Appeal No. UKEAT/0256/20/RN

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 7 January 2021
Judgment Handed down on 15 January 2021

Before

HIS HONOUR JUDGE JAMES TAYLER

SITTING ALONE

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(1) QUEENSGATE INVESTMENTS LLP
(2) QUEENSGATE INVESTMENTS MANAGEMENT LIMITED
(3) JASON KOW — APPELLANTS

JONATHAN MILLET — RESPONDENT

THE MEDIA LAWYERS ASSOCIATION — INTERVENOR

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR SEAN JONES (One of Her Majesty's Counsel) And MR RONNIE DENNIS Instructed by: Penningtons Manches Cooper LLP 125 Wood Street London EC2V 7AW United Kingdom
For the Respondent	MR JAMES LADDIE (One of Her Majesty's Counsel) Instructed by: Brahams Dutt Badrick French LLP Kings House 36 King Street London EC2V 88B
For the Intervenor	BEN GALLOP (of Counsel) Instructed by: Media Lawyers Association 200 Gray's Inn Road London WC1X 8XZ United Kingdom

SUMMARY

PRACTICE AND PROCEDURE

1. Hearings to determine applications for interim relief are public hearings.

2. The Employment Judge did not err in law, in refusing to make an order restricting publicity pursuant to rule 50 ET Rules 2013, in this case.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. By a decision sent to the parties on 26 November 2020, Employment Judge Adkin held that hearings to determine applications for interim relief pursuant to section 128 of the Employment Rights Act 1996 are to be held in public, unless an order restricting publicity is made pursuant to rule 50 Employment Tribunal Rules 2013 (ET Rules 2013). He refused an application to make such an order restricting publicity in this case.

2. The parties are referred to as the Claimant and Respondents as they were before the Employment Tribunal.

3. On 2 December 2020, HHJ Auerbach, having considered the matter pursuant to rule 3(7) of the Employment Appeal Tribunal Rules 1993 (as amended), set the matter down for a hearing and made an "anonymity" Order pending determination of the appeal.

4. On 31 December 2020, I granted permission for the Media Lawyers Association ("MLA") to be joined as an intervenor to the appeal pursuant to Rule 18 of the Employment Appeal Tribunal Rules 1993, as they wished to submit written submissions.

5. Employment Judge Adkin succinctly described the proceedings:

> **20. The claimant was employed by the respondent, a private equity firm, as Head of Acquisitions from 4 September 2017 until 16 October 2020 when he was dismissed for purported redundancy. He brings claims of protected interest disclosure detriment, harassment/discrimination relating to race, sex, religion or belief, sexual orientation; a claim of victimisation and for an unlawful deduction from wages/breach of contract.**

> **21. The allegations made in the claim involve allegedly sexist, racist and homophobic language used in the workplace and allegations that [Y] the respondent's CEO is guilty of breaches of fiduciary duty and serious misconduct, potentially amounting to fraud and including allegations that institutional investors were deliberately misled. In particular one allegation at paragraphs 95-99 is that the entirety of the respondent's cost base was, at [Y]'s insistence, shown as being attributable to one particular investment in order to fraudulently justify a higher level of fees being charged to those investors. [Y] instructed that the same incorrect analysis was shown to another group of banks.**
>
> **22. The claimant has brought an application for interim relief.**

6. The interim relief hearing is listed for 21-22 January 2021.

Open Justice

7. Both aspects of the appeal potentially raise open justice issues. The general principle was recently restated by Baroness Hale of Richmond PSC in **Dring (on behalf of the Asbestos Victims Support Groups Forum UK) v Cape Intermediate Holdings Ltd (Media Lawyers Association intervening)** [2020]AC 629, at 635 para. 1:

> **As Lord Hewart CJ famously declared, in R v Sussex Justices, Ex p McCarthy [1924] 1 KB 256, 259, "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done". That was in the context of an appearance of bias, but the principle is of broader application. With only a few exceptions, our courts sit in public, not only that justice be done but that justice may be seen to be done.**

8. Lord Sumption noted in **Khuja v TNL** [2019] AC 161, at para, 16:

> **It has been recognised for many years that press reporting of legal proceedings is an extension of the concept of open justice, and is inseparable from it. In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so.**

Should interim relief hearings be held in public or private?

9. Employment Judge Adkin concluded that under the Employment Tribunal Rules 2013 (ET Rules 2013) a hearing to determine an interim relief application must be held in public, unless an order restricting publicity is made pursuant to rule 50 of the ET Rules.

Statutory Provisions

10. The claims include allegations that the Claimant was subject to detriment done on the ground that he made protected disclosures, and that he was dismissed for the reason, or principal reason, that he made protected disclosures. It is the dismissal allegation that results in the possibility of an order for interim relief.

11. The Employment Tribunal is a creature of statute. It is therefore necessary to consider the statutory underpinning of its jurisdiction.

12. The underlining in my quotation of statutory provisions is to add emphasis.

13. The starting point is the Employment Tribunals Act 1996 (ETA 1996), section 2 of which provides:

> **2 Enactments conferring jurisdiction on employment tribunals**
>
> **Employment tribunals shall exercise the jurisdiction conferred on them by or by virtue of this Act or any other Act, whether passed before or after this Act.**

14. Unfair dismissal is provided for in Part X of the Employment Rights Act 1996 (ERA 1996). Section 94 ERA 1996 provides:

> **94 The right**
>
> **(1) An employee has the right not to be unfairly dismissed by his employer.**

15. There are a number of reasons for dismissal that make the dismissal automatically unfair (in addition to removing the normal qualifying period to bring a claim and removing the cap on compensation). Section 103A ERA 1996 provides:

> **103A Protected disclosure**
>
> **An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.**

16. The jurisdiction to determine a complaint of unfair dismissal is provided by section 111 ERA 1996:

> **111 Complaints to employment tribunal**
>
> **(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.**

17. Provision is made for interim relief by section 128 ERA 1996:

> **Interim relief pending determination of complaint**
>
> **128 (1) An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and—**
>
> **(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—**
>
> **(i) …. section… 103A…,**
>
> **may apply to the tribunal for interim relief.**
>
> **(2) The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date).**
>
> **(3) The tribunal shall determine the application for interim relief as soon as practicable after receiving the application.**

18. Section 129 ERA 1996 provides:

> **Section 129 - Procedure on hearing of application and making of order**
>
> **(1) This section applies where, on hearing an employee's application for interim relief, it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find—**

> **(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—**
>
> **(i) … 103A, or …**
>
> **(5) If the employer states that he is willing to reinstate the employee, the tribunal shall make an order to that effect. …**
>
> **(9) If on the hearing of an application for interim relief the employer—**
>
> **… (b) states that he is unwilling either to reinstate or re-engage the employee as mentioned in subsection (3),**
>
> **the tribunal shall make an order for the continuation of the employee's contract of employment.**

19. In **Steer v Stormsure Limited** UKEAT/0216/20/AT (V), Cavanagh J set out an overview of interim relief at para. 27 onwards:

> **27. Interim relief is available for certain types of claim. It applies where the claimant is complaining about being dismissed. The claim for interim relief must be made within seven days of the effective date of termination. The mechanism for interim relief applies in the same way in relation to all types of claim for which interim relief is available. The ET sets up an urgent hearing, as soon as is practicable. At the hearing, the ET will only provide interim relief if it appears to the ET that it is likely that on determining the complaint the Tribunal will find in the claimant's favour. As I have said, this means that the ET must satisfy itself that the claimant has a pretty good chance of success at the final hearing.**
>
> **28. Rule 95 of the Rules of Procedure Regulations states that the Tribunal shall not hear oral evidence at the interim relief hearing, unless the ET directs otherwise. The default position, therefore, is that there will be no oral evidence. The issue of interim relief will be decided by reference to the pleadings, submissions, written statements, and the review of a relatively small number of documents.**
>
> **29. If the ET decides that interim relief should be granted, the employer is asked whether it is prepared to re-instate the claimant or, if not, to re-engage the claimant in another job on terms and conditions which are not less favourable than those which would have applied if the claimant had not been dismissed. If the employer indicates that it is prepared to re-instate the claimant, the ET makes an order to this effect. If the employer indicates that it is prepared to re-engage the claimant, and the claimant agrees, the ET makes an order for re-engagement. If the claimant does not agree to re-engagement, and the ET considers the refusal to be reasonable, the ET will make an order for the continuation of the claimant's contract of employment. If the ET considers that the refusal is unreasonable, the ET will not make any order. If the employer refuses to agree to re-instatement or re-engagement, or the employer does not attend the interim relief hearing, the ET will make an order for the continuation of the claimant's contract of employment.**

30. An order for the continuation of the claimant's contract of employment means that the contract of employment will continue in force for the purpose of pay or any other benefit derived from the employment, seniority, pension rights and other similar matters, and for the purpose of determining for any purpose the period for which the employee has been continuously employed, until the final determination or settlement of the claim. The ET specifies an amount which must be paid by the employer during each normal pay period. Such payments are taken into account for the purposes of calculation of damages for breach of contract or compensation for the breach of the relevant statutory right. The employer is not required to permit the claimant to carry on working.

31. The net effect of these provisions, therefore, is that a claim for interim relief, if successful, does not mean in practice that the ET will require the employer to permit the claimant to carry on working pending the determination or settlement of his or her claim. It is not the equivalent of a mandatory injunction or specific performance of the obligation to provide work. Rather, it means that the claimant will continue to receive his/her salary and other benefits in the period up to determination of claim or settlement. This is a valuable benefit, because it can take a number of months before a claim is finally determined (or even longer in complex cases, especially when there is a backlog of claims before the ET). It means that the claimant has a financial cushion whilst s/he is waiting for his/her claim to be heard. It is particularly valuable, because the employee will not have to repay the monies received, even if his or her claim ultimately fails. It also means that the employer has an ongoing financial commitment, which may mean that the employer is more amenable to settlement.

32. Interim relief was originally introduced by the Employment Protection Act 1975, and was limited to claims in which the alleged reason for dismissal was actual or proposed trade union membership or authorised union activities. It was introduced as a way of deterring lightning strikes which used to be a feature of the industrial relations landscape when a trade union official or activist was dismissed for trade union activities. In *Bombardier Aerospace/Short Brother v McConnell* and others [2008] IRLR 51 (NICA), Girvan LJ said, at paragraph 7, that the purpose of interim relief was to "preserve the status quo until the full hearing" and that:

> **"The interim relief provisions were a response to the problem of dismissals of trade unionists which have the potential to generate suspicion of victimisation which on occasions can result in industrial unrest and industrial action. As pointed out in Harvey on Industrial Relations and Employment Law at paragraph 593 an application for interim relief is intended to head off industrial trouble before it begins or at least before it becomes too serious by allowing an employment tribunal to give a preliminary ruling at an emergency hearing."**

…

39. Section 129(1) states that interim relief is only available where, on hearing the employee's application for interim relief, it appears to the tribunal that it is likely that on "determining the complaint to which the application relates" the tribunal will find that the reason or if more than one the principal reason for dismissal is one of the proscribed reasons. However, in Simply Smile, Choudhury J made clear that this did not mean that the only issue that a ET could address at the interim relief stage was the reason for dismissal. Rather, the tribunal needs to consider the likely outcome of the eventual determination

> **of the complaint, and so section 129(1) does not preclude a tribunal from having regard to the merits of other elements of the claim aside from the reason for dismissal. The same "likely to succeed" test has to be applied to all of the matters that the claimant has to prove. In *Simply Smile*, this meant that the ET had been right to consider the chances that the claimant would be able to establish that he was an employee rather than a self-employed worker, at the interim relief stage.**

20. Deciding an application for interim relief does not involve a final determination of any of the liability issues, such as the reason for dismissal, prior to the final hearing. To the extent that authority is needed for that proposition, the Respondents rely on **Raja v The Secretary of State for Justice** UKEAT/0364/09/CEA, in which HHJ Birtles held, at para. 25:

> **What a Tribunal has to do in an application for interim relief is to examine the material put before it, listen to submissions and decide whether at the final hearing on the merits "that it is likely that" that Tribunal will find that the reason or reasons for the dismissal is one or more of those listed in section 129(1). What is clear is that the Tribunal must not attempt to decide the issue as if it were a final issue: *Parkins v Sodexho Ltd* [2002] IRLR 109 in the words of HHJ Altman at paragraph 29:**
>
> > **"Accordingly, it seems to us, that we must find that the Employment Tribunal erred in the question they asked themselves in reality, as to the reason for dismissal, by asking themselves what was the reason for dismissal and forming a judgment about it rather than asking whether it was likely that the reason would be a qualifying reason at the final hearing."**

21. Applications for interim relief are subject to the provisions of the ET Rules 2013. The interpretation section includes the following:

> **1. Interpretation**
>
> **(1)… 'claim' means any proceedings before an Employment Tribunal making a complaint; …**
>
> **"complaint" means anything that is referred to as a claim, complaint, reference, application or appeal in any enactment which confers jurisdiction on the Tribunal; …**
>
> **(3) An order or other decision of the Tribunal is either—**
>
> **(a) a 'case management order', being an order or decision of any kind in relation to the conduct of proceedings, not including the determination of any issue which would be the subject of a judgment;**
>
> **(b) a 'judgment', being a decision, made at any stage of the proceedings (but not including a decision under rule 13 or 19), which finally determines—**

(i) a claim, or part of a claim, as regards liability, remedy or costs (including preparation time and wasted costs); or

(ii) any issue which is capable of finally disposing of any claim, or part of a claim, even if it does not necessarily do so (for example, an issue whether a claim should be struck out or a jurisdictional issue);

(iii) the imposition of a financial penalty under section 12A of the Employment Tribunals Act 1996.

22. Specific provision is made in respect of interim relief by rule 95 ET Rules 2013:

95 Interim relief proceedings

When a Tribunal hears an application for interim relief (or for its variation or revocation) under … section 128 or section 131of the Employment Rights Act 1996, rules 53 to 56 apply to the hearing and the Tribunal shall not hear oral evidence unless it directs otherwise.

23. So far as relevant, rules 53 to 57 ET Rules 2013 provide:

53(1) A preliminary hearing is a hearing at which the Tribunal may do one or more of the following—

(a) conduct a preliminary consideration of the claim with the parties and make a case management order (including an order relating to the conduct of the final hearing);

(b) determine any preliminary issue;

(c) consider whether a claim or response, or any part, should be struck out under rule 37;

(d) make a deposit order under rule 39;

(e) explore the possibility of settlement or alternative dispute resolution (including judicial mediation).

(2) There may be more than one preliminary hearing in any case.

(3) "Preliminary issue" means, as regards any complaint, any substantive issue which may determine liability (for example, an issue as to jurisdiction or as to whether an employee was dismissed). …

55. Preliminary hearings shall be conducted by an Employment Judge alone, except that where notice has been given that any preliminary issues are to be, or may be, decided at the hearing a party may request in writing that the hearing be conducted by a full tribunal in which case an Employment Judge shall decide whether that would be desirable.

56. Preliminary hearings shall be conducted in private, except that where the hearing involves a determination under rule 53(1)(b) or (c), any part of the hearing relating to such a determination shall be in public (subject to rules 50

> **and 94) and the Tribunal may direct that the entirety of the hearing be in public.**
>
> **57. A final hearing is a hearing at which the Tribunal determines the claim or such parts as remain outstanding following the initial consideration (under rule 26) or any preliminary hearing. There may be different final hearings for different issues (for example, liability, remedy or costs).**

The decision of the Employment Tribunal

24. Employment Judge Adkin noted that "both parties agree that there is no appellate decision dealing precisely with this point". He concluded that on a proper construction of the relevant provisions a hearing to determine an application for interim relief should be held in public. The reasoning of the Employment Tribunal included the following elements:

(1) It is the usual practice of the Employment Tribunal to hold such hearings in public. In an introductory section Employment Judge Adkin stated:

> **5. It is sometimes useful to consider, where a rule is genuinely thought to be unclear, in the absence of other authority how the Tribunals operate it in practice. Mr Laddie puts forward on the basis of his and his instructing solicitor's experience that the universal practice is that interim relief hearings are public hearings.**
>
> **6. Mr Jones is aware of an interim relief hearing which was private, in which he was the judge. By implication, since he does not mention it I take it he is not aware of other private hearings. His submission is that if employment judges are habitually holding interim relief hearings in public they are wrong.**
>
> **7. Mr Laddie acknowledges that if decisions are taken to keep such hearings private, we might not know about them.**
>
> **8. Anecdotally the practice at London Central Employment Tribunal is to treat these as public hearings. I see from the case reports put forward by the Claimant that a colleague of mine has previously had to rule on this.**

(2) The determination of an application for interim relief is the determination of a preliminary issue (and so should be held in public unless, for example, an order is made under rule 50 ET Rules 2013) because it is the determination of a substantive issue that may determine liability as regards a complaint.

Employment Judge Adkin's primary finding was that the "complaint" was the application for interim relief:

> **13. Rule 53(3) defines a preliminary issue as a substantive issue which may determine liability as regards any complaint. An interim relief hearing should not and does not determine liability in the complaint of dismissal (Raja). It does however determine liability in the application for interim relief. I do not accept the argument that this does not amount to a determination of liability. Upon any successful application for interim relief, section 130(2) prescribes that the Tribunal should specify in the order the amount which is to be paid by the employer to the employee by way of pay falling between the date of dismissal and determination or settlement.**
>
> **14. This is a determination of liability, at least to make that payment. It is a substantive issue in the context of the application for interim relief.**
>
> **15. I find that determination of an application for interim relief is a preliminary issue within the meaning of rule 53(3). It follows that it falls within rule 53(1)(b) and therefore within the exception to the rule about private hearings defined at rule 56. I conclude therefore that an interim relief hearing should be a public hearing.**

(3) Alternatively, he considered that it is a preliminary issue in respect of the complaint of unfair dismissal:

> **16. If I am wrong in my conclusion that the relevant "complaint" in this context is the interim relief application itself (i.e. because the relevant complaint is the claim for unfair dismissal), I still consider that the application for interim relief is a substantive issue which determines the liability to pay pending resolution of that complaint. It still follows in my analysis that this would fall within rule 53(3), and accordingly within the rule 53(1)(b).**

(4) The determination of an application for interim relief is a preliminary issue for the purposes of the ET Rules 2013 and does not fall within any of the other subcategories for matter to be considered at a preliminary hearing:

> **17. I do not find that an application for interim relief falls outside of rule 53(1). Even if the analysis of the is wrong, natural place for such an application, in my assessment is Rule 53(1)(b). It does not fit into any of the other subcategories.**

(5) In respect of Article 6 ECHR Employment Judge Adkin stated:

> **18 I have not needed to consider the Article 6 arguments in detail at this stage.**

In short, the fact that jurisdictions other than the Employment Tribunal have procedures for interim decisions which are not required to be public hearings does not assist me. The scheme of the Employment Tribunal Rules is to draw a distinction between some hearings which are public and some private.
I do not consider that it is in dispute that some preliminary hearings may appropriately be heard in private. <u>The crucial point under the Rules is that the hearings which determine the substantive matters of liability are in public.</u>
In any event the consideration of the Article 6 arguments and the balancing act with Articles 8 and 10 below all led me to the conclusion that it should be a public hearing.

<u>Arguments and analysis</u>

25. The parties agree that the question of whether a hearing to determine an application for interim relief is to be held in public or private is a question of law to be determined on analysis of the statutory provisions. I consider that the matter can be determined as a matter of construction without recourse to the further supporting arguments that I will consider later.

26. The starting point is whether an application for interim relief is a "complaint" within the meaning of rule 1(1) ET Rules 2013. A complaint is "anything that is referred to as a <u>claim</u>, complaint, reference, <u>application</u> or appeal <u>in any enactment which confers jurisdiction on the Tribunal</u>." Thus I must consider whether there is 1) an application, and 2) whether it is referred to as such in an enactment that confers jurisdiction on the Employment Tribunal.

27. An application for interim relief is specifically referred to as an "application" in section 129 ERA 1996. Mr Jones for the Respondents contends that as the word "claim" is defined as "any proceedings before an Employment Tribunal making a "complaint", if an application for interim relief is a claim "all the consequences in terms of application of the rules" such as for presentation of the claim, would apply to it. I do not accept that the need to present an application for interim relief by way of a claim form, as is usually done, is a reason why it cannot have been meant to fall within the definition of "complaint".

28. Mr Jones also contends that the other words in the definition of a "complaint" in rule 1(1) ET Rules 2013 "are all used in Employment legislation as the means of commencing proceedings". He notes that the term "application" is used in some enactments such as sections **120(2)** and **(3) of** the **Equality Act 2010** (EQA 2010) to refer to the bringing of a "primary claim". While I accept that the word "application" in the definition of "complaint" in Rule 1(1) ET Rules 2013 is not apt to cover applications in the course of case management; such as applications for further information, disclosure or the like, I consider that an application for interim relief is a substantive application, rather than a mere application in the course of case management. It is an application that, if granted, results in an order for continuation of the claimant's contract of employment, with the consequence of a continued entitlement to payment to trial, that will not be undone if the claim of unfair dismissal is unsuccessful.

29. The next question is whether it is referred to as such in a provision that "confers jurisdiction on the Tribunal". I consider that section 129 ERA 1996 does confer jurisdiction on the Employment Tribunal to award interim relief. I do not consider that the fact that the additional jurisdiction to make an application for interim relief only arises where there is an underlying claim of unfair dismissal, alters this analysis. Without section 129 ERA 1996 the Employment Tribunal would have no jurisdiction to award interim relief. That was the point at issue in **Steer v Stormsure** in which the claimant sought interim relief in a discrimination claim, to which the respondent replied that there was no jurisdiction for the Employment Tribunal to grant interim relief as it is not empowered to do so by EQA 2010. Cavanagh J found that the difference in treatment in respect of the availability of interim relief between those making a claim under section 103A ERA 1996 and the EQA 2010 was not justified and that the claimant had made out a breach of Article 14 ECHR. That breach could not be remedied by the Employment Appeal Tribunal because it has no power to make a declaration of incompatibility.

30. While the Respondents contend that section 128 ERA 1996 merely provides a "power" to award interim relief, I see no violence to the wording in considering it as a matter of jurisdiction. The Employment Tribunal has been given jurisdiction to grant interim relief pursuant to ERA 1996, but not EQA 2010.

31. It is to be noted that the Employment Tribunal does not have jurisdiction in respect of all employment disputes; claims for breach of contract of value in excess of £25,000 must be brought in the civil courts, as must applications for injunctions. The statutory provisions determine whether the Employment Tribunal and/or the Courts have jurisdiction. Parliament might have chosen to give jurisdiction to grant interim relief to the Courts rather than the Employment Tribunal, because it is a remedy that has something in common with injunctive relief. Had they done so it would have been natural to refer to the Courts having jurisdiction to determine the application, and the Employment Tribunal lacking that jurisdiction.

32. The next question is whether a hearing to determine an application for interim relief involves the determination of a "preliminary issue". The term is defined by rule 53(3) ET Rules 2013 as " as regards any complaint, any substantive issue which may determine liability". The Respondents contend that the "complaint" must be the underlying "claim" of unfair dismissal, whereas the Claimant contends that the complaint is the "application" for interim relief. I consider that the fact that the application for interim relief can only be made where there has been a claim of unfair dismissal does not prevent the relevant complaint for the purposes of rule 53(3) ET Rules 2013 being the application for interim relief. I consider that in determining the application for interim relief the Employment Tribunal does determine a substantive issue, whether it is likely that the claim will be successful at final hearing, that determines the liability for interim relief, which if granted results in the continuation of the contract of employment, and the obligation to

pay wages. While I do not consider that the determination of an application for further information or disclosure involves the determination of a substantive issue that could determine liability, the position is different in the case of interim relief because of the permanent nature of the remedy should the application be granted. So while I agree with the Respondents that determination of the application for interim relief cannot involve any determination of liability in respect of the underlying complaint of unfair dismissal, I consider it does determine liability in respect of the right, or otherwise, to interim relief.

33. If I am wrong in that analysis, and the only complaint is that of unfair dismissal, I do not accept Employment Judge Adkin's alternative reasoning that determination of the application for interim relief is, nonetheless, a preliminary issue, because while it determines liability to provide interim relief, it could not be said to be the determination of a substantive issue which may determine liability as regards the "complaint" – which in this alternative analysis would be the claim of unfair dismissal. However, I do not need to rely on this alternative reasoning, as I consider that the application for interim relief is the relevant complaint.

34. The Respondents contend that the specific examples of preliminary issues given in rule 53(3) ET Rules 2013 "for example, an issue as to jurisdiction or as to whether an employee was dismissed" are matters that can be determinative of a whole claim because they can bring it to an end. I consider that these are what they are said to be, examples of the type of matters that may be preliminary issues. I do not consider that that prevents an application for interim relief being a preliminary issue. Interim relief is unique, so it is not surprising that it was not chosen as one of the examples.

35. The determination of the complaint for interim relief brings that aspect of the proceedings to an end, subject to any successful appeal. Both parties agree that the effect of Rule 95 ET Rules 2013 is that a hearing to determine an application for interim relief is a species of preliminary hearing. The scheme of the rules governing preliminary hearings is that those that can result in final determinations are held in public. That is why applications for strike out are to be heard in public because they may result in a party not being permitted to proceed with "all or part of a claim or response". I consider that the finality in the determination of applications for interim relief is more akin to strike out than it is to the determination of applications for deposit orders that involve no final determination of any issue of substance in the claim, and are to be conducted in private. A successful application for interim relief has permanent consequences, primarily by making an order for payment of wages that are unrecoverable should the claim of unfair dismissal eventually fail.

36. On these grounds alone, I would conclude that determination of applications for interim relief involves the determination of a preliminary issue and so is required to be in public. I will go on to deal with a number of the arguments that I did not consider of assistance in that analysis and then deal with a number of further arguments that I consider support my primary construction, and I additionally rely on in my determination of this appeal.

The arguments I did not consider to be of assistance

37. Without meaning any disrespect to the many Employment Judges who have considered this issue, I do not consider that the analysis is advanced by noting that a considerable majority of Employment Judges have held interim relief hearings in public. I expect few have had the

benefit of submissions that are anywhere near as comprehensive as those I have considered. If in holding interim relief hearings in public they have erred in law, that is what I must find.

38. The Respondents accept that the determination of an application for interim relief does not fall within any of the other provisions of rule 53(1) ET Rules 2013 other than 53(1)(b). The Claimant contends that it must, therefore, fall within rule 53(1)(b). If I had not concluded that on a proper construction of rule 53(3), the determination of an application for interim relief is the determination of a preliminary issue, I would not have been persuaded that it must be treated as such, because it does not fall into any of the other categories in rule 53(1). Rule 95 makes specific provision for interim relief which, were it not a preliminary issue, could have otherwise applied the general provisions of rules 53 to 56 to such hearings without forcing it into one of the categories within rule 53(1).

The further matters that support the contention that interim relief applications should be held in public

39. While I consider that, as a matter of construction alone, it is clear that an application for interim relief is to be held in public, there are a number of further matters that strongly support this conclusion.

The common law principle of open justice

40. Irrespective of any issue of Convention rights, open justice is a fundamental principle of the common law. If I considered that there was ambiguity in the provisions of the ET Rules 2013,

A I would have concluded that the principle of open justice requires that such hearings be conducted in public, absent any clear statement in the ET Rules 2013 to the contrary.

B 41. The ET Rules 2013 could have been drafted to expressly state that applications for interim relief were either to be determined in public or in private. Both parties prayed this in aid; the Respondents contending that the failure to specify in express terms that the hearing was to be in public suggested that it must have been intended to be in private; and the Claimant contending the converse. I was initially inclined to consider that this was neutral, however, on reflection, I consider that absent a clear indication, either by an express statement that such hearings are to be in private, or because it follows from the unambiguous wording of the rules that they must be held in private, the principle of open justice results in a presumption that they are to be held in public.

C

D

E 42. Generally, the principle of open justice applies equally to interim hearings as it does to final hearings. In **Global Torch** Maurice Kay LJ held at para. 34:

> **This links with … [the]submission that the open justice principle can safely be mollified at the interim stage because, if the allegations are later found to be true at trial, publicity can follow, with the result that a temporary suspension of open justice will have done no harm. I can see no warrant for a general lowering of the bar. Outside the area of statutory or other established exceptions, the open justice principle has universal application except where it is strictly necessary to depart from it in the interests of justice. If an application for departure is made, it will fall to be decided by reference to the principles which I have been considering, whether the proceedings are at an interim or final stage.**

F

G 43. While **Kaim Todner** suggests that the fact proceedings are at an interlocutory stage might be a factor to take into account in the balancing exercise in determining any application for an order limiting open justice, this does not detract from the general principle that interlocutory decisions on matter of substance are to be dealt with in public. This is the approach adopted by CPR rule 39.2(1).

H

A

44. Parliament may determine that certain types of hearings are to be conducted in private, as is the case generally for Preliminary Hearings for Case Management in the Employment Tribunal, where the issues are considered and directions made for the final hearing; but in addition, attempts to promote settlement of the claim may take place. I consider that is why they are conducted in private.

B

C

45. I accept the Respondents' argument that if Parliament decides that a particular type of hearing is to be conducted in private, that is the end of the matter; and the principle of open justice cannot alter the position. But, it requires clear and unambiguous words.

D

46. In this context, the MLA relied on the principle of legality. They correctly contended that the open justice principle is a fundamental right, and relied on the determination of Lord Hoffman in **R v Secretary of State for the Home Department, Ex p Simms** [2000] 2 AC 115 at 131:

E

> **Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.**

F

47. As the MLA point out, if the Respondents are correct in their interpretation, all hearings to determine applications for interim relief are to be held in private, without exception. As Mr Laddie for the Claimant argued, it is much more likely that Parliament would allow some flexibility, which is provided for if the rules are construed as requiring that the determination of applications for interim relief are held in public, with the possibility of an exception where an order for privacy is appropriately made under rule 50 ET Rules 2013.

G

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48. As we are reminded by Cavanagh J's consideration of the history of interim relief in **Steer v Stormsure**, the origin of interim relief lies in the field of labour relations. It had an important role in preventing strike action where trade union activists were dismissed; allowing for an order to maintain the existence of their contracts of employment pending determination of their complaints by the Employment Tribunal. It is hard to see how interim relief fulfils that role if hearings are held in private. As Mr Laddie noted, the extension of the availability of interim relief has been to cases that have an element of public interest, such as dismissals that are contended to have resulted from making protected disclosures.

Convention rights

49. The Claimant and MLA contend that holding interim relief hearings in private would involve infringement of the Claimant's Article 6 right to a fair and public hearing and could involve infringement of the Article 10 right to freedom of expression.

50. The Respondents contend that an application for interim relief does not engage Article 6 at all. They rely on **X v United Kingdom** (Application No. 7990/77, unreported, 11 May 1981), an admissibility decision of the Commission in a case in which a prisoner claimed that he had been prevented from communicating with his solicitor about his tribunal proceedings, including a claim for interim relief. It was held:

> **4. The applicant has first complained that there has been interference by the authorities with his right of access to court for the purpose of seeking interim relief under s. 78 of the Employment Protection Act 1975. He alleges that he was refused permission to write to a solicitor (of the NCCL) and his trade union organiser in time to get the necessary legal and trade union advice within the statutory time-limit of seven days from the effective date of his dismissal.**
>
> **However the Commission considers that the right of access to court which is guaranteed by Article 6, paragraph 1 of the Convention (cf. the ECHR's**

> **judgment of 21 February 1975 in the Golder case) does not extend to the interim relief procedure before the Industrial Tribunal. In fact this procedure neither finally nor even provisionally determines the civil rights of a dismissed trade-unionist vis-a-vis his employer. It only regulates his temporary position pending the outcome of the main proceedings. The Commission therefore concludes that it is outside the scope of Article 6 of the Convention, and that the applicant's complaint must accordingly be rejected under Article 27, paragraph 2 as being incompatible with the provisions of the Convention.**

51. The Respondents noted that **X** was cited by the European Court of Human Rights, with apparent approval, in **Markass Car Hire Ltd v Cyprus** (Application No. 51591/99, unreported, 6 November 2002).

52. Historically, interim applications have been considered by the European Court of Human Rights to fall outside the scope of Article 6. This approach was adopted in the domestic context in decisions such as that of the Court of Appeal in **Regina (M) v Secretary of State for Constitutional Affairs and Lord Chancellor and others** [2004] EWCA Civ 312 in which the Court of Appeal decided that art 6(1) was not engaged where an interim antisocial behaviour order was made.

53. There was a change of tack by the European Court of Human Rights in **Micallef v Malta** [2010] 50 EHRR 37, in which the matter was considered by the Grand Chamber. It was held from paragraph 78:

> **78 The Court observes that there is widespread consensus amongst Council of Europe Member States, which either implicitly or explicitly provide for the applicability of art.6 guarantees to interim measures, including injunction proceedings. Similarly, as can be seen from its case law, the Court of Justice of the European Communities (ECJ) considers that provisional measures must be subject to the guarantees of a fair trial, particularly to the right to be heard.**
>
> **79 The exclusion of interim measures from the ambit of art.6 has so far been justified by the fact that they do not in principle determine civil rights and obligations. However, in circumstances where many contracting states face considerable backlogs in their overburdened justice systems leading to excessively long proceedings, a judge's decision on an injunction will often be tantamount to a decision on the merits of the claim for a substantial period of time, even permanently in exceptional cases. It follows that, frequently,**

> **interim and main proceedings decide the same "civil rights or obligations" and have the same resulting long lasting or permanent effects.**
>
> **80 Against this background the Court no longer finds it justified to automatically characterise injunction proceedings as not determinative of civil rights or obligations. Nor is it convinced that a defect in such proceedings would necessarily be remedied at a later stage, namely, in proceedings on the merits governed by art.6 since any prejudice suffered in the meantime may by then have become irreversible and with little realistic opportunity to redress the damage caused, except perhaps for the possibility of pecuniary compensation.**
>
> **81 The Court thus considers that, for the above reasons, a change in the case law is necessary. While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents laid down in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement. It must be remembered that the Convention is designed to, "guarantee not rights that are theoretical or illusory but rights that are practical and effective".**
> **82 In this light, the fact that interim decisions which also determine civil rights or obligations are not protected by art.6 under the Convention calls for a new approach.**

54. The Grand Chamber went on to consider the new approach:

> **83 As previously noted, art.6 in its civil "limb" applies only to proceedings determining civil rights or obligations. Not all interim measures determine such rights and obligations and the applicability of art.6 will depend on whether certain conditions are fulfilled.**
>
> **84 First, the right at stake in both the main and the injunction proceedings should be "civil" within the autonomous meaning of that notion under art.6 of the Convention.**
>
> **85 Secondly, the nature of the interim measure, its object and purpose as well as its effects on the right in question should be scrutinised. Whenever an interim measure can be considered effectively to determine the civil right or obligation at stake, notwithstanding the length of time it is in force, art.6 will be applicable.**
>
> **86 However, the Court accepts that in exceptional cases—where, for example, the effectiveness of the measure sought depends upon a rapid decision-making process—it may not be possible immediately to comply with all of the requirements of art.6. Thus, in such specific cases, while the independence and impartiality of the tribunal or the judge concerned is an indispensable and inalienable safeguard in such proceedings, other procedural safeguards may apply only to the extent compatible with the nature and purpose of the interim proceedings at issue. In any subsequent proceedings before the Court, it will fall to the Government to establish that, in view of the purpose of the proceedings at issue in a given case, one or more specific procedural safeguards could not be applied without unduly prejudicing the attainment of the objectives sought by the interim measure in question.**

55. Applying that new approach, it is hard to see how it can be contended that awarding interim relief requiring the payment of salary, often for many months, without any possibility of

it being recovered, does not amount to the determination of a civil right or obligation. Awarding interim relief will generally have more significant consequences than even a lengthy injunction affecting where washing can be hung out to dry, which was the issue in question in **Micallef**. I conclude that Article 6 does apply to an application for interim relief.

56. Accordingly, I consider that protection of the Article 6 and Article 10 rights in play in determining whether an application for interim relief should be heard in private or public, provides significant support for the contention that it should be a public hearing, subject to the possibility of an order for restriction on publicity pursuant to rule 50 ET Rules 2013 in appropriate circumstances.

The history of the statutory provisions

57. During the hearing I raised the suggestion that the provision for Case Management Discussions to be held in private, was because they were designed to involve a frank discussion about claims, including the possibility of settlement. I was reminded that the term Case Management Discussions is no longer used in the ET Rules 2013. I expect the consideration of this matter resulted in some thought being given to the position under the predecessor rules. There were some limited submissions on the point. Having considered the matter further, I produced a note for the parties and sought further submissions. While I noted that Mr Jones contended that this "archaeology" is of no, or very little, relevance, because there was a change of direction when the ET Rules 2013 were introduced, I was concerned that because the issue arose "on the hoof", in circumstances in which it is common ground that this will be the first appellate decision on a matter of some general importance, to have the benefit of full submissions, after counsel had a

little more opportunity to reflect on the matter, and to consider the archaeology in a little more detail.

58. The MLA chose not to make submissions. I received written submissions from the Claimant and the Respondents. I am grateful for the production of these submissions under considerable time pressure.

59. There is a significant degree of common ground. Prior to the ET Rules 2013, applications for interim relief were to be heard in public. The Claimant's team traced the history through: i. The Industrial Tribunals (Labour Relations) Regulations 1974, Sch.1, r.6(1) (SI 1974/1386); ii. The Industrial Tribunals (Rules of Procedure) Regulations 1980, Sch.1, r.7(1) (SI 1980/884); iii. The Industrial Tribunals (Rules of Procedure) Regulations 1985, Sch.1, r.7(1) (SI 1985/16); iv. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 1993, Sch.1, para.8(2) (SI 1993/2687); v. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, Sch.1, para.10(2) (SI 2001/1171); vi. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Sch.1, r.18(1) and r.18(2)(e) (SI 2004/1861); and vii. and The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Sch.1, r.18(1) and r.18A (i.e. the 2004 ET Rules, as amended with effect from 6 April 2009).

60. The parties agree that the amendments to the ET Rules 2004 were not designed to result in applications for interim relief being held in private, but were likely to have been designed to deal with a lack of clarity about how the composition of the tribunal was to be determined; i.e. was it to be an Employment Judge sitting alone or a full panel. The Respondents stated in their written submissions:

First, in respect of paragraphs 11 to 13:

a. We agree that the ET Rules 2004 (as originally enacted) lacked clarity about how the composition of the Tribunal was to be determined for a pre-hearing review. Rule 18(1) provided that PHRs "shall be conducted by a chairman unless the circumstances in paragraph (3) are applicable." Paragraph (3) then provided that PHRs "shall be conducted by a tribunal composed in accordance with section 4(1) and (2) of the Employment Tribunals Act if certain conditions were satisfied. This reference to s. 4(2) of the 1996 Act appears to have been an error: it was only ever s. 4(1) that set out the composition of a full tribunal, whereas s. 4(2) provided for proceedings to be heard by the chairman alone;

b. Before the amendment, there was also an apparent conflict between Reg. 18(1) and s. 4(5) of the 1996 Act. It was unclear whether the chairman could also direct that an application for interim relief be heard by a full tribunal in the 2 circumstances set out in s. 4(5) of that Act, which required them to take account of a wider range of circumstances than Reg. 18(3);

c. We agree that this could explain the removal of interim relief from the list in Rule 18(2) by the 2008 Regs. The 2008 Regs resolved this conflict by amending Rule 18(3) to remove "and (2)"; removing interim relief from the list in Rule 18(2); and adding Rule 18A. Rule 18A(2) provided that:

> **"Subject to the provisions applying to interim relief of … the Employment Tribunals Act, these rules shall apply when dealing with the following applications as they apply to pre-hearing reviews–**
>
> **(a) an application made under … section 128 of the Employment Rights Act for interim relief …" (our emphasis)**

The 2008 Regs thereby made clear that the composition of the Tribunal for the purposes of interim relief applications was governed by s. 4 of the 1996 Act, rather than Rule 18(1) and (3), which continued to apply to other PHRs;

d. In any event, we agree that the 2008 amendments did not affect the question of whether applications for interim relief were to be held in public. They were to be treated as PHRs pursuant to Rule 18A, and so to be held in public under Rule 18(1).

61. The parties agreed that the real question, therefore, is whether the ET Rules 2013 were designed to reverse the longstanding position that applications for interim relief were to be heard in public.

62. The Respondents contend that was the intention, and that just as a change was made so that applications for deposit orders were now to be heard in private, the same applied to applications for interim relief, because neither involve any determination of the parties' civil rights and obligations.

63. I do not accept that submission. For the reasons set out above, I consider that an application for interim relief is now to be treated as determining civil rights and obligations. Furthermore, the change to make the hearing of deposit orders private (I expect because they may sometimes be considered during the process of general case management, if the person against whom the order has been sought is given fair notice and a proper opportunity to prepare to defend the application) is clearly set out in the rules, whereas that is not the case for applications for interim relief.

64. In my note I also raised the interplay between section 4 ETA 1996 and the preliminary hearing provisions of the ET Rules 2013. Section 4 ETA 1996 provides:

> **4 Composition of a tribunal**
>
> **(1) Subject to the following provisions of this section …, proceedings before an employment tribunal shall be heard by—**
>
> > **(a) the person who, in accordance with regulations made under section 1(1), is the chairman, and**
> >
> > **(b) two other members, or (with the consent of the parties) one other member, selected as the other members (or member) in accordance with regulations so made.**
>
> **(2) Subject to subsection (5), the proceedings specified in subsection (3) shall be heard by the person mentioned in subsection (1)(a) alone ….**
>
> **(3) The proceedings referred to in subsection (2) are—**
>
> > **(c) proceedings … on an application under section 128, 131 or 132 of that Act …,**
>
> **(5) Proceedings specified in subsection (3) shall be heard in accordance with subsection (1) if a person who, in accordance with regulations made under section 1(1),may be the chairman of an employment tribunal, having regard to—**
> > **(a) whether there is a likelihood of a dispute arising on the facts which makes it desirable for the proceedings to be heard in accordance with subsection (1),**
> >
> > **(b) whether there is a likelihood of an issue of law arising which would make it desirable for the proceedings to be heard in accordance with subsection (2),**

> **(c) any views of any of the parties as to whether or not the proceedings ought to be heard in accordance with either of those subsections, and**
>
> **(d) whether there are other proceedings which might be heard concurrently but which are not proceedings specified in subsection (3),**
>
> **decides at any stage of the proceedings that the proceedings are to be heard in accordance with subsection (1).**

65. There are a number of points to note:

(1) The composition of the tribunal to hear an application for interim relief pursuant to section 128 ERA 1996 is specifically provided for in section 4 ETA 1996. This is consistent with it being something more than a mere application, such as an application for a case management order;

(2) Section 4 ETA sets out a number of specific matters that an Employment Judge should consider in determining whether the matter should be heard by a full panel rather than an Employment Judge sitting alone.

66. Rule 55 of the ET Rules 2013 provides for the composition of a tribunal at a Preliminary Hearing, as follows:

> **55. Preliminary hearings shall be conducted by an Employment Judge alone, except that where notice has been given that any preliminary issues are to be, or may be, decided at the hearing a party may request in writing that the hearing be conducted by a full tribunal in which case an Employment Judge shall decide whether that would be desirable.**

67. In my note I pointed out that it would appear that if the determination of an application for interim relief is not a preliminary issue, rule 55 ET Rules 2013 provides that it will be conducted by an Employment Judge sitting alone. Mr Jones accepted that this is the case but pointed out that there is a tension between the rules and section 4 ETA 1996 even if the hearing of an application for interim relief is a preliminary issue, because rule 55 provides less scope for a decision that a full panel should hear the application and requires a written application by one of the parties. He also pointed to the fact that rule 54 ET Rules 2013 (prior to its amendment by

Reg. 15 of the Employment Tribunals (Constitution and Rules of Procedure) (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2020/1003) provides for 14 days notice of a Preliminary Hearing at which a preliminary issue is to be determined, whereas only 7 days notice is required of a hearing to determine an application for interim relief.

68. While I accept that there is some difficulty in marrying up the requirements of section 4 ETA 1996 with the provision of the ET Rules 2013, I consider that the problems are more fundamental if an application for interim relief is not a preliminary issue. The composition of the tribunal hearing the application is of real significance; if the hearing of the application for interim relief is not a preliminary issue rule 55 ET Rules 2013 requires the matter to be heard by an Employment Judge sitting alone. That precludes the exercise of the discretion provided for in section 4 ETA 1996. If it is a preliminary issue the general discretion in rule 55 would allow the composition of the tribunal to be considered taking into account the specific matters that require consideration pursuant to section 4 ETA 1996. I accept that rule 54 ET Rules 2013, prior to amendment, would have to have been overridden by the provisions of the ERA 1996, in respect of interim relief for the matter to be listed swiftly as required. I do not consider that is nearly so weighty a matter as that of the composition of the tribunal.

69. Most importantly, the history of the ET Rules shows that applications for interim relief have since their inception been heard in public, and I do not consider that any of the material I have been referred to suggests that the introduction of the ET Rules 2013 was designed to change that position.

Overall conclusion of the public/private hearing issue

70. I consider that on normal principles of construction, the better reading of the ET Rules 2013 is that applications for interim relief are to be heard in public. I consider the subsidiary arguments strongly support this primary conclusion.

The Rule 50 Application

71. Rule 50 of the ET Rules 2013 makes provision for orders that restrict publicity:

> **50 Privacy and restrictions on disclosure**
>
> **(1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.**
>
> **(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.**
>
> **(3) Such orders may include—**
>
> **(a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;**
>
> **(b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;**
> **…**
> **(d) a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act.**

72. Employment Judge Adkin directed himself as to the law in respect of open justice as follows:

> **Appellate guidance**
>
> **20. In *Fallows v News Group Newspapers Ltd* [2016] ICR 801, Simler J (President) confirmed that the power to make orders under rule 50 is wide and goes wider than section 11 of the Employment Tribunals Act 1996 ("ETA") (sexual misconduct cases) and section 12 (disability cases). Relevant principles for the grant of restrictions were summarised in Fallows as follows:**
>
> > **[48] The authorities to which both I and the employment judge were referred, including In re *Guardian News and Media Ltd* [2010] 2AC 697, *A v British Broadcasting Corpn (Secretary of State for the Home Department intervening)* [2015] AC 588, In *re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 and *Global Torch Ltd v Apex Global Management Ltd* [2013] 1 WLR 2993, emphasise the following points of relevance to this appeal:**
> >
> > **(i) That the burden of establishing any derogation from the fundamental principle of open justice or full reporting lies on the person seeking that derogation. It must be established by clear and cogent evidence that harm will be done by reporting to the privacy rights of the person seeking the restriction on full reporting so as to make it necessary to derogate from the principle of open justice.**
> >
> > **(ii) Where full reporting of proceedings is unlikely to indicate whether a damaging allegation is true or false, courts and tribunals should credit the public with the ability to understand that unproven allegations are no more than that. Where such a case proceeds to judgment, courts and tribunals can mitigate the risk of misunderstanding by making clear that they have not adjudicated on the truth or otherwise of the damaging allegation.**
> >
> > **(iii) The open justice principle is grounded in the public interest, irrespective of any particular public interest the facts of the case give rise to. It is no answer therefore for a party seeking restrictions on publication in an employment case to contend that the employment tribunal proceedings are essentially private and of no public interest accordingly."**
>
> **21. In the case of *Ameyaw v Pricewaterhousecoopers Services Ltd (EAT)* [2019] ICR 976, HHJ Eady held in relation to Rule 50:**
>
> > **43 As well as allowing for a restriction in cases concerning confidential information (as provided by section 10A of the Employment Tribunals Act 1996), rule 50 thus provides that restrictions on publicity may be imposed both in the cases expressly referenced at sections 11 and 12 of the Act (sexual misconduct allegations; disability cases) but also more generally. This wider ability to restrict publicity derives from the Secretary of State's general power to make procedural regulations for employment tribunals, under section 7 of the Act, whether read by itself or construed in accordance with section 3 of the Human Rights Act 1998 (see *Fallows v News Group Newspapers Ltd* [2016] ICR 801, para 43, per Simler J (President)). It is apparent, however, that the Secretary of State has chosen**

> **to exercise that power in a different way to that allowed in national security cases.**
>
> **44 Taken at face value, the power to restrict publicity, whether for reasons of national security or otherwise, stands in contrast to the transparency that would otherwise be required by the principle of open justice. As already stated, it is a power, however, that acknowledges the fact that other competing rights and interests may sometimes require that transparency is curtailed. The rights provided by both article 6 and 10 of the ECHR are qualified and allow that interests of national security or other Convention rights (including the right to respect for private life under article 8) may outweigh the requirement for public access to judicial proceedings or pronouncements.**

The Judgment of Employment Judge Adkin

73. Employment Judge Adkin explained the basis of the application for an order pursuant to Rule 50 ET Rules 2013, as follows:

> **25. The respondent's argument is that the interim relief hearing will make public the serious allegations made by the claimant some 11 months before the hearing of the substantive claims listed to commence on 14 October 2021. According to a witness statement of the Chief Financial Officer [CFO] filed on behalf of the respondent the business is in a precarious financial position directly caused by the Covid-19 pandemic. The respondent's investments are solely in the hospitality sector. The effect of Covid-19 on the respondent's investments has apparently been 'catastrophic'. The business is in the process of seeking finance. Public allegations suggesting that its investors have been misled or victims of fraud are likely to make this difficult. …**
>
> **27. In short her evidence is that a precarious financial situation will be made worse on a variety of different fronts by the nature of the claimant's allegations.**

74. The third respondent also sought to rely on Article 8. That argument was not pursued in the appeal.

75. The conclusion reached by Employment Judge Adkin had the following elements:

(1) The circumstances in which an order can be made under Rule 50 are wider than those specifically provided for in the ETA 1996:

> **30. It is clear from the case law that orders may be made under Rule 50 in circumstances broader than sexual misconduct (s.11) and to protect a disabled person where there is evidence of a personal nature (s.12).**

(2) Commercial organisations are not entitled to protection from embarrassing allegations being made public:

> **33. It is not the law, based on current authority, that commercial organisations are entitled to protection from embarrassing allegations receiving publicity as a result of litigation in the Employment Tribunal. The guidance in the *Leicester University v A* case has useful application for wider than sexual misconduct cases. I doubt whether corporate respondents should easily invoke anonymity to protect their corporate reputations.**

(3) The burden to establish the requirement for a derogation from the principle of open justice is firmly on the person seeking it and, in this case, had not been discharged:

> **The burden is on the respondent, who is seeking a derogation from the fundamental principle of open justice and full reporting. I do not find, considering the competing arguments of both sides, and in view of the case law that that burden has been discharged.**

(4) The evidence advanced by the Respondents was of commercial embarrassment and did not warrant the protection of an order under rule 50 ET Rules 2013:

> **I have taken account of [CFO]'s evidence, which describes a kind of worst case scenario for the respondent business following on from a public interim relief hearing. Ultimately I have concluded that these are the sort of commercial considerations that fall within the Scott decision. It would be invidious for an employment judge hearing a two hour case management hearing like this one to have to assess whether a corporate respondent was on the brink financially. Many respondents defending claims at present time, with pressures caused by the Covid-19 pandemic may feel that the cost and potential negative publicity caused by embarrassing allegations will have come at a particularly bad time. I do not find, weighing up the competing Article rights find that these matters outweigh the other considerations.**

(5) The public, and specifically the investment community, could distinguish between allegations and determinations:

> **This is a situation in which, per Simler J in Fallows the public, and the investment community specifically, in the event that they came across a report of the interim relief hearing should be credited with the ability to understand that unproven allegations made by the claimant are no more than that. Tribunals frequently hear cases in which the claimant's version of events comes out first. In a longer trial it may be a week or so or even longer before the respondent's version of events comes out. It may then be several weeks or longer before the decision of the tribunal is promulgated. The public at large understand that this is the nature of contested litigation. Not every allegation made is proven.**

Can reputational damage to a company and/or resulting economic damage (including possible insolvency) ever justify an order under Rule 50?

76. Mr Laddie contended for the Claimant that reputational damage to a company and/or resulting economic damage (including insolvency) can **never** justify an order under Rule 50 ET Rules 2013.

The authorities in respect of reputational damage

77. The starting point must be the decision of Lord Atkinson in **Scott v Scott** [1913] AC 417 at 463:

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

78. In the commercial context, in **Global Torch Ltd v. Apex Global Management Ltd** [2013] 1 WLR 2993, it was held by Maurice Kay LJ:

> **28. …The present case is…concerned with allegations and counter-allegations of commercial misconduct, absent any element of confidential information. Open justice will not affect the legal value of the disputed rights and obligations. As with many civil and most criminal cases, grave allegations have been made. The judicial process will determine whether and to what extent they are established. Public airing of the allegations may embarrass one side or the other. It often does, but that is not in itself a good reason to close the doors of the court.**
>
> **33 When the open justice point was being argued before the judge, the position was no different from that which is present in many cases, civil or criminal. There are allegations and counter-allegations of serious misconduct. A person on the receiving end of such allegations will always be at significant risk of reputational damage. However, if the allegations are false, he will obtain his vindication through the judicial process, if not as a result of interlocutory application, then after a trial.**

79. The Claimant relied on **R v. Legal Aid Board ex p. Kaim Todner** [1999] QB 966, to support the proposition that the fact that financial loss may result from reputational damage does not prevent the principle of open justice being of full effect. The case concerned a firm of solicitors that brought proceedings for judicial review of a decision to revoke a legal aid franchise. The firm sought an order keeping their identity secret because "if the reasons on which the board rely for cancelling their franchise were to be made public, this is likely to cause the firm incalculable damage". Lord Woolf stated at para. 8:

> **In general, however, parties and witnesses have to accept the embarrassment and damage to their reputation and the possible consequential loss which can be inherent in being involved in litigation. The protection to which they are entitled is normally provided by a judgment delivered in public which will refute unfounded allegations. Any other approach would result in wholly unacceptable inroads on the general rule.**

80. Thus it appears that reputational damage, even if it may result in significant loss, will not support a derogation from the principle of open justice. As Mr Laddie submitted, were it otherwise, the more serious the allegation, and therefore the greater the risk of reputational damage and consequential financial loss, the more likely the making of a privacy order, meaning that the public would be prevented from knowing about some of the most serious claims before the courts and tribunals.

81. Mr Laddie accepts that there is some provision for excluding publicity because of resulting commercial loss as provided for in section 10A of the ETA 1996 (which is specifically referred to in Rule 50 ET Rules 2013), particularly section 10A(1)(c):

> **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—**

> **(a) information which he could not disclose without contravening a prohibition imposed by or by virtue of any enactment,**
>
> **(b) information which has been communicated to him in confidence or which he has other-wise obtained in consequence of the confidence reposed in him by another person, or**
>
> **(c) information the disclosure of which would, for reasons other than its effect on negotiations with respect to any of the matters mentioned in section 178(2) of the Trade Union and Labour Relations (Consolidation) Act 1992, cause substantial injury to any undertaking of his or in which he works.**

82. Mr Jones stated that the Respondents do not seek to rely on section 10A(1)(c) ETA 1996, as it was not applicable to the circumstances of this case, save that it demonstrates that commercial damage can, in principle, be the basis of protection by way of restriction of publicity. Mr Laddie contended that any protection is limited to that in section 10A, which is essentially dealing with confidential information, and there is no basis for any wider protection, whatsoever.

83. In **Scott v Scott** consideration was given to the circumstances in which there might be a derogation from the principle of open justice if a public hearing would prevent justice being done. Viscount Haldane LC stated at p437, giving the example of litigation about a commercially secret process:

> **.. it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. …**
>
> **But unless it be strictly necessary for the attainment of justice, there can be no power in the Court to hear in camera either a matrimonial cause or any other where there is contest between parties. He who maintains that by no other means than by such a hearing can justice be done may apply for an unusual procedure. But he must make out his case strictly, and bring it up to the standard which the underlying principle requires.**

84. Earl Loreburn stated at 445:

> **It has been held that when the subject-matter of the action would be destroyed by a hearing in open Court, as in a case of some secret process of manufacture, the doors may be closed. I think this may be justified upon wider ground. Farwell L.J. aptly cites Lord Eldon as saying, in a case of quite a different kind, that he dispensed with the presence of some of the parties " in order to do all that can be done for the purposes of justice rather than hold that no justice shall subsist among persons who may have entered into these contracts." An aggrieved person, entitled to protection against one man who had stolen his secret, would not ask for it on the terms that the secret was to be communicated to all the world. There would be in effect a denial of justice.**

85. The point of principle is that privacy should only be provide where it is absolutely **necessary** for justice to be done, in that without privacy there can be no justice in the matter.

86. In **Attorney-General v Leveller Magazine Limited** [1979] AC 440, Lord Diplock held at p 450:

> **However, since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule. Apart from statutory exceptions, however, where a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice.**

87. It is notable that I was only referred to one case where likely commercial damage was so severe that it was decided that it would prevent a party obtaining justice, and so merited an order restricting publicity. That case was raised by Mr Gallop, instructed by the intervenor, the Media Lawyers Association, in accordance with his duty to ensure all relevant authorities are before the EAT (a duty that is of paramount importance and bears being reiterated). In **R. v. Chief Registrar, Ex p. New Cross Society (C.A.)** [1984] 1 QB. 227 a building society sought judicial review of a decision by the registrar which would, in effect, prevent it accepting investment. The proceedings in the High Court and Court of Appeal were held in private

because of the catastrophic consequences that would flow from the proceedings becoming public. Sir John Donaldson M.R. stated at p235E to H:

> **Each application for privacy must be considered on its merits, but the applicant must satisfy the court that nothing short of total privacy will enable justice to be done. It is not sufficient that a public hearing will create embarrassment for some or all of those concerned. It must be shown that a public hearing is likely to lead, directly or indirectly, to a denial of justice.**
>
> **The instant case provides a good example of such exceptional circumstances. When the matter came before Webster J., all that was known was that the chief registrar had made orders which would effectively cause G the society to cease to carry on business and that the society challenged the validity of the orders. Assuming, as Webster J. has held, that the orders should never have been made, the society is entitled not only to have them quashed but to continue in business. However, the judge was told and accepted that if the society had to publicise the chief registrar's actions in the process of getting the orders quashed, the loss of public confidence in the society would be such that whether or not the orders were quashed, the society would be forced to close. In other words, a public hearing would effectively have deprived the society of the relief to which in law and justice it was or might be entitled. Accordingly Webster J. was entirely justified in hearing the society's application in camera.**

88. While this reasoning is described as *per curiam* in the headnote, presumably on the basis that it was not the subject of full argument, it demonstrated the analysis of the Master of the Rolls, with which the other members of the Court of Appeal agreed. It is also consistent with the previous and subsequent authorities that privacy may be required if publicity will prevent justice being done.

89. I am not persuaded that Mr Laddie is correct in his contention that no matter how much commercial damage might be done by a hearing being held in public, even if it will result in cessation of trading and loss of jobs, this could never form the basis for making an order restricting publicity of any kind, even if of limited duration. However, the circumstances would have to be such that publicity would have such catastrophic consequences that justice simply could not be done without the restriction. This would require full, frank and totally compelling evidence. The Courts and Tribunals will be astute to ensure that companies that face allegations of serious financial misconduct are not able to avoid public scrutiny of claims brought against

them by exaggerating the consequences of the mere existence of allegations against them being made known. The fact that a company may face fatal consequences should the allegations against it be upheld, provides no basis for an order restricting publicity; in such circumstances the dire consequences flow from the company's wrongdoing and warrant no protection. There should be no elision of the consequences of making public an allegation and it being upheld. While there may not be a presumption of law that the public can distinguish allegations from determinations (see the discussion of Lord Sumption in **Khuja** at para. 8) a judge may determine on the facts of a particular case that it can be assume that the public, or the relevant section of the public, will be able to distinguish between allegation and determination.

Did Employment Judge Adkin err in law in refusing to make a Rule 50 Order?

90. In **AAA v. Associated Newspapers** [2013] EWCA 554, the Master of the Rolls held that the balancing exercise to be conducted in determining whether to grant an order restricting publicity can only be overturned in limited circumstances, because it:

> **… is treated as analogous to the exercise of a discretion. Accordingly, an appellate court should not intervene unless the judge has erred in principle or reached a conclusion which was plainly wrong or outside the ambit of conclusions that a judge could reasonably reach**

91. In **Fallows** Simler P noted the high evidential threshold to support the making of an order under Rule 50, at para. 48. Employment Judge Adkin considered the evidence provided in support of the application for an order pursuant to rule 50 ET Rules 2013 at paras. 26-27 of his reasons. I consider that those paragraphs are a reasonable summary of the CFO's evidence. He did not doubt that the first and second Respondents were in a precarious position that might be made much worse by publicity if the interim relief hearing was held in public.

92. At paragraph 29 Employment Judge Adkin noted:

> **The point is made on behalf of the claimant that there are no authorities relied upon by the respondent which enable a company to avoid the public scrutiny of proceedings on the basis that it is commercially embarrassing or even that it might cause some harm to that business.**

93. From that paragraph it is clear that Employment Judge Adkin when referring to embarrassment had in mind that such embarrassment could cause very serious harm to the business. From the previous paragraph it is clear that he was aware that the CFO was contending that the financial consequences could be extremely severe. There was no error in that statement because commercial embarrassment alone, even if damaging to the business, is not sufficient to support the making of an order restricting publicity.

94. The **New Cross Society** case was not put before Employment Judge Adkin. It does not appear from the reasons, or on consideration of the skeleton argument of Mr Jones, that the application was put on the basis that a public hearing would be likely to lead, directly or indirectly, to a total denial of justice, in that absent privacy justice could not be achieved. It was not put in terms that the consequences of a public hearing would be so severe that the Respondents would be forced to concede the matter, or that the publicity would almost certainly lead to bankruptcy, so there would nothing left to litigate over; although I accept that there was reference to the risk to its survival. The statement of the CFO did not append accounting or other information that showed that a failure to grant the order would be very likely to result in bankruptcy. Mr Jones summarised the matter in the following terms in his skeleton argument submitted to the Employment Tribunal, stating that the order would:

> **protect the business (and the jobs dependent on its survival), at least during its immediate period of jeopardy.**

95. Mr Jones did not argue before the Employment Tribunal that the failure to make the order would prevent the Respondents having a fair trial in accordance with Article 6. Indeed he argues in the appeal that Article 6 has no application to an interlocutory hearing such as a hearing to determine interim relief. He put the matter in the Employment Tribunal on the basis that the Respondents might suffer reputational damage, with very severe financial consequences, including the possibility of collapse, should a public hearing be held.

96. I consider the core component of Employment Judge Adkin's reasoning was:

> **32. The burden is on the respondent, who is seeking a derogation from the fundamental principle of open justice and full reporting. I do not find, considering the competing arguments both sides, and in view of the case law that that burden has been discharged.**

97. Having noted the evidence given by the CFO, Employment Judge Adkin went on to state:

> **Ultimately I have concluded that these are the sort of commercial considerations that fall within the Scott decision.**

98. I do not consider that there was any error of law on the part of Employment Judge Adkin in concluding that the Respondents had not put forward evidence that went beyond commercial embarrassment, even though it might have potentially very serious financial consequences, and so the evidence did not support the making of an order under rule 50 ET Rule 2013. The evidence was not sufficient to establish that an open hearing would prevent justice being done at all.

99. To the extent that Mr Jones has valid criticisms of the reasoning, I do not consider that they undermine my conclusion that the core reasoning of Employment Judge Adkin was sound.

100. The Respondents claim that the tribunal erred in its approach to the decision in **Leicester University v A** [1999] ICR 7, in considering that it was of some application in determining whether an order under rule 50 ET Rules 2013 could be made in respect of a corporate party. I

accept that the case is not of relevance to that point as it deals only with the issue of whether restricted reporting orders within the meaning of the ETA 1996 (in respect of sexual misconduct etc) can be made to protect corporate respondents. That was not an issue in respect of the first and second Respondents. However, I do not consider that was a necessary part of Employment Judge Adkin's reasoning. He did not conclude that because the first and second Respondents were companies the application for an order under rule 50 ET Rule 2013 must necessarily fail. If he had done so his reasoning would have ended there. He concluded that the Respondents had not provided evidence that met the very high threshold for obtaining such an order.

101. The Respondents contend that the tribunal erred by purporting to take account of the evidence of the CFO while declining to determine whether it was substantially true, and proceeding on the basis that the Respondents were only at risk of embarrassment. I consider that on a proper reading of the reasons for the order, Employment Judge Adkin concluded that even taking the CFO's evidence at face value it was not sufficient to support the making of an order under rule 50 ET Rules 2013.

102. Employment Judge Adkin stated, "It would be invidious for an employment judge hearing a two hour case management hearing like this one to have to assess whether a corporate respondent was on the brink financially". It is hard to see how he could have reached a final determination on this matter on evidence that the Claimant had so limited an opportunity to challenge. Fundamentally, even if there had been a longer hearing and more opportunity for the Claimant to challenge the evidence, this would not have altered the fact that it was insufficient to support the making of the orders sought.

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103. Next it is contended that Employment Judge Adkin erred by "taking into account an irrelevant factor, namely, whether many respondents defending claims might feel that, because of the Covid-19 pandemic, potential negative publicity caused by embarrassing allegations will have come at a particularly bad time." I accept that were the Respondents to have provided the totally compelling evidence required to establish that justice simply could not be done if the hearing was held in public, the fact that other companies were in the same position because of the Covid Pandemic, would not have been relevant to determining whether to make an order under rule 50 ET Rules 2013. However, the evidence was insufficient to make such an order, so this criticism does not undermine the fundamental decision.

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104. It is contended that the decision not to make an order restricting publicity was perverse because of the severe consequences for the Respondents should the allegations against it be made public. I do not accept that is made out in circumstances where I consider that the evidence, at its highest, did not support the making of an order pursuant to rule 50 ET Rules 2013.

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105. It is also worth considering the fact that interim relief will only be awarded if the tribunal conclude that it is likely that the Claimant will be successful at the final hearing. Accordingly, while it is true that allegations might be made public that will only be finally determined in nearly a year from now, it will be clear whether the tribunal considers that it is likely that the allegations will be made out. Mr Jones said that the Respondents will only be relying on causation in contending that it is unlikely that the allegations will be made out, and may not choose to challenge the question of whether protected disclosures were made at the interim relief hearing, particularly as the matter does not turn on the question of whether the information did, in fact, tend to show wrongdoing, but on whether the Claimant reasonably believed the allegations tended to show fraud, or some other breach of legal obligation. It is a matter for the Respondents how

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they defend the application for interim relief, but it would be incorrect to think that the hearing will only involve the allegations being aired, there will be a consideration of the likelihood of the claim being made out.

106. I do not consider that Employment Judge Adkin erred taking into account the fact that the investment community may be taken to understand the difference between allegations and findings. It may well be that mere allegations may affect their investment decisions but, save in the most exceptional circumstances, that is a necessary consequence of open justice. Otherwise, every time a company is subject to serious allegations of financial misconduct that may result in a loss of investor confidence, they can seek an order restricting publicity, with the result that not only interlocutory hearings, but also final hearings, would be held in private; the more serious the allegation and the better evidenced it is, the more likely it is that privacy would be granted. The public would be prevented from hearing about some of the most serious cases that come before the courts and tribunals. That would be inconsistent with the fundamental principle of open justice.

Costs

107. The Claimant made an application for costs for that part of the appeal in which it was contended that Employment Judge Adkin erred in law in refusing to make an order pursuant to Rule 50 ET Rules 2013.

108. The Employment Appeal Tribunal has a discretion, pursuant to rule 34A of the Employment Appeal Tribunal Rules 1993 (as amended) (EAT Rules 1993), to make an award of

costs in circumstances that include where the appeal was misconceived. Misconceived means that the appeal had no reasonable prospects of success.

109. It is contended on behalf of the Claimant that the appeal was misconceived in that there was insufficient evidence, and no proper legal basis, for making an order restricting publicity in respect of the first and second Respondents. It is contended that the only evidence was of commercial embarrassment and economic damage that might flow from it. That was insufficient to support the making of an order under rule 50 ET Rule 2013, and so the original application and appeal had always been bound to fail.

110. It is necessary to consider how the case was put in the Employment Tribunal. It was submitted on behalf of the Respondents that should there be a public hearing they would be likely to suffer severe financial damage, which might even affect their ability to survive. The Claimant contended that there was no power to make an order under Rule 50 ET Rule 2013, on the basis that a party would suffer commercial embarrassment even if it results in financial damage, however serious. Neither party referred the Employment Tribunal to **New Cross Society**. I accept that it was argued, on behalf of the first and second Respondents, that they might suffer very severe financial consequences were the interim relief hearing held in public. The matter was not put on the same basis as in **New Cross Society** that an order should be made because publicity would prevent justice from being done at all.

111. The Claimant did not provide the Employment Tribunal with the **New Cross Society** case. It is a decision of the Court of Appeal that should have been before the Employment Tribunal as it went against the submission that commercial damage could never be relied upon to support an application pursuant to rule 50 ET Rules 2013.

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112. I appreciate that **New Cross Society** is not one of the cases commonly referred to in the literature on open justice; this is demonstrated by the fact that such experienced barristers had not found it in their researches. I am not criticising Counsel who have prepared their arguments with such great care; but they both might be said to have made what His Honour Peter Clark would have referred to as Homeric nods. However, **New Cross Society** was an important authority that would have assisted the Tribunal in analysing this matter, and potentially avoid some of the unclear and, in places, erroneous, subsidiary reasoning.

113. I have rejected Mr Laddie's primary contention in response to the appeal that there is no power to make an order under rule 50 ET Rules 2013 because of the commercial damage that might be caused to a company if publicity is allowed.

114. I made a number of criticisms of the subsidiary reasoning of Employment Judge Adkin. I accept that it was just arguable that when Employment Judge Adkin stated that it "would be invidious for an employment judge hearing a two hour case management hearing like this one to have to assess whether a corporate respondent was on the brink financially" that this suggested that he was not engaging with the evidence of the extent of the financial difficulty that the first and second Respondents contended they might face, and that he had possibly accepted the Claimant's argument that financial damage could never found an order under Rule 50 ET Rules 2013. There was an argument that the reliance on the number of companies in difficulties because of the Covid pandemic involved taking account of an irrelevant factor. I also accepted that Employment Judge Adkin erred in relying on **Leicester University**.

115. I concluded that despite those infelicities that the core of the reasoning of Employment Judge Adkin was that the evidence put forward by the Respondents was insufficient to found the making of an order under rule 50 ET Rules 2013 because it did no more than show potential commercial embarrassment, leading to potential financial damage. It was not put by the Respondents before the Employment Tribunal that the alleged damage was of a kind that would prevent justice being done at all. I do not consider that, on a proper reading of his reasons, Employment Judge Adkin decided that there was no power, in any circumstances, to make an order because of financial damage that publicity might cause. He clearly thought it would require extremely compelling evidence to make such an order and so, without it being put before him, was effectively applying the approach in **New Cross Society**.

116. The position is clearer in the EAT now that I have had the benefit of submissions on the **New Cross Society** case. Because the arguments were put rather differently before the Employment Tribunal, and the effect that had on the way in which the reasoning was expressed, and because of the errors in the supplementary reasoning, I do not consider it can be properly said that this appeal had no reasonable prospects of success.

117. Furthermore, there are a number of factors that I have considered as a matter of discretion that point against making an order for costs. When HHJ Auerbach permitted the matter to proceed pursuant to rule 3(7) EAT Rule 1993 he referred to an aspect of "interaction" between the two parts of the appeal. I consider he was right to do so. As one of the supplementary grounds supporting my decision that interim relief hearings are to be held in public, I concluded that should there be any ambiguity in the wording of the ET Rules 2013, the principle of open justice supported the determination that such hearings should be in public. It is important to consider the specific circumstances of the case under consideration even when determining a point of general

application. It was important to have in mind the type of information that it was contended could come into the public domain, and the financial consequences it might have, in considering the open justice principle. While the overlap is minor, I do consider that it is a factor to be taken into account in determining the question of costs. While the mere fact that an argument gets through the sift does not prevent an order for costs being made: **Iron and Steel Trades Confederation v ASW Ltd** [2004] IRLR 926, the fact that it did, and the reasoning of the judge who allowed it to proceed, may be relevant to exercising the discretion to award costs.

118. Neither party referred Employment Judge Adkin to **New Cross Society**, which I have found to be of importance in considering the general principle of whether financial damage could ever be a factor that would support the making of an order under rule 50 ET Rule 2013. This is another reason why the discretionary factors also point against the making of an order of costs in this case. If the Claimant had submitted this authority and, rather than contending that there could never be an order under rule 50 ET Rule 2013, based on financial damage, but that it was only appropriate where compelling evidence established that financial damage would be so catastrophic that justice could not be done, the arguments would have been better focussed, and the infelicities in the subsidiary reasoning might have been avoided.

119. The appeal against the refusal to grant an order in respect of the third Respondent was abandoned at the outset of the appeal. Because of the lack of specific evidence in respect of the third Respondent, the application before the Employment Tribunal and the appeal did not have reasonable prospects of success. However, I consider that it is so minor a part of the appeal that bringing it and/or pursuing it up to the day of the hearing, was not conduct sufficient to warrant an award of costs. Cost were not sought in respect of this part of the appeal alone and the schedule

did not attribute any particular part of the costs to it. However, they cannot have been substantial as this was such a peripheral issue.

120. I reject the application for costs.

Permission to appeal and discharge of the anonymity Order

121. The Respondents did not seek permission to appeal and accepted that the anonymity Order would lapse. I direct that the anonymity Order made by HHJ Auerbach on 2 December 2020 is discharged.

122. I would like to thank Counsel and the legal teams for all their hard work in preparing this expedited appeal for hearing, and for presenting the competing arguments with such care.