Neutral Citation Number: [2023] EWHC 3 (KB)

Case No: QB-2019-003948

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/01/2023

Before :

MASTER DAVISON

- -

Between :

FKJ	**Claimant**
- and -	
RVT and Others	**Defendant**

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- -

Ms Adrienne Page KC and Mr David Hirst (instructed by **Taylor Hampton**) for the **Claimant**
Mr Christopher Knight (instructed by **Bloomsbury Law**) for the **Defendants**

Hearing date: 8 December 2022

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Approved Judgment

This judgment was handed down at 10.30am on 11 January 2023 in Room E100, Royal Courts of Justice

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MASTER DAVISON

Master Davison:

Introduction

1. The claimant is a solicitor. She qualified in January 2017. On 17 February 2017 she commenced employment with the second and third defendants, which are connected law firms. She was then 25 years of age. The first defendant, RVT, the managing and sole equity partner of both firms, was her supervisor. On 21 December 2017, the claimant was dismissed for misconduct – falsifying a timesheet. On 9 March 2018, she commenced a claim against the defendants in the Employment Tribunal alleging (principally) sex discrimination, unfair dismissal and wrongful dismissal. The nub of the claim was that she had, throughout her employment, been subjected to sexual harassment from RVT. There were some 79 factual allegations, ranging from inappropriate remarks to sexual touching. The claim was heard over a period of 11 days in February and March 2019. The Tribunal gave its decision on 18 March 2019. The claimant lost. A significant component of the evidence deployed against her consisted of her own WhatsApp messages. As the Tribunal put it, this evidence "played a large part in our findings where there was a direct conflict of evidence". Some of the messages undermined her credibility. Some were found to demonstrate that the conduct of which she complained was consensual or not "unwanted". Some indicated that alleged misconduct did not take place at all.

2. This claim is about how the defendants came to have and to retain the WhatsApp messages. It is a claim for misuse of private information ("MPI").

3. There were some 18,000 messages occupying some 900 pages of the Tribunal's bundle. (The claimant was a heavy user of WhatsApp.) They were private messages from the claimant to her partner (now husband), BRB, and her best female friend, KNF. The defendants had come to be in possession of a complete log of the claimant's chats with BRB from January 2017 through to April 2018 and with KNF from March 2016 to April 2018. It is obvious that they were communications in respect of which the claimant would ordinarily have had a reasonable expectation of privacy. They contained several years' worth of day-to-day information about her professional, social and private life, including about her health and sex life. Some of the messages and images which she shared with BRB were of the most intimate kind.

4. The claimant first became aware that the defendants were in possession of her WhatsApp messages when she received the Grounds of Resistance in the Tribunal claim. This was on 12 June 2018. Disclosure of the actual messages was provided in two tranches, the first on 28 November 2018 and the second at the end of January 2019. On 1 February 2019, the claimant, acting by her present firm of solicitors, wrote a pre-action letter alleging that the messages had been "hacked" and putting the defendants on notice of an MPI claim.

5. The claimant's case was that RVT hacked into her WhatsApp messages by setting up the computer-based "WhatsApp Web" and using her smartphone to scan the QR code generated, which operated as the only authorisation required by the site. He was thereby able to capture the entirety of her available WhatsApp messages. The claimant alleges that setting up WhatsApp Web was the work of a few moments and that RVT would have had numerous opportunities to use (or misuse) her smartphone in this way.

6. RVT's explanation for his possession of the messages was twofold. He said that a substantial quantity of messages were found on her work laptop when he "reviewed the contents of the laptop [in January 2018] to establish why the claimant was attempting to login after she was dismissed and to ensure that the laptop could be safely passed to another member of the firm and did not contain personal information of the claimant". These messages were printed out and retained, following which the messages were deleted from the laptop. Secondly, he said that two further tranches of messages had been received via letters from an anonymous source. The first letter was in February 2018; the second in January 2019. The second letter ("conveniently and remarkably" as the claimant characterised it) provided updated logs of the claimant's messages with BRB and KNF from 22 December 2017, i.e. the day after her dismissal, to April 2018.

7. As is obvious, the alleged hacking of her WhatsApp messages gave the claimant the opportunity to submit in the Tribunal that this evidence should be excluded and that the defendants' conduct should also sound in damages, including aggravated damages. On 6 February 2019 she served a witness statement some 33 pages of which were devoted to this topic. Two days later, she served an amended Schedule of Loss which increased her claim for aggravated damages from £10,000 to £25,000. But at a case management hearing on 11 February 2018, represented by counsel – as she was throughout – she asked the Tribunal not to rule on any of the hacking allegations, which she stated she was pursuing in the High Court. Nor did she raise / further raise the issue of admissibility. The Tribunal and the defendants proceeded on this basis.

8. This claim was issued on 6 November 2019. Statements of Case were exchanged. These included a counterclaim by the defendants based on the common law torts of malicious prosecution and abuse of process and the statutory tort of harassment under the Protection from Harassment Act 1997. Costs budgets were prepared and the case was listed for a Costs and Case Management Conference before (then Deputy) Master Amanda Stevens. On 11 November 2020, the day before that CCMC, the defendants issued an application to strike out / grant reverse summary judgment on the claim and for summary judgment on the counterclaim. As a fallback position, they asked for an order making the claimant's defence of the counterclaim conditional upon her bringing a substantial amount of money into court. They asked for a similar order in respect of their defence of the claim. Remarkably, and very unsatisfactorily, the application has taken two years to come to a hearing. That was largely due to the defendants' application to rely upon the terms of a Part 36 offer made by the claimant as a consideration relevant to strike out. Senior Master Fontaine refused that application. The defendants were granted permission to appeal but, on 25 February 2022 before Collins Rice J, they were unsuccessful in the appeal. They then sought permission for a second appeal, which was refused by Warby LJ on 13 May 2022.

9. Despite the extensive evidence devoted to it, the application for reverse summary judgment on the claim was not, in the end, pursued. As to the other applications, I have reached the clear conclusion that they are without merit. Parts of them are, indeed, not worthy of serious consideration. My overall impression is that they are an attempt to stifle a claim that the defendants would prefer not to contest on its merits. In those circumstances, I will deal with them succinctly and without extensive citation from the many authorities I was referred to. Nevertheless, I emphasise that I have considered carefully all the arguments and the authorities cited and I have taken account of them, though they may find no specific mention in what follows.

Strike-out of the claim

10. This application was based upon the propositions that the claim was (a) a *Jameel* abuse, (b) a *Henderson* abuse and (c) an abuse because it breached the implied undertaking arising from CPR rule 31.22. I was invited to consider these propositions against the background of the "significant problems" on the merits of the claim were it allowed to go forward.

11. I find it hard to agree that the claim will face significant problems. Indeed, on present material (and without so deciding) it seems to me that the issue will more likely be the extent rather than the principle of the claimant's recovery in her MPI claim. I have reached this provisional conclusion based upon the defendants' pleaded case. It cannot be seriously contested that the claimant had a reasonable expectation of privacy in her WhatsApp messages. The defendants, at paragraph 13.1 of the Amended Defence, have pleaded that she could not have had a reasonable expectation of privacy or confidence in relation to material saved or downloaded to her work laptop during working hours. But (a) that plea could not apply to the messages which, on the defendants' case, were apparently intercepted by the writer of the anonymous letters and (b) no explanation or authority has been offered for the proposition that private information downloaded to a work laptop (a very common scenario) thereby loses its private character. Only some 40 or so of the messages (out of very approximately 80,000) were in fact deployed in the Employment Tribunal claim and only about half of those 40 were strictly probative of an issue (and therefore disclosable). In respect of the bulk of the messages, there was no relevance to the Employment Tribunal proceedings and no justification for their retention or use. Further, the WhatsApp messages that were, on his case, (a) taken by RVT from the claimant's work computer in January 2018 and (b) received anonymously on 8 February 2018 both pre-dated the Employment Tribunal proceedings. Given their obvious privacy and given the absence at that time of any proceedings to which the messages might be relevant, he would have come under an immediate duty to notify the claimant and deliver up the messages to her. But he did not do so. Finally, even if those proceedings had by then been on foot, the retention of private communications would still have been *prima facie* actionable because it would have been an impermissible form of self-help which it is the policy of English law to discourage; see *Imerman v Tchenguiz* [2010] EWCA Civ 908. The correct course of action would still have been to return the material to the claimant or her solicitors who would then have had disclosure obligations in respect of it.

12. Turning to the specific grounds relied upon, the first is *Jameel* abuse. The principles were helpfully summarised by Nicklin J in *Tinkler v Ferguson* [2020] EWHC 1467 (QB) at [46]-[49]:

> "46. The Court has jurisdiction to stay or strike out a claim where no real or substantial wrong has been committed and litigating the claim will yield no tangible or legitimate benefit to the claimant proportionate to the likely costs and use of court procedures: in other words, "the game is not worth the candle": *Jameel* [69]-[70] per Lord Phillips MR; *Schellenberg v BBC* [2000] EMLR 296, 319 per Eady J. The jurisdiction is useful where a claim "is obviously pointless or wasteful": *Vidal-Hall v Google Inc* [2016] QB 1003 [136] per Lord Dyson MR. Although *Jameel* was a defamation claim (and defamation claims present particular features) the jurisdiction is of general application: *Sullivan v Bristol Film Studios Limited*

> [2012] EMLR 27 and has been held to extend to malicious falsehood claims: *Niche Products* [63] and c.f. *Tesla Motors* [47]-[49].
>
> 47. Nevertheless, the *Jameel* jurisdiction to strike out claims as abusive ought to be reserved for exceptional cases: *Stelios Haji-Ioannou v Dixon* [2009] EWHC 178 (QB) [30] per Sharp J. Courts should not be too ready to conclude that continued litigation of the claim would be disproportionate to what could legitimately be achieved. The conclusion must be that it is impossible "to fashion any procedure by which that claim can be adjudicated in a proportionate way": *Ames v Spamhaus Project Ltd* [2015] 1 WLR 3409 [33]-[36] per Warby J citing *Sullivan v Bristol Film Studios* [29]–[32] per Lewison LJ.
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> 48. In defamation actions, an important factor in the assessment of the value of what is sought to be achieved by the proceedings is usually the element of vindication that the claimant hopes to obtain: see the discussion in *Alsaifi - Trinity Mirror plc* [2019] EMLR 1 [42]-[43]. But the principle has a more general application beyond "vindication" in the defamation sense. In *Alsaifi*, I described it as follows [45]: "… The Court cannot strike out a claim for a £50 debt simply because, assessed against the costs of the claim, it is not 'worth' pursuing. Inherent in the value of any legitimate claim is the right to have a legal wrong redressed. The value of vindicating legal rights – as part of the rule of law – goes beyond the worth of the claim. The fair resolution of legal disputes benefits not only the individual litigants but society as a whole."

13. It is unrealistic to submit that this claim reveals "no real or substantial wrong" or that "litigating the claim will yield no tangible or legitimate benefit to the claimant proportionate to the likely costs and use of court procedures". Indeed, it is so unrealistic as to call into question whether the defendants have any genuine or honest belief in this being a proper basis for strike-out. I have described the scale of the hacked data and the nature of the material. As Ms Page KC and Mr Hirst put it in their skeleton argument, the material in the defendants' possession enabled them to "rove through several years of the claimant's day-to-day communications on all aspects of her life with those closest to her". The quantity of data was enormous and much of it was of the most personal and intimate kind. It is unnecessary for me, at this stage, to venture possible figures for the damages[1] that would be payable in the event that the claimant was successful (in whole or in part). Master Fontaine has already noted that the claim would appear to represent "a very serious breach of her private information" and that damages in an MPI claim in the High Court "may be very different from such a claim made in the Employment Tribunal". The components of those damages would reflect (a) the claimant's loss of control of her private information, (b) her distress and (c) aggravated damages. That could yield an award of many thousands of pounds. Further, even though the defendants have stated that they do not oppose the non-monetary relief sought, a court award would vindicate the interference with her rights and that is in itself a tangible and legitimate benefit which she is entitled to pursue. The claimant's costs budget is, I acknowledge, high; (it is in excess of £800,000). But (a) that budget includes the costs to be incurred in defending a counterclaim which the defendants value at several hundreds of thousands of pounds, (b) the costs have not yet been

[1] I note that in *Gulati v MGN* [2015] EWCA Civ 1291 the Court of Appeal upheld first instance damages awards of between £55,000 and £110,000 for acts of unauthorised accessing of voicemails, before any adjustment for aggravated damages, with additional damages awards for each act of disclosure of the information to the public.

subjected to costs management and (c) I do not, in any event, regard them as so disproportionate to the issues at stake in the claim as to bring this case within the territory of a *Jameel* abuse argument. If, contrary to that view, the costs were wholly disproportionate, then the task of the court would be to impose proportionate case and costs management – not to strike out the claim, which is a last resort.

14. The second ground for strike-out is *Henderson* abuse, i.e. that the claimant should have invited the Employment Tribunal to determine the allegations of hacking that she is presently making, (as had, indeed, appeared to be her intention before she withdrew that part of her case in favour of the High Court proceedings).

15. It is true that the claimant could have sought to exclude the WhatsApp messages on the basis that the evidence was improperly and unlawfully obtained. Although that would not, of itself, have rendered the evidence inadmissible, the Employment Tribunal would, on well-established principles, have a had a discretion to exclude; see most recently *Candey Ltd v Bosheh* [2022] EWCA Civ 1103 at paragraphs 96 – 108. But it does not follow that it was incumbent on the claimant to pursue this point. The claimant and her advisers were entitled to take a view on her prospects of excluding the evidence. As has often been observed, English courts tend to admit relevant evidence – even when improperly obtained or procured. And plainly the Employment Tribunal regarded at least a small proportion of the WhatsApp messages (the ones which they cited in their judgment) as relevant. For the claimant to have argued this aspect of her case at its strongest would also have required technical, expert evidence, which in turn would have given rise to delay and almost certainly an adjournment of the substantive hearing. It is unsurprising that she decided not to do so.

16. Even if she had sought and obtained a ruling of the Tribunal on the admissibility of the evidence, that ruling – whichever way it had gone – would not have prevented her from pursuing an MPI claim in this court.

17. It follows that the decision not to apply to exclude the WhatsApp messages from the evidence is no ground for an abuse application.

18. As for making a hacking claim in the Employment Tribunal, she simply could not have made such a claim at all. The Employment Tribunal had no jurisdiction to deal with an MPI claim and it has not been suggested that it could have been "re-cast" as a claim of sex discrimination. The most that the claimant could have achieved would have been some uplift to her damages based upon this aspect of the defendants' conduct towards her. But that too would not have prevented her from subsequently bringing her MPI claim. On the contrary, she would still have been able to bring it – subject only to the rule against double-recovery (which, given the Employment Tribunal's limited jurisdiction, would have impinged upon her MPI claim very little).

19. Lastly, she expressly reserved her MPI claim and all parties proceeded on that basis. Having been informed of the claimant's position, without protest, it is not open to the defendants to complain now of a *Henderson* abuse.

20. That leaves abuse based upon breach of CPR rule 31.22, (disclosed documents only to be used for the purpose of the proceedings in which they are disclosed). Based upon this rule, it is said that the claimant required the permission of the court to disclose her own documents – the WhatsApp messages – to her present solicitors in order to

formulate and pursue her MPI claim[2]. A similar argument based upon CPR rule 32.12 (the equivalent provision relating to witness statements) was given short shrift by the Court of Appeal in *Candey v Bosheh*; see at paragraph 109. Coulson LJ simply said that, to the extent that permission was required, he would give it. I would say the same here. If the claimant needed permission under rule 31.22, I would give it. But I do not think that she does need permission. These were the claimant's own documents and they did not fall within the scope of rule 31.22; see *Process Development Ltd v* Hogg [1996] FSR 45 at 51 – 52. Further, the documents were not disclosed pursuant to an order. They were disclosed voluntarily and for that reason also fell outside the implied undertaking; see *Cassidy v Hawcroft* [2000] CPLR 624 at 632. Lastly (and surprising as it may seem given the nature of the documents and the lack of relevance of the overwhelming majority of them) all the WhatsApp messages were placed into the bundle of documents, which was deployed at the hearing, which was in public. (A hearing to which reporting restrictions apply is still a public hearing.)

21. For these reasons, I refuse the application to strike out the claim as an abuse of process.

The applications for summary judgment on the counterclaim, for an interim payment (£250,000) and/or for conditions to be imposed requiring the claimant to pay money into court on account of the costs of the defendants' defending the claim (£350,000) and bringing the counterclaim (£100,000)

22. These comprise the balance of the applications before me. (The amounts sought in respect of each application are taken from Mr Knight's skeleton argument.) The claimant is a junior solicitor on a relatively modest salary. She has no substantial assets. The effect of an order for an interim payment or for the imposition of conditions in the sums sought would be to stop the claim in its tracks. The claimant would be bankrupted and/or her claim would be stayed indefinitely or struck out for non-compliance with the conditions. It seems to me obvious that that is RVT's objective. Given what I have said about the apparent merits of the claimant's claim and given the fact that it is settled law that a court should not impose a condition which has the effect of stifling a claim, I am again driven to question the defendants' *bona fides*.

23. For the reasons that follow, I refuse all these applications.

Summary judgment – the tort of malicious prosecution

24. The civil claim for malicious prosecution is a relative newcomer. It was only authoritatively recognised as a cause of action in respect of a civil claim in *Willers v Joyce* [2016] UKSC 43. Cases since then have been thin on the ground. It requires proof of the following: (1) the claimant brought proceedings against the defendants; (2) the proceedings were determined in the defendants' favour; (3) the proceedings were without reasonable and probable cause; (4) the proceedings were malicious; and (5) as a result, the defendants suffered loss that sounds in damages.

25. What constitutes malice is, as yet, unclear. When *Willers v Joyce* came back before the High Court (having initially been struck out as disclosing no cause of action but then reinstated by the Supreme Court) Rose J was not required to resolve the issue of malice

[2] To be fair to the defendants, this deeply unattractive point was not put forward as a freestanding ground of abuse of process, but, rather, to "assist consideration of the *Jameel* and *Henderson* arguments".

because she had resolved the first and third issues in favour of the defendants. Malice was therefore left to another day.

26. There are at least the following problems with the defendants' application for summary judgment on the counterclaim for malicious prosecution.

27. First, the Employment Tribunal proceedings have not yet been finally determined. After the Tribunal announced and promulgated their decision, the defendants applied for a costs order against the claimant. The consideration of that application was postponed pending the findings of the High Court in this litigation. The major item of damage which the defendants claim to have suffered as a result of the claimant's malicious prosecution consists of the costs of the Tribunal proceedings. If, in the light of the findings made by this court, the Tribunal were to refuse the defendants their costs in the Employment Tribunal proceedings then, putting it at its lowest, it would be at least arguable whether those same costs could be awarded as damages in the counterclaim. Similarly, if the Tribunal awarded the costs in full, then that element of the counterclaim (which is the bulk of it) would fall away. These contingencies demonstrate why it is impermissible to claim for malicious prosecution in a "still pending suit"; see generally Clerk & Lindsell 23rd Ed at 15-34.

28. Second, (and as already mentioned), the parameters of the requirement of malice are unclear. It therefore cannot be said that the claimant has no "real prospect" of defeating this element of the claim. In the criminal context, malice would require that the "sole or dominant" purpose of the prosecutor was not the proper invocation of the law but, rather, an illegitimate purpose; see *Willers v Joyce* [2018] EWHC 3424 (Ch) at paragraph 278. It is not clear how that test (itself somewhat vague) translates to a civil claim. What can be said though is that (a) the Tribunal's findings do not and could not address malice as such and therefore no issue estoppel arises and (b) the working out of the law's requirements regarding malice is not at all suitable for a summary judgment application. This is a novel and untested area of law and, analogously with the principle in *Barrett v Enfield BC* [2001] 2 AC 550, should be determined with more investigation of the facts (including the claimant's precise state of mind and motives) and more opportunity for argument than is possible or permissible at a summary judgment application.

The tort of abuse of process

29. This tort has longer antecedents than the tort of malicious prosecution. But it adds little. Mr Knight placed some reliance on it in this case because doing so avoided the issues just discussed concerning malice. The essence of the tort is the court's processes being misused to achieve something not properly available to the claimant in the course of properly conducted proceedings; see *Broxton v McClelland & Anor* [1995] EMLR 485. That improper purpose must be predominant.

30. The difficulties facing the defendants on this limb of their counterclaim are similar to those set out above in relation to malicious prosecution. There is no finding by the Employment Tribunal that the claimant's improper purpose (to "destroy" RVT) was predominant. That point, which requires an examination of the claimant's state of mind, is not suitable for summary judgment.

31. It is also not obvious that the processes of the Employment Tribunal were misused. As observed by Lord Wilson in *Crawford Adjusters (Cayman) Ltd v Sagicor* [2013] UKPC 17 at paragraph 63:

> "If the claimant's intention is that the result of victory in the action will be the defendant's downfall, then his purpose is not improper: for it is nothing other than to achieve victory in the action, with all such consequences as may flow from it. If, on the other hand, his intention is to secure the defendant's downfall—or some other disadvantage to the defendant or advantage to himself—by use of the proceedings *otherwise than for the purpose for which they are designed*, then his purpose is improper." (My emphasis.)

32. To put that differently, the Tribunal found that the claimant intended to bring about RVT's downfall. But that is not necessarily a misuse of court proceedings. As Mr Andrew Lenon KC, sitting as a Deputy High Court Judge in the case of *King's Security Systems v King & Anor* [2021] EWHC 325 (Ch), put it (at paragraph 228) "the bringing of legal proceedings for the purpose of achieving the natural consequences of the litigation, such as the defendant's financial ruin [and here, I interpose, the ruin of RVT's professional reputation] is not an improper purpose". To put that differently again, even if the claimant had an ulterior purpose, that purpose appears to have been within the natural scope of the proceedings which she brought.

33. Relevant to both torts is the fact that the claimant had the support of counsel's advice throughout[3] and that advice remained cautiously positive after the hearing had concluded and the claimant's counsel and solicitors were able to make some sort of assessment of the evidence that had been given and the impact of the WhatsApp messages.

34. These points are reasonably arguable and, as with malicious prosecution, not suitable for a summary judgment application.

Protection from Harassment Act 1997

35. The defendants did not pursue their summary judgment application on this limb of the counterclaim.

Conclusion on the summary judgment application

36. The defendants have fallen well short of demonstrating that the claimant has no real prospect of successfully defending the counterclaim. Due to the novelty of the points that arise and due also to the need to make findings as to the claimant's state of mind and motivation, the claims for malicious prosecution and abuse of the process are inherently unsuitable for summary judgment.

Interim payment and conditions

37. The interim payment application cannot survive my refusal of summary judgment on the counterclaim.

[3] And therefore had "reasonable and proper cause".

38. As to the conditions, having regard to the claimant's financial means, such conditions could not be imposed because they would unjustifiably stifle her continued participation in the proceedings. But the conditions are anyway unnecessary because the claimant has ATE insurance which would, on the face of the policy, cover her potential costs liability in favour of the defendants. The conditions would also be inappropriate given what I have said about the merits of the claim and counterclaim and the merits of the defendants' application for summary judgment.

Miscellaneous

39. There were two further matters.

40. First, I will direct that the costs of what has come to be called the defendant's "waiver application" should be costs in the case. The application went beyond the limited waiver of privilege expressed in the claimant's witness statement and was eventually dealt with by consent on a narrower basis. Given the number of documents that the claimant's team were required to review, I think that the response was reasonably expeditious. Costs in the case (as Master Fontaine has ordered previously in not dissimilar circumstances) seems to me to reflect the overall justice of the situation.

41. Second, I am troubled by the anonymity order that has been imposed. The reason it was imposed was to avoid frustrating the permanent Restricted Reporting Order ("RRO") that was made by the Employment Tribunal by their decision of 31 May 2019. I cannot fault the logic of the anonymity order in this court. But the permanent RRO was, as the Tribunal acknowledged, "exceptional" in that the parties were seeking "a derogation from the principle of open justice, post promulgation of the liability decision". Given the exceptionality, the reasons given at paragraph 37 of the decision may, to some, appear slender. Further, the Employment Tribunal could not and did not address an important "knock-on" effect of their order, namely that it indirectly conferred anonymity on the parties in these proceedings when, ordinarily, that would have been inappropriate. That is a significant change of circumstances from those envisaged by the Tribunal at the time. Finally, the permanent RRO seems to me to be out of line with more recent decisions of the appellate courts on anonymity; see e.g. the decision of the Employment Appeal Tribunal in *Frewer v Google UK Ltd & Ors* [2022] EAT 34.

42. I am minded to refer this matter back to the Employment Tribunal at Central London for consideration by the Regional Employment Judge whether the Tribunal should, of its own motion, list the RRO for reconsideration. My understanding is that the Tribunal has the power to do this; see the discussion at paragraph 11.123 of the IDS Handbook: Employment Tribunal Practice & Procedure; and see *Secretary of State for the Home Department v Parr* EAT 0046/20. The final decision would be one for the Employment Tribunal.

43. Because this was a matter raised (a) by me and (b) for the first time at the hearing itself, I will give the parties an opportunity to make representations in writing as to whether I should take the course I have proposed.