, at a hearing.
>
> (5) Where an order is made under paragraph (3)(d) above—
>
> (a) it shall specify the person whose identity is protected; and may specify particular matters of which publication is prohibited as likely to lead to that person's identification;
>
> (b) it shall specify the duration of the order;
> (c) the Tribunal shall ensure that a notice of the fact that such an order has been made in relation to those proceedings is displayed on the notice board of the Tribunal with any list of the proceedings taking place before the Tribunal, and on the door of the room in which the proceedings affected by the order are taking place; and

> (d) the Tribunal may order that it applies also to any other proceedings being heard as part of the same hearing.
>
> (6) "Convention rights" has the meaning given to it in section 1 of the Human Rights Act 1998 [emphasis added]

15. Rule 50 **ET Rules 2013** provided for 3 potentially overlapping circumstances in which an order derogating from the open justice principle might be necessary:

15.1. in the interests of justice

15.2. to protect Convention rights

15.3. in circumstances identified in section 10A of the **Employment Tribunals Act 1996** ("**ETA 1996**")

16. Section 10A **ETA 1996** provided:

> 10A Confidential information.
>
> (1) Employment tribunal procedure regulations **may enable an employment tribunal to sit in private** for the purpose of hearing evidence from any person which in the opinion of the tribunal is likely to consist of—
>
> …
>
> (b) **information which has been communicated to him in confidence** or which he has **otherwise obtained in consequence of the confidence reposed in him by another person**, or … [emphasis added]

17. Thus, specific provision was made in respect of confidential information. The provision covers both information that has been communicated in confidence and information obtained in consequence of confidence reposed by another.

18. Courts and tribunals are familiar with the fundamental importance of the common law open justice principle and the limited circumstances in which a derogation from it is permissible. Courts and tribunals are also familiar with the circumstances in which it is necessary to balance Convention rights in deciding whether a derogation from the open justice principle is appropriate. The conduct of the necessary balancing exercise has been considered in numerous well-known authorities and was helpfully summarised by Heather Williams QC, then sitting as a deputy Judge of the High Court, in **TYU v ILA Spa Ltd** [2022] I.C.R. 287. I shall not conduct another overview of the relevant authorities.

19. The relevance of a duty of confidence, or a right to privacy, to the making of an order derogating from the principle of open justice is less familiar. That is the main subject of this judgment.

20. The **ET Rules 2013**, in force at the time relevant to this appeal, were revoked with effect from 6 January 2025 by the **Employment Tribunals (Procedure Rules) (Consequential Amendments) Regulations 2024**, SI 2024/1156. On the same date, the **Employment Tribunal Procedure Rules 2024,** SI 2024/1155, ("**ET Rules 2024**") came into force. The equivalent of Rule 50 **ET Rules 2013** is Rule 49 **ET Rules 2024**, which, so far as relevant, provides:

> 49.— Privacy and restrictions on disclosure
>
> (1) The Tribunal may, on its own initiative or on the application of a party, make an order with a view to preventing or restricting the public disclosure of any aspect of proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person.

21. Rule 49 **ET Rules 2024** still refers to such orders being made in the interests of justice or to protect Convention rights, but does not refer to section 10A **ETA 1996** or explicitly to the protection of confidentiality.

22. Section 10A **ETA 1996** was repealed with effect from 25 April 2024 by schedule 5, part 2, paragraph 7 of the **Judicial Review and Courts Act 2022**. The Explanatory Note states:

> Paragraph 7 repeals section 10A of the Act, relating to the ability of employment tribunals to sit in private where confidential information is involved, which is covered by more general provisions about the things Employment Tribunal Procedure Rules may (like Tribunal Procedure Rules) contain.

23. I agree with Counsel for the individual respondent, Mr Williams, that this suggests that Section 10A was repealed because it was considered otiose, rather than because confidentiality cannot be protected. The application for a Restricted Reporting Order considered in this appeal was decided before the repeal of the provisions mentioned above. I refer to the repeals because I do not consider they will change the approach in similar cases after they came into effect, and so the points made in this judgment are likely to remain relevant.

24. Section 11 **ETA 1996**, which remains in force, provides:

> 11 Restriction of publicity in cases involving sexual misconduct.
>
> (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. [emphasis added]

25. In the Employment Tribunal the respondent relied on the EAT judgement of Eady J (President) in **Millicom Services UK Ltd and others v Clifford** [2022] EAT 74, [2022] I.C.R. 1204 for the proposition that the individual respondent in this case had a right of confidentiality in respect of private messages of a sexual nature that supported the making of a Restricted Reporting Order for reasons falling within section 10A **ETA**.

26. The facts of **Millicom** are somewhat unusual and are important to understand the relevant issues that arose in that case. The respondent company (the first respondent) provided digital services to emerging markets in Latin America and Africa. The claimant was employed as global investigations manager from 3 January 2017 until 30 November 2019. The claimant's employment contract contained express confidentiality clauses. On 28 February 2020, the claimant commenced Employment Tribunal proceedings, including complaints of automatic unfair dismissal on the basis of having made protected disclosures, and protected disclosure detriment. The claimant's case was that he had investigated and reported on concerns that a Millicom subsidiary supplied mobile telephone data and live tracking data of a customer to a government agency without lawful authority and that, subsequently, a serious criminal offence was committed. The claimant alleged that the respondents subjected him to detriment, and ultimately dismissed him, because of his investigation and reports. The respondents sought an order pursuant to Rule 50 **ET Rules 2013**. The respondents' application was made under all three limbs of rule 50(1) **ET Rules 2013**; that it was necessary in the interests of justice and/or in order to protect rights under the ECHR and/or to protect confidential information. The Employment Tribunal refused the application. So far as is relevant to this appeal the Employment Tribunal accepted that the claimant's contract of employment established a duty of

confidentiality in respect of matters undertaken in the course of his employment, but concluded that this could not outweigh the principle of open justice. Eady J held that the Employment Tribunal erred in its approach to common law principles and confidentiality. Eady J considered the relevant law:

> 76. The third basis on which the employment tribunal may make an order under rule 50 of the Employment Tribunal Rules is where it is of the view that the evidence to be adduced is likely to consist of information communicated in confidence or otherwise obtained as a consequence of another's confidence (see section 10A of the Employment Tribunals Act 1996).
>
> 77. **When considering a possible derogation from the open justice principle on this basis, a relevant factor will be whether the information in question was imparted in circumstances in which an express contractual duty of confidence applied. In such cases, the test to be applied is not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached, there being an important public interest in the observance of duties of confidence**, see *HRH Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57:
>
> > "68. **For these reasons, the test to be applied when considering whether it is necessary to restrict freedom of expression in order to prevent disclosure of information received in confidence is not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached.** The court will need to consider whether, having regard to the nature of the information and all the relevant circumstances, it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the public interest that the information should be made public."
>
> 78. In HRH Prince of Wales , the Court of Appeal further noted:
>
> > "69. In applying the test of proportionality, the nature of the relationship that gives rise to the duty of confidentiality may be important. Different views have been expressed as to whether the fact that there is an express contractual obligation of confidence affects the weight to be attached to the duty of confidentiality. In *Campbell v Frisbee* [2003] ICR 141 at para 22 this court drew attention to this conflict of view, and commented: 'We consider that it is arguable that a duty of confidentiality that has been expressly assumed under contract carries more weight, when balanced against the restriction of the right of freedom of expression, than a duty of confidentiality that is not buttressed by express agreement'. We adhere to this view. But **the extent to which a contract adds to the weight of duty of confidence arising out of a confidential relationship will depend upon the facts of the individual case**."
>
> 79. Applying these principles, in *ABC v Telegraph Media Group Ltd* [2019] EMLR 5 an appeal was allowed against a refusal of interim relief in respect of the proposed publication in breach of non-disclosure agreements where (inter alia) it was held that the judge had erred by failing to weigh in the balance the public policy considerations relevant to upholding non-disclosure agreements, both generally and in that particular case (see paras 34, 41 and 47). [emphasis added]

27. Eady J set out her conclusions:

> 106. Having thus found that a contractual duty of confidence existed in this case, the tribunal determined, nevertheless, that this did not necessitate the making of an order under rule 50 , reasoning:
>
> > "112. … if the duty of confidentiality of itself justified restrictions on disclosure under rule 50 , then surely every whistleblowing claim would potentially be the subject of a rule 50 application, which cannot have been the intention of the statutory power under that rule. I do not find the claimant's obligations of confidentiality outweigh the principle of open justice."
>
> 107. Referring to *HRH Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57, the tribunal continued:
>
> > "113. … I do not accept that the respondent has shown that, 'it is legitimate for the owner of the information to seek to keep it confidential'. If the respondent maintains that the alleged disclosure was not made by the claimant in the public interest, then it should not be a problem for that information to be withheld."
>
> 108. I am not sure I entirely understand the second part of that paragraph, but my primary concern relates to the partial citation from para 68 of the Court of Appeal's judgment in *HRH Prince of Wales v Associated Newspapers Ltd*. **In setting out the test to be applied where information has been obtained pursuant to an express obligation of confidence, it was made clear that the question was "not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached". Although a court or tribunal will need to consider whether "it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the public interest that the information should be made public", it is required to do so "having regard to the nature of the information and all the relevant circumstances".**
>
> 109. **Here, the relevant circumstance relied on by the respondents was the fact that the information relating to the specified matters had been obtained by the claimant under a contractual duty of confidence.** There is, however, no indication that the tribunal weighed this in the balance. As for its concern that the floodgates might otherwise be opened in whistleblowing claims, I do not see why this should be so. **Not all protected disclosures will involve information obtained under a duty of confidence. Even where that is the case, however, it will still be for the tribunal to determine whether an order under rule 50 should be made. In making that decision, the tribunal will need to weigh in the balance the public policy considerations relevant to upholding contractual duties of confidence (both generally and in that particular case).**
>
> 110. **By failing to have regard to the contractual duty of confidence it had found in this case, the tribunal thus omitted to take into account a relevant circumstance. It was required to ask itself not merely whether it was legitimate for the respondents to seek to keep that confidence but whether it was in the public interest for that duty of confidence to be breached.** As identified by grounds 9 and 10 of the appeal, these errors vitiate its reasoning in this regard.

28. On appeal in the Court of Appeal **Millicom Services UK Ltd and others v Clifford** [2023] EWCA Civ 50, [2023] I.C.R. 663, Warby LJ emphasised that the starting point is the relevant ET

Rule, and stated:

> 26. **The first and main difficulty with the EJ's approach is that she gave no separate and distinct consideration to the relevant language of rule 50 or to the common law open justice principle. She wove these together with issues arising under the Convention and treated her Convention analysis as decisive of the application under the "interests of justice" limb of rule 50** . Eady J held (at para 104) that the EJ had erred by failing to apply common law principles in its consideration of the respondents' evidence. I agree, although I would put it slightly differently.
>
> 27. **The EJ was required to apply a rule made under a statutory power. The wording of that rule was recited but there was no consideration of the meaning or ambit of the "interests of justice" provision. Further, whilst the basic common law principles of open justice were identified there was no detailed discussion of those principles or their application, separately from the issues arising under the Convention. There was no acknowledgement that analysis by reference to the domestic rule and/or the common law might yield a different answer.** [emphasis added]

29. Common law principles such as the open justice principle, confidentiality and the interests of justice should have been considered before going on to consider Convention rights.

30. Warby LJ set out the approach to be applied where confidentiality is asserted:

> 69. The third issue raised by the rule 50 application was whether the derogations sought fell within the "the circumstances identified in section 10A of the [1996 Act]". Read literally, the question posed is whether the hearing would involve taking
>
> > "evidence from any person which in the opinion of the tribunal is likely to consist of … information which has been communicated to him in confidence or which he has otherwise obtained in consequence of the confidence reposed in him by another person."
>
> But **the wording of rule 50(1) suggests that the test is whether a restriction on open justice is necessary in order to protect information of these kinds. That would be the test at common law. For both these reasons I think that is the right basis on which to approach this limb of rule 50**.
>
> 70. Mr Clifford and his representatives were not happy with the late introduction of a copy of his employment contract, but they did not seek an adjournment. Nor did they dispute the authenticity of the document. In the relatively informal procedural context of ET proceedings the EJ was entitled to treat it as a sufficient evidential basis for findings of fact. Clause 15 of the contract, headed "Confidentiality", contained an undertaking by Mr Clifford that he would not during or after his service under the agreement disclose or communicate, make use of or divulge to any person, directly or indirectly "confidential information of any kind whatsoever of the company or its associated companies or its respective clients which he may acquire in the course of his service hereunder …"
>
> 71. The EJ held (at para 112) that "the late introduction of the claimant's contract of employment did establish a duty of confidentiality as regards matters undertaken in his employment duties". But she went on to decide that this did not necessitate an order under rule 50 because:

> "112. … if the duty of confidentiality of itself justified restrictions on disclosure under rule 50 , then surely every whistleblowing claim would potentially be the subject of a rule 50 application, which cannot have been the intention of the statutory power under that rule. I do not find the claimant's obligations of confidentiality outweigh the principle of open justice.
>
> "113. Bearing in mind the passages cited by [counsel for the Millicom parties] in *HRH Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57, I do not accept that the respondent has shown that, 'it is legitimate for the owner of the information to seek to keep it confidential'. If the respondent maintains that the alleged disclosure was not made by the claimant in the public interest, then it should not be a problem for that information to be withheld."

72. There are several obvious problems with this approach. Eady J identified two. First, she observed that review of *HRH Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57 shows that it is inaccurate to suggest that enforcement of a contractual duty of confidence depends on proof that "it is legitimate for the owner … to seek to keep [the information] confidential". **The overall question is "not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached "** (my emphasis). **Further, the relevant circumstances include the nature of the information and the nature of the relationship that gives rise to the duty of confidentiality**. (See *HRH Prince of Wales* at paras 68–69.) The EJ failed to address these aspects of the test. She thereby failed to have regard to relevant factors. I agree. Indeed, I would characterise this as a misdirection in law.

73. **Secondly, Eady J pointed out that the EJ's floodgates argument was simplistic and flawed. Not all whistleblowing claims will involve information protected by a contractual duty of confidence. And, in those that do, the ET will have to conduct a fact-specific analysis, to answer the questions just identified, and to determine whether restrictions on disclosure are compatible with open justice.** Again, Eady J was clearly correct on this point.

74. To these points, I would add the following.

> (1) In *HRH Prince of Wales* the court emphasised at para 67 **the "important public interest in the observance of duties of confidence …" which is "a significant element to be weighed in the balance".** At para 69 **the court endorsed the view that a duty of confidentiality expressly assumed under contract may, depending on the circumstances, carry more weight than one that is not.** These aspects of public policy were re-emphasised more recently in *ABC v Telegraph Media Group Ltd* [2019] 2 All ER 2329 , paras 18–21 and 41–44. Eady J alluded to these points earlier in her judgment but might have given them more emphasis in her reasons for remitting the case on this issue. …

31. Thus, the protection of confidentiality pursuant to an express contractual confidentiality clause can be a reason for the making of an order derogating from the open justice principle. Where an employer would have an actionable right to protect confidentiality, the decisions of the EAT and Court of Appeal in **Millicom** establish that the question for the Employment Tribunal is whether it is

in the public interest for the duty of confidence to be breached.

32. The fact that a duty of confidentiality is expressly assumed under contract may, depending on the circumstances, carry more weight than one that is not. In **Millicom** the respondent had a private law right to confidentiality that it could have enforced against the claimant. It seems to me that is the context in which it was held that it was necessary to ask whether it was in the public interest for the duty of confidence to be breached

33. This appeal is not about a contractual confidentiality clause. In considering this appeal I came to the realisation that this case might better be analysed by the similar principles that apply to the closely related concept of privacy. I sought the parties' submissions on whether this analysis was correct and, if so, the correct approach that should be adopted when considering privacy. I also sought the parties submissions on the question of whether a privacy analysis was available on appeal when it was not specifically argued below. I have take account of the submissions they provided.

34. Confidentiality is a much older and well settled concept than privacy. In **Coco v AN Clark (Engineers) Ltd** [1968] F.S.R. 415 at 419, Megarry J held that an action for breach of confidence requires that (1) the information must have the necessary quality of confidence about it; (2) the information must have been imparted in circumstances importing an obligation of confidence; and (3) there must be an unauthorised use of that information to the detriment of the party communicating it. As the case law developed, the emphasis has moved from how the information was imparted to the circumstances in which the information was acquired: **Attorney-General v Observer Ltd** [1990] 1 A.C. 109 at 281.

35. The concept of privacy is subtly different. As the authors of **Toulson & Phipps on Confidentiality**, 5th Edition, put it, at 7-001:

> Confidentiality and privacy are connected but different concepts. They both relate to information which is not general knowledge but, as a matter of both etymology and historical usage, the focus of the former is on the relationship between the provider and recipient of information, whereas the focus of the latter is on the nature of the information itself—or more accurately, perhaps, on the significance of that information for the person to whom it relates. It is possible to confide information to someone else which is not private, and it is also possible conversely to hold information which is private, whether or not it is shared with someone else. On the other hand, many situations will engage both concepts. When private information

> is shared on a confidential basis, the phrase "private and confidential" cannot be dismissed as mere tautology.
>
> In legal terms, the origins of duties of confidentiality lay in equity's long-standing willingness to uphold the sanctity of a relationship of trust and confidence. By contrast, in circumstances where the law has recognised no general rights of property in information, legal protection for privacy in the absence of a confidential relationship has taken much longer to emerge.
>
> However, English law now has, at least in part, a law of privacy. Its boundaries are uncertain and it remains at a transitional stage. It initially emerged in a curious way involving a hybridisation of art.8 of the European Convention and the cause of action for breach of confidence. These developmental peculiarities resulted in doctrinal uncertainties that still persist, but it is now generally recognised that there is a tortious cause of action for misuse of private information, which is (for the time being, at least) distinct from the traditional action for breach of confidence discussed in earlier chapters.

36. The tortious cause of action for misuse of private information is underpinned by articles 8 and 10 of the Convention and the requirement for public authorities, such as courts and tribunals, to act in a manner compatible with Convention rights pursuant to section 6 of the Human Rights Act 1998.

37. While a number of authorities had suggested that a single cause of action was developing to encompass both confidentiality and privacy, it is now clear that there is a separate cause of action for breach of privacy, which requires that the party seeking the protection had a reasonable expectation of privacy and, if so, an analysis of whether any interference with privacy is justified by other relevant considerations, which includes balancing article 8 and 10 Convention rights.

38. The concept of breach of privacy is subtly different from breach of confidence. It is not entirely clear how, if at all, the statements in **Millicom** in both the EAT and Court of Appeal, that, where there is a contractual obligation of confidentiality, the test when considering an order derogating from the open justice principle is whether it is in the public interest for that duty of confidence to be breached, applies where it is asserted that there is a right to privacy. In **Millicom** there was a common law contractual obligation of confidence that was to be assessed irrespective of Convention rights. When considering privacy, the tort itself is founded on balancing of Convention rights and so it is less easy to separate the consideration of privacy from the balance of Convention rights that is generally required when considering whether to make an order derogating from the open justice principle. The Article 8 right to respect for private and family life will generally be relevant

to consideration of applications for orders that derogate from the open justice principle even where neither party would have an enforceable right to prevent misuse of private information. It may be that, where one party would have a right to bring a claim for misuse of private information against the other, that has the consequence that, in considering any order that derogates from the open justice principle, the question for the Employment Tribunal is whether it is in the public interest for the right to prevent the misuse of private information to be overridden. However, I have concluded that is not a point I have to determine in this appeal.

39. An actionable right to prevent the misuse of private information was not relied on in the Employment Tribunal and I do not consider it would be appropriate for that issue to be relied upon in the appeal. That said, I do accept that a legitimate expectation of privacy in respect of sexual activity can be relied upon in this appeal because it is so closely related to confidentiality, that was specifically relied upon by the individual respondent in the Employment Tribunal, particularly given the definition of confidential information in section 10A **ETA** including information obtained in consequence of the confidence reposed in a person.

40. I have concluded that where a legitimate expectation of privacy exists (whether it could give rise to an action to prevent the misuse of private information, or not), particularly in relation to consensual sexual activity, that is a highly significant factor that must be taken into account in deciding whether to make an Order under Rule 50 **ET Rules 2013** (and now Rule 49 **ET Rules 2014**).

41. That analysis fits with the approach adopted by Slade J in **EF v AB** [2015] IRLR 619 when she considered the importance of the application of Article 8 in a case in which a party seeks to refer to consensual sexual relations:

> 59. The Article 8 right at issue in this case was to privacy in respect of sexual conduct: that of AB, EF and NP. Some of such conduct alleged by AB against EF included an allegation of sexual assault found by the ET to be untrue. **All such alleged conduct took place in private between adults in circumstances in which there was a reasonable expectation of privacy.** The observation by the ET in paragraph 29 that the course of conduct engaged in by EF with a fellow employee, AB, must be always regarded as risky does not diminish **that high degree of privacy which anyone engaging in sexual activity in private is entitled to expect**. [emphasis added]

42. Slade J decided in that case that the only correct answer was the making of a permanent

anonymity order:

> 84. **In my judgment the most powerful countervailing factor to the Article 8 rights of NP and EF is the principle of open justice.** However the following factors lead me to the conclusion that the Article 8 rights prevail. EF and NP have an undoubted right to privacy in the sexual allegations about their private lives. **Save for the principle of open justice, there is no public interest in revealing the identity of NP.** There is, in my judgment no discernible public interest, properly so categorised, in revealing that of EF. The findings of the ET do not suggest any wrong-doing on his part. Nor are there any findings of mismanagement beyond observations that as CEO EF appeared not to have put in place checks on how AB was managing JK. There are findings made about his private lawful sexual activity. The ET found that AB brought the ET proceedings as an act of revenge. He had tried to black-mail EF into having the corporate respondents pay him a large sum of money. Amongst the effects of not continuing the RRO would be to expose a child to having his mother identified as a participant in sexual activity and in a pornographic photograph. Not continuing the RRO would render useless ongoing privacy proceedings. On the findings of the ET in the liability judgment, properly directing themselves an ET would inevitably have concluded that an extended RRO should be made. Unlike the situation explained in paragraph 61 of *F v G*, the ET had before them an application for an extended RR O and heard submissions from the interested parties.

43. Generally, a more convincing case is required for a permanent order derogating from the open justice principle than one of limited duration: **Fallows v News Group Newspapers Ltd** [2016] I.C.R. 801, per Simler J (President) at paragraph 42.

44. In **TYU**, Heather Williams QC set out the correct test when the making or refusal of an order derogating from the open justice principle is considered on appeal:

> 47. The appeal will only succeed if the judge below erred in law. **As regards the outcome of the balancing exercise between the countervailing rights, the appeal tribunal should not intervene unless the judge below erred in principle or reached a conclusion that was plainly wrong or outside the ambit of conclusions that s/he could reasonably reach**: *AAA v Associated Newspapers Ltd* [2013] EWCA Civ 554 at [8]. However, the judge's decision may be "wrong" not only because of an error of principle, but also because of an identifiable flaw in the reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion: ***R (R) v Chief Constable of Greater Manchester Police*** [2018] 1 WLR 4079, para 64, per Lord Carnwarth JSC. [emphasis added]

The decision of the Employment Tribunal

45. The Employment Tribunal gave the following reasons for rejecting the application for a permanent Restricted Reporting Order:

> 410. **We carry out the required intense focus on the comparative importance of the specific rights**. We do so by **considering whether the Respondents have shown there are clear and cogent grounds (*Curless*) for derogating from the principle of open justice**.

411. In the Respondent's closing submissions, the application was put in the following terms:

> "First, his rights under Article 8 ECHR. R2 is married and has a young child (born in Jan 2020), with another expected in March 2023. His relationship with C ended before either of the children was born. **A public judgment detailing the allegations in this case against him (whether proven or not) would clearly affect his relationship with his family**. The second point is the nature of the parties' relationship. The parties communicated throughout (and particularly on Snapchat) with the clear mutual purpose of keeping their sexual communications private and confidential. Since both parties were communicating on that basis, it is justifiable to maintain that confidentiality in the Tribunal's judgment" (paragraphs 119 and 120)

412. **No further detail was provided in oral closing submissions as to effect on [MC's] relationship with his family that would be "clearly" caused by a public judgment detailing the allegations. Nor was any further detail provided in the supplementary written submissions provided in response to the Tribunal's request for assistance as to the impact (if any) of *A v Choice Support***. The Respondents did accept in that later document that factors would need to be present to bring this case into the exceptional category where a limited incursion into the principle of open justice in the form of an anonymity order is justified.

413. **Whilst the Respondents have advanced the basis for the application compendiously, we acknowledge that [MC], his wife, and his children have separate Article 8 rights to privacy. Other than her status as [MC's] wife, and the approximate age of the Claimant s children, no other details have been provided as to the impact on them of refusing the anonymity order requested**.

414. **It is not specifically alleged that identifying the Claimant and [MC] in a public judgment might potentially impact on the mental health** of [MC] or that of his wife or his children. Whilst recognising that medical evidence could not be obtained before any mental health issue had arisen, the possibility of such an impact is not even asserted. Neither [MC] nor his wife are said to be particularly vulnerable. Self-evidently, the Claimant s children are too young to be aware of the details of a Tribunal judgment.

415. **The unstated assumption underlying the way the application is made appears either to be that a public judgment would bring the nature of the allegations to the attention of [MC]'s family (i.e. his wife) for the first time**; or would bring the allegations to the attention of others who know the family, which in turn in some unspecified way would further impact on [MC's] relationship with his family. If the former, it is not clear how [MC's] wife is more likely to discover the allegations, without more, if names are revealed in a judgment published on the internet, given she has not done so to date despite [MC's] extensive involvement in attending the Final Hearing throughout. We note the comments made by Lord Summers in *A v Burke & Hare* at paragraph 56 about the extent to which information published on the internet is accessed and reported. If it is the latter unstated assumption, the submission is too vague to be clear and cogent.

416. **In any event, all the allegations advanced under the Equality Act 2010 have failed. The Tribunal has found that these allegations are without merit. In the way he conducted his virtual relationship with the Claimant, [MC] has not contravened that statutes requirements.** We have rejected the Claimant's allegations. **The virtual**

relationship was conducted on a consensual basis at all times. It ended in 2018, several years ago. **The lack of merit in the allegations of sexual misconduct may make this aspect of the case less newsworthy, so reducing the prospect that there may be any press report.**

417. Any revelation made by this public judgment that [MC] conducted a virtual relationship with one of his employees and did so by engaging in the role play described in our factual findings, may create "a risk of embarrassment" or "a risk to reputation". Article 8 does not exist to protect against the former or against the latter except in specific terms within a particular community (*Christie*).

418. As to the second point, "the nature of the parties relationship .. with the clear mutual purpose of keeping their sexual communications private and confidential":

> a. We repeat the observation of Slade J in *EF v AB* that **there is a high degree of privacy which anyone engaging in sexual activity in private** is entitled to expect (paragraph 59). As Slade J observed, this is not diminished by the fact that the sexual conduct was with someone at work.
>
> b. **The most intimate of the Claimant s allegations relate to conduct that took place over Snapchat**. **The medium of Snapchat was chosen (by contrast with some other potential means of communicating) because messages communicated over Snapchat are automatically deleted. It was therefore chosen in order to be confidential and to leave no evidence.** Explicit comments were generally not made by WhatsApp. The unspoken rule was that where [MC] or the Claimant wanted to be more intimate, this would take place over Snapchat**. If a Snapchat exchange was suggested but not accepted, then an intimate exchange would not occur over WhatsApp.**
>
> c. **However, at times, both the Claimant and [MC] chose to comment over WhatsApp about what had taken place over Snapchat**. This included passing references to the role play in which they had engaged over Snapchat. These comments were made in the same communication medium which was used for day-to-day discussions about work issues and arrangements. **Therefore, both the fact of the relationship and some details of the relationship were not kept hidden from the main channel of work communication.**
>
> d. We bear in mind that had the allegations against [MC] amounted to allegations of sexual offences, there would have been an automatic entitlement to anonymity on all public records of the proceedings (Section 11(1)(a) Employment Tribunals Act 1996), although alleged victims can choose to forego their right to anonymity. The Respondents accept that the allegations made against [MC] do not amount to allegations of sexual offences. …

420. **In the supplementary submissions provided by Mr Williams on 22 March 2023, the Respondents added a further justification for making an anonymisation order. This was the lurid nature of some of C's allegations and her clear willingness to use her relationship with R2 for irrelevant and even malicious ends.** Whilst the submissions do not identify which particular allegations are in mind, we have upheld some of the Claimant's factual contentions as to what took place during the virtual relationship for instance her allegation that she undressed and was filmed in the bath; and her allegation that on occasions [MC] masturbated during Snapchat communications. Again, other than a cross reference to paragraph 51 of the original written closing

submissions, the Respondents do not identify the "irrelevant and even malicious ends". Even though we have rejected the Claimant's allegations under the Equality Act 2010, we do not find that the Claimant has acted maliciously in making her allegations in these proceedings. She was genuine, albeit mistaken, in her belief that [MC] had wronged her.

421. So far as the principles of open justice are concerned:

a. **We bear in mind that the circumstances justifying any derogation from the principles of open justice must be exceptional, established on clear and cogent grounds** (*Curless*). Such a case is likely to be a rare case (*Fallows*).

b. **We have regard to the importance of the press being able to report not just the facts of cases, but also the identities of the participants** (*In re Guardian News and Media Ltd; R v Secretary of State for Justice*).

c. **The mere fact that the Judgment and Reasons will be published on the internet does not necessarily mean that this case will generate publicity in circumstances where there has been no press interest to date** (*A v Burke & Hare*).

d. **The relative importance of the principle of open justice is necessarily less strong where allegations of sexual misconduct, as here, have failed** (*Piepenbrock*); **and where the relationship was consensual**. Had the allegations succeeded, the allegations would have been significantly more newsworthy. **That said, this may make it less likely that the case will generate press interest and so potentially come to the attention of [MC's] family.**

422. **Having undertaken this intense focus on the comparative importance of the competing rights, we conclude that the balance comes down in favour of refusing an anonymisation order in relation to the identity of [MC] in relation to all the allegations**. The same result is reached when conducting the balancing exercise separately in relation to [MC's] wife's privacy rights; and again in relation to the privacy rights of his children. No sufficiently clear and cogent basis has been identified to justify derogating from the principle of open justice.

423. We do not consider it appropriate to make an anonymisation order on a selective basis in relation to the more lurid allegations, as Mr Williams appears to suggest at paragraph 122(c) of his closing submissions.

424. **This is not a rare or exceptional case entitling the Tribunal to derogate from the fundamental principle of open justice.** The application for an Anonymisation or Confidential Order is therefore refused.

425. **That said, we acknowledge the possibility that we may be wrong in how we have conducted this balancing exercise on these facts. The Respondents have indicated that they may choose to appeal against any refusal to grant an Anonymisation Order. It would be appropriate to preserve the current position** to prevent any publicity being generated before the position can be reviewed by the Employment Appeal Tribunal, if, after taking instructions, that remains the Respondents intention. Otherwise, there is a risk that publication might impact on privacy rights in a way that cannot be remedied even if the appeal is successful.

> 426. Therefore, we will extend the duration of the current Restricted Reporting Order until 56 days after the date on which this Judgment and Reasons is sent to the parties. We will also direct that this Judgment and Reasons is not to be published on the website containing Employment Tribunal Decisions until the same time. [emphasis added]

The appeal

46. It is not always clear from reading the judgment whether a factor weighed in favour or against making a Restricted Reporting Order when the "intense focus on the comparative importance of the specific rights" was applied.

47. The difficulty is exacerbated because the Employment Tribunal did not give written reasons for making the temporary Restricted Reporting Order, so it is not possible to assess how the Employment Tribunal analysed what, if anything, had changed when the final judgment was given. The Employment Tribunal presumably took account of the fact that a permanent Restricted Reporting Order requires more compelling reasons than a temporary order. It is not clear whether the Employment Tribunal properly took account of the fact that their judgment meant that the sexual communications were consensual with an expectation of privacy. While there would have been no rationale to protect the privacy of a person who had engaged in unlawful sexual harassment of an employee, the same did not apply to the individual respondent who engaged in a consensual exchange of messages of a sexual nature with an expectation of privacy.

Ground 1

> S.10A ETA 1996 and the confidentiality of the parties' relationship
>
> In its Reasons, the Tribunal failed to have sufficient regard to the third limb of ET Rule 50(1), which provides that it may "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 circumstances identified in section 10A of the Employment Tribunals Act [1996]." Section 10A ETA 1996 (which was referred to by the Respondents in their closing submissions, but not by the Tribunal in its Reasons) refers at limb (1)(b) to "information which has been communicated to him in confidence or which he has otherwise obtained in consequence of the confidence reposed in him by another person."
>
> The Tribunal noted the Respondents' submission on this issue (at paragraph 418), but dealt with it only briefly (at best) at paragraphs 420-421. This discussion was merely part of the Tribunal's wider consideration of the balance of rights under Articles 6, 8 and 10 ECHR and the general principle of open justice. The correct approach would have been to (a) identify the specific "confidentiality" ground for restricting publicity under the specific provision in ET Rule 50(1); (b) consider whether the basis for a restriction under that ground was made out; and then (c) consider whether some restriction of the open

justice principle is necessary in order to protect information of this kind.

The parties' relationship, as found by the Tribunal, was consensual and private. Self evidently, it took place in private between adults in circumstances in which there had been a reasonable expectation of privacy (even if it was not contractual). The Tribunal was wrong to find (at paragraph 418c) that occasional references to the relationship in a WhatsApp exchange, which involved only the Claimant and the Second Respondent, altered its confidential nature. The comments of Slade J in EF v AB, correctly identified by the Tribunal at paragraph 418a, should have led it to conclude that its findings about the relationship should remain confidential despite the requirements of open justice.

48. The respondent in its written submissions to the Employment Tribunal dated 4 November 2022 specifically relied on **Millicom** in the EAT and Section 10A **ETA**. Neither were referred to in the section dealing with the law in the judgment. By the time the judgment was promulgated **Millicom** had been determined in the Court of Appeal. While **Milicom** concerned a contractual confidentiality clause the analysis was of considerable significance to the closely related concept of privacy.

49. The Employment Tribunal did not consider the respondent's arguments based on section 10A **ETA** and whether the definition within that section, including information obtained in consequence of confidence reposed by another, was broad enough to encompass such private messages.

50. The Employment Tribunal did not explicitly take account of the fact that it had held that the exchange of messages was consensual, as a result of which the individual respondent had a reasonable expectation of privacy in respect of private consensual sexual activity, and then consider whether a derogation from the open justice principle was necessary to protect his privacy. I consider that ground 1 is made out.

Ground 2

Incorrect approach to the open justice principle and the likelihood of publicity

9. The Tribunal correctly found at paragraphs 421c – d that because the allegations of sexual misconduct had failed, and the relationship was consensual, this meant that the relative importance of the principle of open justice was "necessarily less". But the Tribunal appears to have used this as a significant factor in favour of permitting publicity. In fact, it is either neutral or an argument to the contrary – in favour of preserving confidentiality.

10. Similarly, the Tribunal's conclusion that because the allegations failed they would be less "newsworthy" is not accepted – the allegations are lurid enough to be of interest on

> their own. But in any event, even if this conclusion is correct, the Tribunal's reasoning is flawed: the fact that a judgment is less likely to generate press interest is not a reason in itself to support unredacted publicity. Overall, in a case involving a private and consensual relationship between consenting adults, the Tribunal was wrong to find that the public interest in open justice in publication outweighed the interests of the Second Respondent in confidentiality.

51. For similar reasons, I consider that the Employment Tribunal erred in law. The Employment Tribunal should have considered whether the individual respondent had a reasonable expectation of privacy in respect of private consensual sexual activity and, if so, whether any interference with the right to privacy was justified by other relevant considerations. If there was a reasonable expectation of privacy, interference with which was not justified by other relevant considerations, the fact that the dismissal of the claim would make it less "newsworthy" was irrelevant.

52. The rejection of the complaint on the basis that the communications were consensual was the reason why the claimant had a reasonable expectation of privacy, which would not have been the case had the complaints succeeded.

Ground 3

> Inclusion of irrelevant material in the judgment
>
> 11. Whether or not the above grounds succeed, the Respondents contend that (as a minimum) paragraph 419 of the Tribunal's reasons should be redacted (either in full or by the removal of certain words). As the Tribunal acknowledges, this was not an allegation made by the Claimant in her claim and it was not in the list of issues; the Respondents did not address or bring up this issue in closing; and the Tribunal made no finding on it. It was not necessary for this paragraph to be included in full to understand the Tribunal's conclusions, to secure anyone's ECHR rights, nor to give effect to the open justice principle. Further, it engages the ECHR rights of [a person who was not a party or witness]. It was therefore wrong to include it.

53. The point raised in this ground is different to those in the other grounds. It relates only to paragraph 419 of the judgment, which with appropriate amendment reads:

> 419. **For completeness**, we note that **the Claimant was alleging in her evidence (though not in her allegations) that there had been a serious sexual offence committed by [a person who was not a party or a witness]**, … . **This is not an allegation which we have needed to determine** given the issues before us. The Claimant has chosen to mention it in her resignation email and has given evidence on this issue …. Mr Williams made no specific reference to this particular allegation in his closing submissions. He did not rely on any right to privacy on the part of [the person] in relation to this particular allegation.

54. Where an Employment Tribunal considers including material "for completeness" an alarm

bell should ring. The Employment Tribunal should take time to consider carefully whether the inclusion of the material really is necessary. In this case the material included for completeness involved an allegation of a serious sexual offence that was wholly irrelevant to the claim. In the unaltered version of the judgment it is clear against whom the allegation was made. That person was not a party to or involved in the proceedings at all.

55. The allegation was irrelevant to the issues in the claim. The truth of that allegation was not determined. There was no need to raise such a serious allegation in the judgment.

56. Ground 3 succeeds.

Disposal

57. In respect of Ground 3 there is only one possible outcome; paragraph 419 should be removed from the judgment.

58. In respect of Grounds 1 and 2, the matter shall be remitted for redetermination by the same Employment Tribunal. I have considered the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. The Employment Tribunal determined the underlying complaints which have not been successfully challenged on appeal. The original Employment Tribunal will be better placed than a newly constituted Employment Tribunal to assess whether a permanent Restricted Reporting Order should be made, applying the guidance in this judgment.

59. The EAT Restricted Reporting Order shall remain in force until the promulgation of the judgement in the Employment Tribunal and the determination thereafter of any application to extend the EAT Restricted Reporting Order made with 14 days of the promulgation of the Employment Tribunal judgment.