



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no 4113845/2021

5 **Deliberations (following written submissions) on 11 April 2022**
Employment Judge W A Meiklejohn

X	Claimant
10	Represented by: Ms M Dalziel – Solicitor
Y	First Respondent
15	Represented by: Mr S Jones – Solicitor
Z	Second Respondent
	Represented by: Mr S Jones – Solicitor

20 **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is as follows –

- 25 (a) the application made by the second respondent for a restricted reporting order under Rules 50(1) and 50(3)(d) of the Employment Tribunal Rules of Procedure 2013 is granted,
- (b) the application by the second respondent that this Judgment be anonymised is granted, and
- 30 (c) the application by the claimant for anonymisation under Rule 50(3)(b) is refused.

REASONS

- 35 1. This case came before me for a closed preliminary hearing for the purpose of case management on 2 March 2022. In the course of that hearing I was told that (a) the claimant was seeking an anonymisation order under Rule 50(3)(b) of the Employment Tribunal Rules of Procedure 2013 (the “Rules”) and (b) the **E.T. Z4 (WR)**

respondent was seeking a temporary restricted reporting order under Rules 50(1) and 50(3)(d) of the Rules.

2. Following that hearing I made an order under Rule 29 of the Rules requiring the parties to provide written submissions setting out the terms of the order they were seeking from the Tribunal under Rule 50 and why they believed such an order should be made. These written submissions were duly provided and I am grateful to Ms Dalziel and Mr Jones for these. A deliberation day was listed for 11 April 2022 to allow me to consider these submissions and decide what order (if any) should be made.

Employment Tribunals Act 1996 (“ETA”)

3. Section 11 ETA provides, so far as relevant, as follows –

“Restriction of publicity in cases involving sexual misconduct

(1) *Employment Tribunal procedure regulations may include provision –*

(a)

(b) *for cases involving allegations of sexual misconduct, enabling an employment tribunal, on the application of any party to proceedings before it or of its own motion, to make a restricted reporting order having effect (if not revoked earlier) until the promulgation of the decision of the tribunal.*

(2)

(3)

(4)

(5)

(6) *In this section –*

“identifying matter”, in relation to a person, means any matter likely to lead members of the public to identify him as a person affected by, or as the person making, the allegation....

“restricted reporting order” means an order –

5 (a) *made in exercise of a power conferred by regulations made by virtue of this section, and*

10 (b) *prohibiting the publication in Great Britain of identifying matter in a written publication available to the public or its inclusion in a relevant programme for reception in Great Britain,*

15 *“sexual misconduct” means the commission of a sexual offence, sexual harassment or other adverse conduct (of whatever nature) related to sex, and conduct is related to sex whether the relationship with sex lies in the character of the conduct or in its having reference to the sex or sexual orientation of the person at whom the conduct is directed....”*

Rule 50

20 4. Rule 50 provides, so far as relevant, as follows –

“Privacy and restrictions on disclosure

25 (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....*

30 (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 –*

35 (a) *an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;*

40 (b) *an order that the identities of specified parties, witnesses or other persons referred to in the proceedings shall not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;*

(c) *an order for measures preventing witnesses at a public hearing being identifiable by members of the public;*

(d) *a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act.*

(4)

(5) *Where an order is made under paragraph (3)(d) above –*

(a) *it shall specify the person whose identity is protected; and may specify particular matters of which publication is prohibited as likely to lead to that person’s identification;*

(b) *it shall specify the duration of the order;*

(c) *the Tribunal shall ensure that a notice of the fact that such an order has been made in relation to those proceedings is displayed on the notice board of the Tribunal with any list of the proceedings taking place before the Tribunal, and on the door of the room in which the proceedings affected by the order are taking place; and*

(d) *the Tribunal may order that it applies also to any other proceedings being heard as part of the same hearing.*

(6) *“Convention rights” has the meaning given to it in section 1 of the Human Rights Act 1998.”*

Convention rights

5. The Convention rights applicable in this case are set out in Schedule 1 to the Human Rights Act 1998 and are, so far as relevant, as follows –

“Article 6

Right to a fair trial

1. *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public*

order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice....”

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“Article 8

Right to respect for private and family life

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1. *Everyone has the right to respect for his private and family life and his correspondence.*

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2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”*

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“Article 10

Freedom of expression

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1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

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2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”*

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Submissions for second respondent

6. Mr Jones reminded me of the Tribunal's general power under Rule 50(1) to make a restricted reporting order ("RRO") where it considers that such an order is "*necessary in the interests of justice or to protect the Convention rights of any person*" (his emphasis). That meant there could be an indefinite RRO.

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7. By enacting section 11 ETA and Rule 50(3)(d), Parliament had made specific provision for RROs to be available in cases involving allegations of sexual misconduct. Such an order would prohibit the publication of any matter likely to lead members of the public to identify an individual as a person affected by or making the allegation of sexual misconduct and lasts only until promulgation of the Tribunal's decision. A person "*affected by*" the allegation of sexual misconduct includes the perpetrator and so the identity of that person can be the subject of an RRO – **A v B [2010] ICR 849**.

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8. The two grounds for making a RRO were that it was necessary (a) in the interests of justice or (b) to protect the Convention rights of any person. In relation to the former, Mr Jones quoted a passage from **M v Vincent [1998] ICR 73** (per Morison J) –

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"It is to be noted that restricted reporting orders apply, and are intended to apply, only whilst the tribunal proceedings are afoot. It is, as this court has already indicated in A v B, ex parte News Group Newspapers Ltd [1998] ICR 55, an order which is there to prevent the excesses, if there are going to be, of the press or other media whilst the case is proceeding, which might put undue pressure on persons who are involved. Where serious allegations of this sort are made, it is better for all concerned that the tribunal rule on the matter, and find out where the truth lies before the persons become identified."

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9. In relation to the latter (to protect Convention rights), Mr Jones said it was well-established that the Article 8 right to respect for private and family life included protection of reputation. Allegations of sexual activity sat at the very centre of private life – **F v G [2012] ICR 246**. Mr Jones referred to **EF v AB 2015 IRLR 619** as authority for the proposition that sexual activity conducted in private between consenting adults should be regarded as attracting a high degree of privacy.

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10. Mr Jones referred to the fact that the second respondent is married with two children. He argued that publication of details about the second respondent's sexual activities and/or public identification of him as the alleged perpetrator of sexual misconduct would clearly have an impact on the private lives of the second respondent's wife and children and would infringe their Article 8 rights.
11. Mr Jones pointed out that the Article 10 right to freedom of expression was qualified and subject to the restrictions set out in Article 10(2) where it referred to "*protection of the reputation or rights of others*".
12. Referring to the principle of open justice, Mr Jones noted out that Article 6(1) contained a derogation where "*the protection of the private life of the parties*" so required. Parliament had reflected that by providing in Rule 50 that a departure from the principle of open justice was justified where it was necessary "*to protect the Convention rights of any person*". It had been recognised by the Employment Appeal Tribunal in **Fallows v News Group Newspapers Ltd and others [2016] ICR 801** and **A and B v X and others UKEAT/0113/18** that interference with open justice for a limited period was less objectionable than a permanent restriction.
13. Mr Jones said that the Tribunal's task was to carry out a balancing exercise between the Article 8 rights of the second respondent and his family on the one hand and the principle of open justice and freedom of expression on the other. He referred me to paragraph 17 of Lord Steyn's judgment in **Re S (A child) [2005] 1 A.C. 593** –
- "The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in Campbell v MGN Ltd [2004] 2 A.C. 457. For present purposes the decision of the House on the facts of Campbell and the differences between the majority and the minority are not material. 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.”

14. In the context of balancing the right to freedom of expression with the Article 8
5 rights of the second respondent and his family, Mr Jones quoted a passage
from the judgment of Lord Hoffman in ***Campbell v MGN Ltd [2004] 2 A.C. 457***

—
10 *“...when press freedom comes into conflict with another interest protected by
the law, the question of whether there is a sufficient public interest in that
particular publication to justify curtailment of the conflicting right.”*

15. Turning to the issue of what factors were relevant to his application, Mr Jones
reminded me that the second respondent denied the claimant’s allegations of
15 sexual harassment in their entirety. His position was that any conduct of a
sexual nature had been consensual. What was in dispute was the duration of
the consensual sexual relationship. Evidence would be given as to the details
of what the second respondent contended was private consensual sexual
activity, which was clearly an aspect of private life under Article 8.

- 20 16. Mr Jones made the points that (a) it was self-evident that publication of
unproven allegations of sexual misconduct could damage the second
respondent’s reputation and (b) unrestricted publication could mean that the
damage would be done before the Tribunal’s decision on liability became
25 publicly available. Against this risk of infringement of the second respondent’s
Article 8 rights, there was no countervailing wider public interest in the
publication of a private employment dispute between the parties. Contemporaneous
reporting of the proceedings might affect the second
respondent when giving evidence of such a sensitive and intimately personal
30 nature.

17. On the basis of his assertion that the principle of open justice did not have the
same weight at the stage of a preliminary application designed to establish
whether an order under Rule 50 should be made, Mr Jones submitted that it
35 would be appropriate for the Tribunal to anonymise the details of all of the
parties to the proceedings in its judgment determining the Rule 50 applications.

Submissions for claimant

- 5 18. On behalf of the claimant Ms Dalziel sought an order under Rule 50(3)(b) granting the claimant personal anonymity. Her name should not be made public in the course of any hearing to follow or in the listing of the case or in any document entered in the register of judgments or otherwise forming part of the public record.
- 10 19. Ms Dalziel accepted that the starting point was that proceedings should ordinarily be open to the public and such an order could only be made if the Tribunal was satisfied that (a) it was in the interests of justice or (b) it was otherwise necessary to protect the claimant's Convention rights. Ms Dalziel argued that both applied here.
- 15 20. Ms Dalziel said that in deciding whether the claimant's right to privacy under Article 8 was engaged, the Tribunal had first to determine whether the information sought to be protected by anonymisation was in principle protected by Article 8. If the Tribunal was satisfied that the right to privacy was engaged, it would then need to consider whether this should yield to the broader interests of the right to a fair trial under Article 6 and the right to freedom of expression under Article 10. To make a derogation from the principle of open justice necessary, it had to be established by clear and cogent evidence that harm would be done to the privacy rights of the individual seeking the restriction.
- 20 21. The claimant had been involved in a sexual relationship with the second respondent, a former work colleague. Ms Dalziel described this as "*intensely personal and private information*". The claimant was entitled to significant privacy in relation to any sexual relationship she had undertaken, in accordance with Article 8. If the order sought was not granted, it would open up the claimant's private life to anyone who showed interest in these proceedings. This could have a seriously detrimental effect on her mental health and wellbeing. There would be no prejudice to the first and second respondents if the order sought was granted.
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22. Ms Dalziel submitted that anonymisation of the claimant's name would be an appropriate balance which would allow the claimant a degree of privacy in respect of deeply personal matters while still permitting details of the case to be reported and open justice to be done, and be seen to be done.

Responses

23. Both sides provided responses to the other's written submissions. Ms Dalziel referred to the need to balance the right to privacy against the principle of open justice and the right to report proceedings in accordance with the right to freedom of expression. She stressed the requirement under Rule 50(2) to give "full weight" to the principle of open justice and to the Article 10 right to freedom of expression. She argued that, given press reporting was an inseparable part of the concept of open justice, making a RRO would represent an unjustified interference with that concept. She objected to the second respondent's application.

24. Mr Jones objected to the claimant's application for an anonymity order. He argued (under reference to *BBC v Roden [2015] ICR 985* and *Fallows, supra*) that granting the claimant indefinite anonymity would be a greater interference with the principle of open justice than the temporary RRO sought by the second respondent. The claimant had not, he submitted, established by "clear and cogent" evidence that a derogation from the principle of open justice was necessary. It would be premature to grant the claimant permanent anonymity at this formative stage of the proceedings. It would also be contrary to the overriding objective as the parties would not be on an equal footing.

Discussion

25. I reminded myself that, in terms of Rule 50(2), I should give "full weight" to the principle of open justice and to the Convention right to freedom of expression. I would therefore need to be persuaded that there was good reason to depart from the normal position, ie that the proceedings were conducted in public, the

identity of the parties was disclosed and full details were recorded in the Register of Judgments which was in the public domain.

26. The EAT expressed this in **BBC v Roden** (at paragraph 50) as follows –

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“The default position in the public interest is that judgments of Tribunals should be published in full, including the names of parties. That principle promotes confidence in the administration of justice and the rule of law. The reporting of court proceedings in full without restriction is a particularly important aspect of the principle and withholding a party’s name is an obvious derogation from it, requiring cogent justification for its restriction.”

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27. I also reminded myself that where conflicting Convention rights were engaged, or potentially engaged, there should be a balancing of those rights against each other. As Lord Steyn said in **Re S (A child)** in the context of the interplay between Article 8 and Article 10, neither of the competing rights had precedence over the other. Where there was conflict, there had to be *“an intense focus on the comparative importance of the specific rights being claimed in the individual case”*.

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28. In this case, both sides were seeking a derogation from Article 10 (freedom of expression). The claimant sought anonymity. The second respondent sought a restriction preventing the reporting of the proceedings. Both the claimant and the second respondent relied on their Article 8 right to respect for private and family life (including in the case of the second respondent, the Article 8 rights of his wife and children).

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29. What factors were relevant? I began by considering the parties’ respective positions as set out in the ET1 and ET3. In the paper apart to her ET1, the claimant alleged that –

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“...in the period from March 2021 through to 2 August 2021 [she] was subjected to a series of unlawful conduct on the part of the Second Respondent which was sexual in nature, which amounted to harassment, and in respect of which the First Respondent is vicariously liable.”

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The claimant then set out in fairly graphic detail the nature of the alleged unlawful conduct.

- 5 30. In the respondents' ET3, some of the alleged conduct was denied and it was asserted that the relationship between the second respondent and the claimant had been consensual throughout. There was a dispute of fact as to the duration of the relationship.
- 10 31. I next considered what would happen when these issues came before the Tribunal. It was apparent that, to resolve the areas of factual dispute, evidence would need to be given at the final hearing by the claimant and the second respondent about a number of incidents where there had been conduct of a sexual nature. That engaged both parties' Article 8 rights.
- 15 32. I believed that both sides had strayed into the realms of speculation. On the claimant's side, it was said that without anonymity there could be an adverse effect on her mental health and wellbeing. On the second respondent's side, it was said that his being publicly identified as the alleged perpetrator of sexual misconduct would have an impact on the private lives of his wife and children. 20 While I do not question the sincerity with which these arguments were advanced, I did not regard them as relevant factors in the balancing of conflicting Convention rights.
- 25 33. I then considered the interests of justice. I did not believe it would be possible to have a fair trial of the issues in this case without personal and intimate details of the sexual conduct, and alleged misconduct, between the claimant and the second respondent being given in evidence to the Tribunal. There was in my view a risk that those parties would be affected when giving their evidence by the prospect of its entering the public domain by being reported in the media. 30
34. I moved on to consider the risk of damage to reputation. This was clearly a matter of concern to both the claimant and the second respondent. It was common ground that there had been a sexual relationship between them. For the allegations in the ET1 and ET3 to be made out, there would need to be

evidence given about the detail of that relationship. Given the way in which these allegations were expressed, there was a clear risk of reputational damage to both parties. While it might be said that any litigation carries a measure of reputational risk, it seemed to inevitable that the risk was heightened when evidence was required about sexual activity.

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35. I next looked at the extent to which the public interest was engaged. I did not believe that there was a great deal of intrinsic public interest in a private employment dispute. Most cases of this type attract no such interest. Members of the public rarely attend an Employment Tribunal hearing and only a very small minority of cases come to be reported in the media. What made this case different were the allegations of sexual misconduct.

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36. Given that I required to adjudicate on the competing views of the claimant and second respondent as to the appropriate degree of privacy in this case, I did not have arguments before me as to the rights of the media to freedom of expression. However, both Mr Jones and Ms Dalziel were respectful of the rights conferred by Article 10 and the norm (per Article 6) that litigation was conducted in a public forum.

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37. At the risk of being unfair to the media, it seemed to me that a case involving allegations of sexual misconduct was more likely to attract their attention than one which did not. That meant that the risk of intrusion into the Article 8 right to private life enjoyed by both the second respondent and the claimant, with the potential for reputational damage, was self-evident.

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38. What then should be the outcome of the “*ultimate balancing test*”? I decided that, in the circumstances of this case, the second respondent’s right to respect for his private life (per Article 8) outweighed the conflicting right of freedom of expression (per Article 10). The same argument (for an RRO) could have been advanced on behalf of the claimant. I accepted the argument advanced by Mr Jones that private consensual sexual activity (as contended by the second respondent) was clearly an aspect of private life.

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39. I acknowledge that the claimant disputes that all of the sexual activity was consensual. That is a matter upon which the Tribunal will require to adjudicate after hearing the evidence. I considered that such evidence should be given
5 without the spectre of disclosure in the media hanging over the second respondent (and the claimant) during the hearing. I also considered that this was, for the same reason, consistent with the interests of justice.

40. I came to the view that granting a RRO of temporary duration was more
10 appropriate in this case than granting the claimant permanent anonymity. I accepted Mr Jones' argument that granting a permanent order for anonymity to the claimant involved greater interference with the principle of open justice than the alternative of a temporary RRO. Where there is a RRO in place, there will still be a public hearing (the fairness of which should not be adversely
15 impacted) which accords with Article 6.

41. I anticipate that the issue of whether any further order under Rule 50 should be made is likely to be revisited at the final hearing – that will be a matter for the Tribunal dealing with that hearing.
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42. I also accepted Mr Jones' argument for anonymising this Judgment. To do so does not involve the same degree of derogation from the principle of open justice as the anonymisation of a final decision on liability and/or remedy. This Judgment will be entered in the Register and could, in theory, be reported in
25 the media. I believe it is consistent with the interests of justice that the parties should not be identified in this Judgment.

Disposal

30 43. For the reasons set out above, my decision is –

(a) to grant application for a temporary RRO sought by the second respondent,

(b) to grant the application by the second respondent to anonymise this Judgment, and

(c) to refuse the application by the claimant for anonymity.

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10	Employment Judge:	WA Meiklejohn
	Date of Judgment:	06 May 2022
	Date Sent to Parties:	09 May 2022

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