Neutral Citation Number: [2022] EAT 34

Case No: EA-2021-000690-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17 March 2022

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

MR R FREWER	**Appellant**
- and -	
GOOGLE UK LIMITED AND OTHERS	**Respondents**

- -
- -

Richard O'Dair (instructed by Greenwoods GRM LLP) for the **Appellant**
Talia Barsam (instructed by Lewis Silkin LLP) for the **Respondents**

Hearing date: 23 February 2022

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The employment tribunal failed properly to consider the open justice principle, including the importance of naming names, in ordering the anonymisation of all clients of the first respondent and failed to apply the necessary step by step consideration of the application for redaction of documents described in the order as being "commercially sensitive" and "irrelevant". The matter was remitted to the employment tribunal.

HIS HONOUR JUDGE JAMES TAYLER:

Introduction

1. The claimant commenced employment with the first respondent on 6 August 2007. By the time of his dismissal he was employed as Commercial Director - Travel EMEA. The claimant was dismissed summarily on 8 June 2020. The first respondent asserts that the claimant was dismissed because of his conduct at a dinner on 25 September 2019, when he allegedly sexually harassed two female colleagues, by making inappropriate sexual comments and suggestions.

The claim

2. On 3 November 2020 the claimant presented a claim to the employment tribunal. The claimant brought the claim against the first respondent and three employees of the first respondent as named respondents. He claimed: unfair dismissal; wrongful dismissal; direct disability discrimination; discrimination because of something arising in consequence of disability; detriment done on the grounds of having made protected disclosures, against the second to fourth respondents; and, automatic unfair dismissal on the basis that the dismissal was for the reason, or principal reason, that he had made protected disclosures, against the first respondent. The claimant complained about his dismissal and the failure to uphold his appeal. The protected disclosures were said to have been made on various dates to be confirmed following the first respondent's reply to the claimant's subject access request.

3. The claimant contended, in essence, that he had made disclosures of information, that in his reasonable belief were made in the public interest, and tended to show that the first respondent was engaged in anti-competitive behaviour by favouring two major clients in the travel industry.

Preliminary hearing for case management

4. A preliminary hearing for case management was fixed for 12 March 2021. In advance of the preliminary hearing for case management the claimant produced a document described as a “Further List of Issues”. To say the least, the document expanded on the protected disclosure claim. 22 groups

of disclosures were set out. The first respondent asserts that when analysed there are in excess of 100 separate disclosures.

The application for redaction and anonymity

5. At the preliminary hearing for case management on 12 March 2021, the first respondent sought anonymisation of all of its clients. EJ Grewal directed that if the first respondent wished to pursue the matter it should make an application in writing setting out the legal and factual basis on which it sought the order. EJ Grewal stated that: "Having considered the application and the response, I will decide whether the application should be dealt with on paper or at a hearing."

6. On 16 April 2020 the respondent wrote to the employment tribunal:

> …we write to apply for an order pursuant to Rules 29 and 50 of the Employment Tribunal Rules of Procedure 2013 (the "ET Rules") that:
>
> > • The names of the First Respondent's clients, where they appear in either the agreed bundle or in witness statements, be redacted and referred to by a code number, with the panel, the parties' representatives and the witnesses to be provided with a copy of the code;
> >
> > • Following on from the above, the names of the First Respondent's clients be referred to only by their code number in the Tribunal decision and any reports of the proceedings, and that no confidential information belonging to the First Respondent or any of its clients which is not in the public domain be referred to in any such decision or reports; and
> >
> > • The First Respondent be permitted to redact commercially sensitive and irrelevant information from the bundle of documents in this claim.
>
> The purpose of this application is to protect sensitive confidential information (including confidential information belonging to the First Respondent's clients) which is not relevant to the matters to be determined by the Tribunal, by limiting its disclosure to the public. [emphasis added]

7. The first respondent asked that the matter be dealt with on the papers.

8. The claimant responded on 23 April 2021, asserting that the employment tribunal did not have the power to make the orders requested, that the orders would be contrary to the open justice principle and that any consideration of redaction should take place only after disclosure.

9. The first respondent replied slightly modifying the order sought and seeking an order that specified that the respondent would be permitted to redact "commercially sensitive and irrelevant" information "which would include details of its overall revenue figures which are not client specific".

10. The matter was considered by Employment Judge Grewal on the papers who made the following Order on 18 June 2021:

> 1 The names of the First Respondent's clients are to be anonymised in all the documents put before the Tribunal and made available to the public.
>
> 2 The First Respondent is permitted to redact commercially sensitive **and** irrelevant information (which would include details of its overall revenue figures which are not client specific) from all documents put before the Tribunal. [emphasis added]

11. The first respondent has read the second order as being conjunctive, in that for information to come within the terms of the order it must be both commercially sensitive and irrelevant.

12. In its reasons the employment tribunal referred to the information that might be redacted:

> 5 The documentation upon which the Claimant relies to establish that the disclosures that he made were "qualifying disclosures" contains commercially sensitive and confidential information relating to the First Respondent's business and client relationships. It includes (a) lists of the First Respondent's top clients in the EMEA travel space and detailed breakdowns of their spend with the First Respondent; (b) details of the First Respondent's identification of business opportunities and growth strategies and (c) details of overall revenues received by the First Respondent in relation to EMEA travel, broken down by region and country with year on year comparison. The information at (a) (above) is confidential not just to the First Respondent but also to the clients in question who have no part in these proceedings. The information is highly sensitive in terms of what it reveals about their marketing strategies. Its public disclosure would give competitors access to information that would not normally be available to them. It could cause damage to the position of the clients and to their relationship with the First Respondent. The information at (b) and (c) (above) is confidential to the First Respondent and would give its competitors an unfair commercial advantage. [emphasis added]

13. The employment tribunal's consideration of the law was limited to setting out the provisions of Rules 29 and 50 of the Employment Tribunal Rules 2013 ("ET Rules") and stating:

> 8 The authorities all make it clear that the principle of open justice is of paramount importance and that the burden of establishing any derogation from it lies on the person seeking that derogation. Most of the reported cases deal with orders being sought in order to protect the Convention rights of the person seeking the orders and the balancing exercise to be conducted between competing Convention rights.
>
> 9 The present case is not such a case. The First Respondent is applying for the orders on the grounds that it is necessary in the interests of justice to make the orders to prevent any abuse of its and its clients confidential information. Under Rules 29 and 50(1) the Tribunal has the power to make the orders sought if it considers it necessary in the interests of justice to do so. All courts have an inherent power to allow evidence to be given in such a way that the identity of a witness or other matters is not more widely disclosed in open court if the interests of justice require it (per Lord Sumption in Khuja v Times Newspapers Ltd [2019] AC 161, at 174, 176). It is very difficult to justify the restriction of reporting of, or not providing to the public, any evidence that has been given or any material that has been placed before a court or a tribunal. It is, therefore, important to consider whether any evidence that is to be placed in the public domain is necessary for the fair disposal of the proceedings. [emphasis added]

14. The employment judge then set out her conclusions:

> 10 In considering whether it is in the interests of justice to make the orders sought I took into account the following matters. The First Respondent is not seeking to have any part of the case heard in private, it will all be heard in public. The Claimant's case will not be prejudiced by the making of the orders sought. All the relevant documents containing the confidential and commercially sensitive information will be disclosed to him and he will be able to use them to make the points that he wishes to make. The identity of the clients is irrelevant to the issues that the Tribunal has to determine. The issue for the Tribunal will be whether he had reasonable grounds for believing that the First Respondent was giving preferential treatment to certain clients to the detriment of other clients and that that was in breach of anti-competition laws. The Tribunal does not need to know the identity of the clients. Nor does the Tribunal need to know commercial information relating to the First Respondent that has no bearing on the issues. The clients are not parties to the proceedings, they are not witnesses, they play no part in the proceedings. The information that the Respondent is seeking to redact/anonymise is not necessary to the fair disposal of the proceedings. The interference with the principle of open justice is minimal. The potential of commercial harm to persons who have no part to play in these proceedings if an order is not made is real. The making of the order will not in any way prevent the Claimant from having a fair trial. The unredacted documents will be made available to the Claimant and he will have the opportunity to express his views on the proposed redactions. In the event of any specific dispute, the matter can be referred back to the Tribunal. I consider it necessary in the interests of justice to make the orders sought by the Respondents. [emphasis added]

15. The claimant applied to set aside the second order and sought further disclosure. The application was refused by letter dated 30 July 2021. The employment judge stated:

> The Claimant's application to revoke the second order of 18 June 2021 is refused. As has already been made clear, all documents that are disclosable will be disclosed unredacted to the Claimant, the Claimant will have an opportunity to comment on the proposed redactions and any dispute will be determined by a judge. The Claimant's real complaint appears to be that the Respondent has failed to disclose documents that should have been disclosed. That issue can be dealt with by an application for specific disclosure. The two issues are separate.
>
> The Claimant's application for specific disclosure dated 4 June 2019 is far too wide and generalised and it would be disproportionate to order the Respondent to search for and disclose all those documents. The disclosure of all those documents would not assist the Tribunal in determining the issues that it has to determine. If the Claimant wishes to pursue an application for specific disclosure it needs to be more focused and precise.

The Appeal

16. The claimant appealed by a Notice of Appeal dated 5 July 2021. The claimant's counsel summarised, and simplified, the grounds of appeal as being:

> Ground 1 No power to make either order for the reason given
>
> Ground 2: The Tribunal erred in concluding in paragraph 10 that C would not be prejudiced by the making of the order
>
> Ground 3 – reversal of the burden of redaction justification

17. The first respondent contends that the employment tribunal had the power to make the orders

and that it was entitled to make the orders as a matter of case management discretion that should not be interfered with on appeal.

The principles involved

18. There are a number of principles that it is important to distinguish:

18.1. A party is not required to disclose documentation unless it is relevant to the issues in dispute; a document will only be "relevant" if it supports or adversely affects a party's case

18.2. Even if material is relevant an order for disclosure should not be made unless the material is necessary for the fair determination of the issues

18.3. If a document contains material some of which is relevant and necessary for the fair determination of the issues and some that is irrelevant, it may be appropriate to redact irrelevant sections, if there is some good reason such as commercial confidentiality or sensitivity

18.4. If material is relevant and necessary for the fair determination of the issues there may be restrictions on publicity including redaction where it is appropriate to make an order pursuant to Rule 50 ET Rules. The parties or other persons mentioned in legal proceedings may be anonymised pursuant to Rule 50. Any application for an order pursuant to Rule 50 must be considered giving full regard to the principle of open justice and must be properly evidenced. Such an order can only be made if it is necessary.

Relevance and necessity

19. The principles underlying disclosure in the employment tribunal were considered by Choudhury J (President) in **Tesco Stores Limited v Ms K Element & Others** UKEAT/0228/20/AT:

> 21. Rules 29 and 31 of the Employment Tribunals Rules of Procedure (as contained in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013) ("the ET Rules") are relevant for present purposes. These provide:
>
> > "Case management orders
> >
> > 29. The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. Subject to rule 30A(2) and (3) the particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.

> …
> Disclosure of documents and information
>
> 31. The Tribunal may order any person in Great Britain to disclose documents or information to a party (by providing copies or otherwise) or to allow a party to inspect such material as might be ordered by a county court or, in Scotland, by a sheriff."

22. It is clear from Rule 31 that the Tribunal's powers in respect of disclosure and information are coterminous with those of the County Court. That means that the power to order disclosure is the same as in Part 31 of the Civil Procedure Rules ("CPR") and the power to order the provision of information is the same as in Part 18, CPR.

23. CPR 31.5 provides that an order to give disclosure is an order to give "standard disclosure". This is defined in CPR 31.6 as follows:

> "31.6 Standard disclosure—what documents are to be disclosed Standard disclosure requires a party to disclose only–
>
> (a) the documents on which he relies; and
>
> (b) the documents which –
>
> (i) adversely affect his own case;
> (ii) adversely affect another party's case; or
> (iii) support another party's case; and
>
> (c) the documents which he is required to disclose by a relevant practice direction."

24. The guiding principle for disclosure is not, therefore, mere relevance but whether the document is one on which a party relies, adversely affects his own or another party's case, or supports another party's case, as was made clear by Linden J recently in *Santander UK PLC v Bharaj* UKEAT/0075/20/LA:

> "18. As Lewison LJ said in relation to [the test in CPR 31.6] Shah v HSBC Private Bank (UK) Limited [2011] EWCA Civ 1154 at paragraph 25:
>
> 'It is notable that the word 'relevant' does not appear in the rule. Moreover the obligation to make standard disclosure is confined 'only' to the listed categories of document. While it may be convenient to use 'relevant' as a shorthand for documents that must be disclosed, in cases of dispute it is important to stick with the carefully chosen wording of the rule...'
>
> 19. Thus, the test under Rule 31.6 is not one of relevance, although documents which satisfy the Rule 31.6 test will by definition be relevant. Relevance is a more flexible and potentially broader concept and, obviously, there are degrees of relevance: see the discussion in *HSBC Asia Holdings BV & Anor v Gillespie* [2011] ICR 192, particularly at paragraph 13(2). For this reason, I will use the term "disclosable" rather than "relevant" where I am referring to documents which the parties are required to disclose pursuant to their duty of disclosure."

25. Linden J went on to consider CPR 31.12 (3), which provides for specific disclosure:

> "23. Rule 31.12(3) also provides for orders for specific inspection (see also Rule 31.19 which deals with claims to withhold disclosure or inspection). As I have said, Practice Directions 31A UKEAT/0075/20/LA and 31B contain helpful guidance as to how these powers should be exercised in relation to hard copy and electronic disclosure respectively. These Practice Directions emphasise the need for a proportionate approach and explain how the overriding objective should be applied in this context.

> 24. As is well known, in **Canadian Imperial Bank of Commerce v Beck** [2009] IRLR 740 CA, Wall LJ said this at paragraph 22:
>
> "In our judgment, the law on disclosure of documents is very clear, and of universal

> application. The test is whether or not an order for discovery is 'necessary for fairly disposing of the proceedings'. Relevance is a factor, but is not, of itself, sufficient to warrant the making of an order. The document must be of such relevance that disclosure is necessary for the fair disposal of the proceedings. Equally, confidentiality is not, of itself, sufficient to warrant the refusal of an order and does not render documents immune from disclosure. 'Fishing expeditions' are impermissible."

25. In applying this passage, ETs should bear in mind what was said by Mr Justice Eady in *Flood v Times Newspapers Ltd* [2009] EMLR 18 about the approach to applications for specific disclosure, correctly using the terminology of CPR Rule 31.6 rather than the potentially broader and less precise concept of relevance:

> "23. The first requirement is that any documents sought must be shown to be likely to support or adversely affect the case of one or other party. Thus, the question to be asked in each case is whether they are likely to help one side or the other. The word "likely" in this context has been considered in the Court of Appeal and is taken to mean that the document or documents "may well" assist: see e.g. *Three Rivers District Council v Governor and Company of the Bank of England (No 4)* [2003] 1 WLR 210.
>
> 24. Secondly, the hurdle must be overcome of demonstrating that disclosure of the documents sought is 'necessary' in order to dispose fairly of the claim or to save costs. This only arises for consideration if the first hurdle has been surmounted. Unless the documents are relevant in that sense, it is not necessary to address the test of necessity.
>
> 25. Thirdly, there is a residual discretion on the part of the court whether or not to make such an order - even if the first two hurdles have been overcome … It is at this third stage that broader considerations come into play, such as where the public interest lies and whether or not disclosure would infringe third party rights in relation, for example, to privacy or confidentiality. If so, the court must conduct a careful balancing exercise …"
>
> 26. I entirely agree and note that these passages were adopted by the Employment Appeal Tribunal at paragraph 24 of its decision in *Birmingham City Council v Bagshaw and others* [2017] ICR 263. … "

26. I agree with Linden J's analysis of the authorities.

20. Choudhury J then went on to consider the principles applicable to specific disclosure:

> 27. CPR Rule 31.5(1)(b) provides "the court may dispense with or limit standard disclosure" and CPR 31.12, as referred to in Santander, provides that "The court may make an order for D specific disclosure or specific inspection". These powers introduce an element of judicial discretion into the disclosure process. That discretion must be exercised in accordance with the overriding objective. For Employment Tribunals that is set out in Rule 2 of the ET Rules:
>
> "2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
> (a) ensuring that the parties are on an equal footing;
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

21. Choudhury J summarised the position:

28. The position as to the Tribunal's powers as to disclosure may be summarised as follows:

> (a) the Tribunal's powers under Rule 31 of the ET Rules are coterminous with those of the Court under CPR 31;
>
> (b) as such, the guiding principle is not relevance but whether the documents are relied on by a party, or are likely to support or be adverse to a party's case. A document falling within that description will be relevant;
>
> (c) if relevance in that sense is established, the test for making an order for disclosure is whether it is necessary for the fair disposal of the proceedings; and
>
> (d) the Tribunal has a discretion as to whether to order disclosure. Such discretion must be exercised in accordance with the overriding objective.

Redaction

22. If a document does not support, or is not adverse, to a party's case, or is not necessary for the fair disposal of the proceedings then it need not be disclosed in the first place; that will avoid long battles about redaction. If there is a dispute about whether specific documents should have been disclosed this can be dealt with by an application for specific disclosure.

23. Documents may contain material that is likely to support or be adverse to a party's case and is necessary for the fair disposal of the proceedings, but other material that is not. Generally, this is not a problem because the irrelevant material can be ignored. It is usually helpful to have an entire document, to better understand it. However issues can arise where there is sensitive or confidential material, either commercially or personally (in which case Article 8 rights might be engaged); in which case consideration may have to be given to including only part of the document in the bundle or to redaction: particularly as the bundle may be available for inspection at the hearing, and possibly thereafter: **Dring v Cape Intermediate Holdings Ltd** [2019] UKSC 38, [2020] AC 629

24. The Court of Appeal explained the principles applicable to redaction in **Hancock v Promontoria (Chestnut) Ltd [2020]** EWCA Civ 907, [2020] 4 WLR 100 [85]-[87]:

> 85 It has been settled law in this jurisdiction for well over a century that a litigant giving disclosure of documents is entitled to redact parts of a document which are irrelevant, and in all normal circumstances a certificate to that effect by the party's solicitor will be treated as conclusive. As Hoffmann LJ explained in GE Capital Corporate Finance Group v Bankers Trust Co [1995] 1 WLR 172 at p 174B:
>
> > It has long been the practice that a party is entitled to seal up or cover up part of a document which he claims to be irrelevant. Bray's Digest of the Law of Discovery, 2nd ed (1910), pp 55–56 puts the matter succinctly: 'Generally speaking, any part of a document may be sealed up or otherwise concealed under the same conditions as a whole document may be withheld from production; the party's oath for this purpose is as valid in the one case as in the other. The practice is either to schedule to the affidavit of documents those parts only which are

> relevant, or to schedule the whole document and to seal up those parts which are sworn to be irrelevant; …"
>
> "The oath of the party giving discovery is conclusive, 'unless the court can be satisfied—not on a conflict of affidavits, but either from the documents produced or from anything in the affidavit made by the defendant, or by any admission by him in the pleadings, or necessarily from the circumstances of the case—that the affidavit does not truly state that which it ought to state:' per Cotton LJ in *Jones v Andrews* (1888) 58 LT 601, 604."

86 To similar effect, Leggtt LJ said in the same case, at pp 176–177H:

> The plaintiffs are obliged to disclose the relevant parts of documents, but not the irrelevant … For over a century litigants have been permitted to cover up or blank out irrelevant parts of documents. The court will not ordinarily disregard the oath of the party that the parts concealed do not relate to the matters in question."

87 In the Disclosure Pilot for the Business and Property Courts (CPR PD 51U) express provision is now made in paragraph 16.1 for the redaction of a part or parts of a documents: "on the ground that the redacted data comprises data that is— (1) irrelevant to any issue in the proceedings, and confidential; or (2) privileged." Paragraph 16.2 then provides that any redaction "must be accompanied by an explanation of the basis on which it has been undertaken and confirmation, where a legal representative has conduct of litigation for the redacting party, that the redaction has been reviewed by a legal representative with control of the disclosure process." A party who wishes to challenge the redaction must apply to the court by an application notice supported where necessary by a witness statement: ibid. It will be noted that redaction is permitted under paragraph 16.1 only where the relevant material is both irrelevant and confidential. Confidentiality alone is not enough. [emphasis added]

25. It is important to appreciate that if a document is not relevant in the sense of being likely to support or be adverse to a party's case, or is not necessary for the fair disposal of the proceedings, it need not be disclosed; or if there is such information in some part of a document it may be redacted (but this should be attested to by the party making the redaction); but, if material is likely to support or be adverse to a party's case and is necessary for the fair disposal of the proceedings it should be disclosed, and cannot be redacted merely on the basis that it is confidential. Any order for redaction on grounds of confidentiality must be made only where necessary on an application supported by evidence having full regard to the open justice principle, usually pursuant Rule 50 ET Rules.

The Principle of Open Justice

26. In **Dring** Baroness Hale of Richmond PSC reiterated the importance of the open justice principle:

> 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."

27. Baroness Hale set out the main purposes of the open justice principle:

> 42 The principal purposes of the open justice principle are two-fold and there may well be others. The first is to enable public scrutiny of the way in which courts decide cases to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly. In *A v British Broadcasting Corpn* [2015] AC 588, Lord Reed JSC reminded us of the comment of Lord Shaw of Dunfermline, in Scott v Scott [1913] AC 417, 475, that the two Acts of the Scottish Parliament passed in 1693 requiring that both civil and criminal cases be heard "with open doors", "bore testimony to a determination to secure civil liberties against the judges as well as against the Crown" (para 24).
>
> 43 But the second goes beyond the policing of individual courts and judges. It is to enable the public to understand how the justice system works and why decisions are taken. For this they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases. In the olden days, as has often been said, the general practice was that all the argument and the evidence was placed before the court orally. Documents would be read out. The modern practice is quite different. Much more of the argument and evidence is reduced into writing before the hearing takes place. Often, documents are not read out. It is difficult, if not impossible, in many cases, especially complicated civil cases, to know what is going on unless you have access to the written material.

Naming Names

28. In **R (on the application of C) v Secretary of State for Justice** [2016] UKSC 2, [2016] 1 WLR 444 Baroness Hale explained the rather different reason why it is important to name the names of those involved in legal proceedings:

> 18. However, in many, perhaps most cases, the important safeguards secured by a public hearing can be secured without the press publishing or the public knowing the identities of the people involved. The interest protected by publishing names is rather different, and vividly expressed by Lord Rodger in *In re Guardian News and Media Ltd* [2010] UKSC 1; [2010] 2 AC 697, para 63:
>
> > "What's in a name? 'A lot', the press would answer. This is because stories about particular individuals are simply more attractive to readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected. … The judges [have recognised] that editors know best how to present material in a way that will interest the readers of their particular publication, and so help them to absorb the information. A requirement to report it in some austere abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive."
>
> 19. Of course, there are now many more ways of disseminating information, through the electronic media, to which that last comment does not apply. However, Lord Rodger also pointed out that the identities of claimants "may not matter particularly to the judges. But the legitimate interest of the public is wider than the interests of judges qua judges or lawyers qua lawyers" (para 38). Furthermore, the fact that the parties have agreed to anonymity cannot absolve the court from balancing the interests at stake for itself. Indeed that is when there is the greatest need for vigilance (para 2). [emphasis added]

29. In **Khuja v Times Newspapers Ltd** [2017] UKSC 49, [2019] AC 161, Lord Sumption JSC stated with reference to **In re Guardian News and Media Ltd**:

> The public interest in the administration of justice may be sufficiently served as far as lawyers

> are concerned by a discussion which focusses on the issues and ignores the personalities, but (para 57)
>
> > "the target audience of the press is likely to be different and to have a different interest in the proceedings, which will not be satisfied by an anonymised version of the judgment. In the general run of cases there is nothing to stop the press from supplying the more full-blooded account which their readers want".

30. The right to report is clearly an important aspect of the Article 10 right to freedom of expression and a component of the Article 6 right to a public hearing.

31. Lord Sumption JSC went on to note that there could be circumstances in which anonymisation is appropriate:

> 30 None of this means that if there is a sufficient public interest in reporting the proceedings there must necessarily be a sufficient public interest in identifying the individual involved. The identity of those involved may be wholly marginal to the public interest engaged. Thus Lord Reed JSC remarked of the Scottish case *Devine v Secretary of State for Scotland* (unreported) 22 January 1993, in which soldiers who had been deployed to end a prison siege were allowed to give evidence from behind a screen, that "their appearance and identities were of such peripheral, if any, relevance to the judicial process that it would have been disproportionate to require their Disclosure": *A v British Broadcasting Corpn* [2015] AC 588, para 39. In other cases, the identity of the person involved may be more central to the point of public interest, but outweighed by the public interest in the administration of justice. This was why publication of the name was prohibited in *A v British Broadcasting Corpn*. Another example in a rather different context is *R (C) v Secretary of State for Justice (Media Lawyers Association intervening)* [2016] 1 WLR 444, a di–cult case involving the disclosure via judicial proceedings of highly personal clinical data concerning psychiatric patients serving sentences of imprisonment, which would have undermined confidential clinical relationships and thereby reduced the efficacy of the system for judicial oversight of the Home Secretary's decisions.

Rule 50 ET Rules

32. Rule 50 ET Rules provides:

> (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 –
>
> > (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 anonymization or otherwise, whether in the course of any hearing or its listing or in any documents entered on the Register or otherwise forming part of the public record…

33. Section 10A of the Employment Tribunals Act 1996 ("ETA"):

> 10A.— Confidential information.
>
> (1) Employment tribunal procedure regulations may enable an employment tribunal to sit in private for the purpose of hearing evidence from any person which in the opinion of the tribunal

> is likely to consist of—
>
> …
>
> (b) information which has been communicated to him in confidence or which he has otherwise obtained in consequence of the confidence reposed in him by another person, or
>
> (c) information the disclosure of which would, … , cause substantial injury to any undertaking of his or in which he works.

34. I consider it is clear an order can be made to protect commercially confidential information pursuant to Rule 50 ET Rules in appropriate circumstances. This is clear from the Rule itself, including the fact that it makes specific reference to section 10A ETA. In **Dring** Baroness Hale referred to "the protection of trade secrets and commercial confidentiality" being matters that could support a restriction to the open justice principle. However, such an order can only be made subject to the high threshold required for any order that derogates from the open justice principle.

35. Information that is truly subject to obligations of commercial confidentiality, as opposed merely to being commercially sensitive, can be protected pursuant to Rule 50 ET Rules. In **Queensgate Investments LLP v Millet** [2021] ICR 863 I referred to the very limited circumstances in which commercial damage might support a derogation from the open justice principle. That is a different point to that of whether truly confidential material can be protected; but is relevant when considering any suggestion that material that is merely commercially sensitive and is otherwise disclosable should be redacted.

Determining applications for orders that derogate from the open justice principle

36. In **Fallows v News Group Newspapers** [2016] ICR 801 Simler J (President) considered how such applications should be determined by the employment tribunal:

> 48 The authorities to which both I and the employment judge were referred, including *In re Guardian News and Media Ltd* [2010] 2 AC 697, *A v British Broadcasting Corpn (Secretary of State for the Home Department intervening)* [2015] AC588, *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.
>
> (iv) It is an aspect of open justice and freedom of expression more generally that courts respect not only the substance of ideas and information but also the form in which they are conveyed. …

> 49 As for the balancing exercise itself, Lord Steyn described the exercise to be conducted in *In re S (A Child)*, para 17 as follows:
>
> "What does, however, emerge clearly from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience, I will call this the ultimate balancing test.

This appeal

37. I have concluded that the order made by the employment tribunal cannot stand, essentially for the reason asserted in the first ground of appeal. The matter must be remitted to the employment tribunal to determine such applications as may be pursued after the parties have sought to narrow the issues in dispute, as much as they can, in compliance with their duty to help the employment tribunal further the overriding objective, leaving the question of any order that derogates from the principle of open justice for determination by the employment tribunal. It is likely that the matter will have to be determined at a hearing.

38. I have considerable sympathy for the employment judge who sought to deal with the matter in a pragmatic and efficient manner; doing so in circumstances in which the employment tribunal has an enormous workload that has been exacerbated by the Coronavirus pandemic. The employment judge was not assisted as much as she should have been by the parties, ensuring that her attention was drawn to all the relevant principles, legal provisions and authorities. This no doubt had some influence on the fact that the issues that arose in the application were not dealt with in the necessary sequential manner with a sufficient focus on what power or principle was being applied to each separate aspect of the application. The employment judge was not referred to Rule 31 ET Rules that specifically deals

with disclosure and is relevant to the related process of redaction, or the authorities that limit the meaning of "relevance" to material that is likely to support or be adverse to a parties case; and the limitation of disclosure to material that is necessary for the fair disposal of the proceedings. There is an interplay between the circumstances in which disclosure should be provided and where redaction of documents can be appropriate. The employment judge was not referred by either party to the authorities that explain the additional public interest principle that usually requires the naming of those significantly involved in court proceedings.

39. The application, although referring to Rules 29 and 50 of the ET Rules, did not clearly set out which rule was relied on in each component of the application. It is important that when making orders the employment tribunal is clear about which rule, or other power, it is exercising. It is not enough to state that the power derives from one of a number of rules, or principles. Generally, where there is a specific rule of the ET Rules that deal with an issue that is the rule that must be relied upon, as the rule will have been drafted to set out the extent of, and any limitations to, the power. Rule 29 should only be relied upon where there is no rule dealing with the subject matter of an application, or there is good reason to conclude that despite there being a rule that deals with the specific matter a wider power is necessary, such as an order that is necessary to protect convention rights.

40. While I accept that Rule 29 ET Rules was relevant, because there is no specific rule dealing with redaction, the decision about redaction had to be informed by the principles applicable to disclosure. It was not clear in the case of both orders the extent to which Rule 29 or Rule 50 ET Rules was being relied upon.

41. There is nothing wrong in principle in a decision being made under one rule or, in the alternative, another. If that is the case it should be explicitly stated, and the basis upon which each rule is said to be applicable should be explained.

42. Pursuant to the first order the names of the first respondent's clients were to be anonymised in all documents put before the tribunal and made available to the public. I consider that the making of the order constituted an error of law because the employment tribunal did not have regard to the

Article 10 rights involved or to the cases, set out above, that demonstrate the importance of naming the names of persons involved in legal hearings. There is a public interest in hearings being conducted so that the press can report names of those involved, even if the court could have done its job without the names being named, because in a strict sense the identities of the persons involved are not relevant to the issues in dispute. If the lack of relevance, in that sense, of the names of the persons involved was sufficient to grant anonymity, it could be granted in nearly all cases. The claimant asserts that the first respondent acted in an anti-competitive manner to ensure that its two main clients received a disproportionate number of hits when people searched for information about holidays. There is a strong argument that the public would have a genuine and legitimate interest in knowing the identity of the key clients who were said to be given that advantage. Any press reporting would be likely to be of far less interest to readers if the identity of the companies the first respondent is alleged to be favouring is kept secret. This was a matter that the employment judge was required to consider before making an order derogating from the open justice principle irrespective of how the argument was put by the parties.

43. I have declined the suggestion that I should make the determination myself on the basis that there is only one possible outcome. I consider that the principled determination of whether there should be anonymisation of some, or all, of the clients of the first respondent can only be made after it has been decided what information should properly be before the employment tribunal. There could be issues of commercial confidentiality that mean that some or all of the first respondent's clients should be anonymised, even once full regard has been given to the principle of open justice, although I very much doubt that anonymisation of the two main clients can be justified. Consideration of anonymisation would require a focused and detailed consideration of the competing rights, including the claimant's Article 6 right to a fair and public hearing, the Article 10 right to freedom of expression on the one hand, and any issues of commercial confidentiality on the other. It is important that a distinction is drawn between information that is said to be "commercially sensitive" and that said to be "confidential". Material clearly can be commercially sensitive without being confidential, in the

sense that the information has been imparted in circumstances that result in a legal right to confidentiality.

44. The second order permitted the first respondent to redact "commercially sensitive and "irrelevant" information which was stated to include the first respondent's "overall revenue figures which are not client specific" from all documents put before the tribunal. I do not consider that this order can stand because of the failure to conduct the necessary structured analysis and to sufficiently identify the appropriate rules or principles that were applied.

45. The claimant contends that the first respondent had its opportunity to put the application properly and failed to do so; there should be no second bite of the cherry. I do not accept that argument. I consider it is clear that this case is in need of robust case management. The issue of redaction and any anonymisation must be considered in a structured and principled manner. In its response to the first respondent's application, the claimant also failed to focus on all of the relevant principles to be applied in determining the application.

46. I was informed that as many as 3,000 documents have been redacted. I have considerable doubt as to whether all of the material that has been provided can have been disclosable in that it is relevant, in the sense of being likely to support or be adverse to a parties case, and because it is necessary for the fair disposal of the proceedings. It might well have been better had these matters been raised prior to providing disclosure, although I accept that the first respondent was seeking to adopt a pragmatic approach. I also note that at paragraph 10 of the reasons for the order the employment tribunal stated that the unredacted documents would be made available to the claimant who would have the opportunity to express his view on the proposed redaction and, in the event of any specific dispute, the matter could be referred back to the tribunal. In its letter of 30 July 2021 the employment tribunal again stated that the claimant would have the opportunity to comment on proposed redactions and that any dispute would be determined by a judge. The letter also referred to the possibility of a focussed application for specific disclosure. I accept that was an attempt to adopt a pragmatic stepwise approach. However, the order and reasons appear already to have determined

that some classes of documents are commercially sensitive and/or confidential and/or irrelevant. The order appears to have already determined that overall revenue figures that are not client specific should be redacted because they are "commercially sensitive" and "irrelevant", although in paragraph 5 of the reasons it appears to have been decided that such documents are "confidential".

47. If documents that were not disclosable, have been disclosed, that is not the end of the matter. The employment tribunal has the power pursuant to Rule 29 ET Rules, read with the overriding objective, to ensure that material that is irrelevant, in the sense of not being likely to support or be adverse to a party's case, or is not necessary for the fair disposal of the issues, should be excluded. In appropriate circumstances there can be redaction of documents. It is obviously in accordance with the overriding objective for the employment tribunal to deal with matters in an efficient and cost-effective manner. I consider that on remission the following stepwise approach should be adopted:

47.1. Is any material that remains the subject of a dispute relevant in the sense of being likely to support or be adverse to a party's case

47.2. Is the material necessary for the fair disposal of the proceedings

47.3. If material does not pass both of those criteria it should not be before the tribunal

47.4. Only if there is material that is likely to support or to be adverse to a party's case and is necessary for the fair disposal of the proceedings should consideration be given as to whether some order pursuant to rule 50 should be made Such an order should only be made if the first respondent persuades the tribunal on proper evidence that such an order is necessary, having given full regard to the open justice principle, including the importance of names being named particularly those of persons who played a significant role in the subject matter of the proceedings, so that the press can report exercising its editorial judgement.

48. The claimant asserted that any material that tends to show that the disclosures are factually correct, not merely that the claimant reasonably believed that to be the case, is relevant. The claimant relied on comments in **Kilraine v Wandsworth London Borough Council** [2018] ICR 1850. That

issue has recently been argued before HHJ Auerbach in **Miss A Dodd v 1) UK Direct Business Solutions Limited 2) Mr S Moslemi** EA-2021-000761-OO, in which judgment is awaited.

49. Before the matter is put before the employment tribunal again the parties must seek to limit as far as they can any areas of dispute, save that any order that would limit the principle of open justice can only be made by the judge on a careful consideration of the relevant principles and cannot be nodded through because of agreement between the parties. The parties should carefully consider issues of proportionality remembering that they are under an obligation to assist the employment tribunal in furthering the overriding objective. That is not a request, but a requirement. It is also important that the parties keep an overview of the case. If the first respondent establishes that the reason for the dismissal of the claimant was that he had sexually harassed his colleagues the question of whether he made any protected disclosures may end up being moot. The claims all relate to dismissal and rejection of the claimant's appeal, so the focus must be on which of the myriad of disclosures now asserted it is contended resulted in the decision to dismiss, and the rejection of the appeal. The claimant now has had the disclosure of a vast amount of documentary evidence that must surely assist in determining which of the multitudinous disclosures asserted may have been causative of his dismissal and the rejection of his appeal. A component of the obligation on the parties to assist the tribunal in achieving the overriding objective includes having regard to the fact that the tribunal's resources are limited and they must be fairly distributed amongst the many parties that have a right to have their claims heard.

50. At the moment the case is listed for hearing over 6 days in May, although the parties have applied for the listing to be extended to 9 days. Unless the parties co-operate and focus on the core issues I struggle to see how the matter can be determined even in the proposed extended listing if the claimant is going to rely on close to 100 disclosures. The claimant should consider whether this is likely to be an effective way in which to advance his claim, and might wish to reflect on the observation I made in **Vaughan v Modality Partnership** [2021] ICR 535 at paragraph 41:

> In all public interest disclosure cases the focus should not be on how many disclosures can be asserted and how many detriments can be alleged, but on which disclosures are likely to be shown to have given rise to a detriment. Litigants in public interest disclosure cases often feel with

> detriments and disclosures that the more the merrier, whereas focus on the principal disclosures that may have resulted in detriment or dismissal is more likely to bear fruit. The fact that all relevant detriments are pleaded does not assist a claimant if the disclosure that resulted in them is not pleaded.

51. I do not raise the issue just because I like the sound of my own voice, but because it often seems that those who draft the enormous schedules of protected disclosures and/or detriments, that are too common a feature of protected disclosure claims, feel that they have done a good day's work when they look at the multitudinous allegations they have tabulated, because they think that the more protected disclosures and/or detriments asserted the greater the prospects of success, whereas experience suggests that the converse is often the case. As the editors of Harvey pithily put it: "quality, not quantity".

52. I consider that any application that is pursued on remission can be considered by any employment judge chosen by the Regional Employment Judge, having regard to the need to progress the case with reasonable dispatch. I do not consider that it would be inappropriate for Employment Judge Grewal to deal with the matter. I have accepted that she sought to deal with the application in an efficient and proportionate manner; and did so on the papers without all relevant authorities and principles having been referred to in the application and response. I see no reason to doubt that she would deal with any application that is pursued professionally in the step-wise manner required.