NAVIGATING ANONYMITY IN THE EMPLOYMENT TRIBUNAL

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Navigating anonymity in the Employment Tribunal

1. I plan to talk under 4 headings:-

    - An historical perspective on the law on anonymity generally.
    - The law on anonymity in the Employment Tribunal.
    - Redaction of documents relating to comparators.
    - Practical suggestions.

Historical perspective of the law on anonymity generally

2. Although it had been stated in a case called *Scott –v- Scott* [1913] AC 417 in 1913 that the general rule was that hearings took place in public, in the 1980's and 1990's, it was not difficult to obtain anonymity. At that time the principle of open justice was often the subject of exceptions and derogations. There was certainly very little inclination on the part of the Courts or the then Industrial Tribunal to require evidence to support an application for anonymity.

3. That somewhat lax approach changed with the advent of the Human Rights Act 1998, which of course came into force in the year 2000. In a case called *In re S* [2005] 1 AC 593 in 2005 the House of Lords signalled the change in emphatic terms.

4. The facts in *In re S* were that a mother was charged in a criminal trial with the murder of her son. But she had another child, a boy aged 5, S. There was evidence from a psychiatrist before the Court that if the mother was identified the effect on S would be "significantly harmful". The Judge at first instance made an order preventing publication of the name of the mother and of S's identity in the newspapers and elsewhere.

5. But the newspapers appealed. They lost in the Court of Appeal but were successful in the House of Lords. The decision of the House of Lords is based upon the interplay between Article 8 ECHR, the right to respect for privacy and family life, and Article 10, the right to freedom of expression. Lord Steyn gave the leading speech and he

identified 4 propositions which still apply whenever consideration is being given to questions of anonymity:-

(1) First, neither article of the ECHR has precedence over the other;

(2) 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;

(3) Third, the justifications for interfering with or restricting each right must be taken into account;

(4) Fourth and last, a proportionality test must be applied in an ultimate balancing exercise.

6. Adopting this approach and giving greater importance to the principle of open justice than the Court below had done, the House of Lords decided that although S would suffer distress, the Article 10 rights at issue, particularly the freedom of the press to report criminal trials which promoted public confidence in the administration of justice, led to the conclusion that anonymity should not be granted. The newspapers' appeal was allowed.

7. It is right to add that there is a forthcoming appeal to the Supreme Court which is likely to challenge the approach of the House of Lords in *In re S*. Early next year the Supreme Court is going to hear an appeal in a case called *M(PN) –v- the Times* [2015] 1 Cr App R 1, which was decided by the Court of Appeal in August 2014. It is going to be argued that the Lords downplayed the significance of the best interests of the child under international law in *In re S*. It may be though that the principles laid down by Lord Steyn in *In re S* will emerge unscathed, and we must take them a binding at least for the time being.

The law in the Employment Tribunal

8. The starting point is that there are statutory and regulatory provisions which govern the position in the ET. Unfortunately, you cannot understand the rules by just reading the Regulations – you also have to read the Employment Tribunals Act 1996 too.

9. Under sections 10 and 10B of the ETA 1996 there is a power on the part of a government Minister to *direct* that an ET sit in private, and to take other steps in a case involving national security.

10. The second statutory provision of importance is section 10A ETA. That provision enables the ET to sit in private for the purpose of hearing evidence in 3 circumstances:-

    (a) When evidence is taken from someone who cannot give that evidence without contravening a statute or enactment.

    (b) When evidence is taken from someone who has had information communicated to him or her in confidence or which he or she has obtained in consequence of a confidence reposed in him (or her).

    (c) If disclosure of the information about which the witness gives evidence would cause substantial injury to any undertaking in which he or she works, and in relation to a person in Crown employment that means injury to the national interest.

11. The third type of statutory provision in the ETA of relevance is that contained in sections 11 and 12, which are about the restriction of publicity in cases involving sexual misconduct and disability. Section 11 may be important because in cases involving allegations of the commission of sexual offences or sexual misconduct the ET may make a reporting restrictions order. Breach of a reporting restrictions order made under section 11 ETA can, unlike many other provisions, be a *criminal* offence (although breach of any other kind of reporting restrictions order could also be a contempt of court).

12. Sexual misconduct is defined in section 11(6) ETA as meaning "the commission of a sexual offence, sexual harassment or other adverse conduct (of whatever nature) related to sex, and is conduct 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" – a wide definition.

13. Section 12 of the ETA provides for restriction of publicity in disability cases. Where the complaint relates to disability and evidence of a personal nature is likely to be heard, the ET may make a reporting restriction order under that section too. Breach of a reporting restriction order made under section 12 ETA may also be a *criminal* offence.

14. Sections 11 and 12 ETA do call for more analysis. The object of the reporting restrictions order under these sections is to prevent the identification in the media of a person who is making or is affected by an allegation of sexual misconduct and of any person who in a disability discrimination claim may be embarrassed by evidence of a personal nature. These provisions only permit protection until the decision is promulgated, although under rule 50 of the Schedule 1 to the ET (Constitution and Rules of Procedure) Regulations 2013, a permanent anonymity order can be made.

15. In principle the protection under section 11 ETA could apply both to the alleged victim of the sexual misconduct and to the alleged perpetrator (*Tradition Securities & Futures SA –v- The Times* [2009] IRLR 354). In each case the approach adopted by Lord Steyn should be used (unless it is modified by the Supreme Court early next year). An intense fact-specific focus on the comparative importance of the specific rights being claimed in the individual case is necessary.

16. But there is some controversy about whether a reporting restrictions order under section 11 ETA may be made in order to prevent identification in the media of corporate bodies. In *M –v- Vincent* [1998] ICR 73 in 1998 the EAT held that an order could be made to protect the identification of a body corporate. But this proposition was doubted and then rejected in two EAT decisions decided during the following year: *Associated Newspapers Ltd –v- London (North) Industrial Tribunal* [1998] IRLR 569 and *Leicester University –a- A* [1999] ICR 701. In the *Leicester University* case, HHJ Peter Clark, sitting in the EAT, pointed out that the intention of Parliament was to protect individuals only and that meant the person making the complaint and the individual against whom

the allegation of sexual misconduct was made, together with any other individuals affected by the allegation. It was not intended to affect the corporate respondent.

17. This argument may be relevant to the Chief Constable respondent who is deemed to be a corporation sole as a result of paragraph 2 of Schedule 2, Police Reform and Social Responsibility Act 2011. Depending upon the facts it may well be difficult to demonstrate that a respondent Chief Constable is "a person affected by" an allegation of sexual misconduct within the meaning of section 11 ETA. Thus, again depending on the facts, it may well be difficult for a respondent Chief Constable successfully to apply for a RRO under section 11 ETA. It may of course be different if the Chief is himself caught up in the allegations personally.

18. The fourth provision is rule 50 of the Rules. It came into force on 29th July 2013.

19. Two points should need to be made at the outset. First, an order can be made at any stage of the proceedings. Second, the rule refers to restricting the public disclosure of any aspect of the proceedings. This may have an impact on disclosure of documents, which may be referred to in hearings at a later stage.

20. If one turns to rule 50(2), that approach appears to reflect the principles laid down by Lord Steyn in *In re S*.

21. The orders which can be made are various – see rule 50(3) – they include

    - an order that the hearing be conducted in whole or in part in private;
    - an order that the identities of specified parties, witnesses or other persons should not be disclosed to the public by the use of anonymisation in the hearing or in documents;
    - An order that measures be taken to prevent witnesses being identifiable by members of the public;
    - And of course a reporting restrictions order under section 11 and 12 ETA.

22. The Divisional Court has said that if the case is one involving sexual misconduct, the ET should make an order under section 11, ETA not under a general procedural power: *R –v- Southampton Industrial Tribunal ex parte INS News Group Ltd* [1995] IRLR 247.

Of course if section 11 ETA is not sufficiently wide – eg because it permits an order only until promulgation of the decision, then one will also need to look at rule 50.

23. Under rule 50(4) any person with a legitimate interest who has not had a reasonable opportunity to make representations before an order under this rule is made may apply for the order to be revoked or discharged. This is the power which enables the press to apply to discharge an order which has been made without the media having had a chance to make earlier submissions.

24. Under rule 50(5) the basic minimum of the terms of the order which the ET may make are prescribed. The ET must ("shall"):-

    - specify the identity of the person whose identity is protected (and may specify other matters of which publication is prohibited as they may likely to lead to identification of that person – so called "jigsaw" identification).

    - Specify the duration of the order.

    - Ensure that there is a notice that such an order has been made on the notice Board in the ET and on the door of the room where the hearing is taking place.

25. The EAT has provided guidance in three recent cases which assists the ET as to how to proceed in exercising powers under rule 50. In *F -v-* G [2012] ICR 246 Underhill J was considering the predecessor rule 50 which was promulgated under the 2004 rules, but his approach is helpful in understanding rule 50 of the 2013 rules. He made the point that the default position is that it is in the public interest that the full decisions of tribunals including the names of the parties should be published. This follows the direction of travel set by *In re S*. But he nonetheless decided that on the facts of the case a restricted reporting order was appropriate.

26. The case involved a care assistant at a further education college with facilities for disabled students. She was asked to wash a male student after assisted masturbation had taken place. She resigned and brought a claim for sex discrimination, unlawful harassment and unfair dismissal. The respondent college asked for a reporting restriction order prohibiting the identification of the relevant students and an anonymity

order preventing identification of the names of the college, the claimant, the students and the staff. The Claimant resisted the application in relation both to herself and the college.

27. Underhill J decided that the Article 8 rights of the relevant students and staff were sufficient to justify an interference with the principle of open justice and that there was no public interest which could justify identifying the individual student or the member of staff who assisted him. The impact on the group of male disabled students, a group of highly vulnerable individuals, was such as to engage Article 8 ECHR. What seems to have swung the balance was the Article 8 rights of this group of highly vulnerable individuals. It is possible that in an ET involving the police, the identification of victims of crime, potentially highly vulnerable individuals, might also engage Article 8 so as to justify anonymity orders.

28. On the other side of the line were the facts in *BBC –v- Roden* [2015] ICR 985. In *Roden* Mrs Justice Simler's decision was based on rule 50 as modified in 2013. She decided that the ET had wrongly granted an anonymity order to the claimant. He had been employed by the BBC as a development officer working with young people. He was dismissed when the BBC was told by the police that he posed a risk to young men. He had in fact been dismissed from an earlier job because of allegations of serious sexual assaults. When he applied for his job with the BBC he had not told the BBC about this history. He nonetheless brought a claim for unfair dismissal after he was dismissed and sought and obtained anonymity at first instance.

29. The ET Judge granted him anonymity mainly because he thought there was a risk that the public would conclude that the claimant had actually committed the alleged sexual offences, when those matters had not been the subject of any trial. The truth or falsity of those allegations were not in issue before the ET. The Judge thought that if matters became public by identification of the claimant this could have devastating consequences for him.

30. Simler J allowed the BBC's appeal from this decision. The starting point was the principle of open justice and the right to freedom of expression under Article 10 ECHR. Derogation from that principle could only be justified when it was strictly necessary in the interests of justice. The risk of the public misunderstanding that the claimant had

been found to have committed the offences was not enough to justify derogation from the principle of open justice. The public could distinguish between mere suspicion and proven charges.

31. There is a very helpful summary of the legal principles, which refers to the *In re S* case, at paragraphs 19 to 31 of the judgment in *Roden*. It is important to note that Simler J relied upon passages from the *Practice Guidance (Interim non-disclosure Orders)* [2012] 1 WLR 1003, which requires notice of applications for privacy and anonymity to be given to the media in civil proceedings. It is not clear whether this *Practice Guidance* also applies to applications in the ET. In my experience it is rarely followed in the ET.

32. The third case is another very recent decision of Mrs Justice Simler in *Fallows –v- NGN* [2016] IRLR 827. John Fallows was Sir Elton John's hairdresser. Mr Fallows was dismissed and brought claims which included claims of sexual misconduct. His employers sought privacy orders under section 11 ETA and those applications were unsuccessful. There was an appeal to the EAT, and in order to hold the ring pending the appeal a reporting restrictions order was made.

33. The claims were then settled and NGN asked that the reporting restrictions order be discharged. The ET judge revoked the reporting restriction order and the employers appealed to the EAT. Mrs Justice Simler dismissed the appeal. Rule 50 gave the tribunal power to impose a reporting restrictions order even after settlement. For two reasons the reporting restrictions order was justified. First, there was a strong public interest in the story about how the open justice principle applied in the ET. Second, as Sir Elton John was a well-known public figure, his behaviour as an employer was a legitimate subject for public scrutiny.

Redaction of documents relating to comparators

34. But there is one line of authority which does not appear to have been exposed to the full glare of the Convention approach in *In re S*. Not infrequently in discrimination cases disclosure is sought from the respondent of documents relating to comparators. More often than not the names and other identifying details of the comparators are redacted. Redaction is usually justified by the argument that the redacted material is both confidential and irrelevant to the issues in the case. There are two EAT cases from the pre-HRA era which are still cited in the textbooks as supporting this approach: *Oxford –v- Department of Health and Social Security* [1977] ICR 884 and *Williams–v- Dyfed County Council* [1986] ICR 449.

35. Indeed, in a more recent unreported case from 2013 (*Plymouth City Council –v- White* UKEAT/0333/13, decided on 23rd August 2013), Judge McMullen QC permitted disclosure of redacted documents in appropriate circumstances so as to respect confidentiality without adverting to the test in *In re S* or the ECHR.

36. More often than not the redactions go largely unchallenged. But it is worth bearing in mind when disclosing redacted documents relating to comparators that sooner or later a challenge based on Convention grounds and the open justice principle will probably be made.

Practical suggestions

37. Here are some practical suggestions when considering how best to navigate issues relating to anonymity in ET:-

    (i) It is worth considering at an early stage whether you wish to obtain an anonymity order or some other like order. If you obtain such an order early enough, provided proper notice of any application has been given, this may be a practical impediment to a later challenge by the media.

(ii) In deciding whether to seek anonymity, bear in mind the public relations risks if it comes to the attention of the media that you have sought what may be described in the newspapers as “secrecy”.

(iii) If you are going to seek such an order you need clear and cogent evidence in the form of witness statements supporting any proposed derogation from the open justice principle.

(iv) Do not base your arguments on any suggestion that the public may misunderstand the issues in the case.

(v) There may however be good arguments supporting a claim for anonymity based upon reasonable expectations of privacy and the lack of a public interest in material that is only of interest to the prurient (see *Goodwin –v- NGN* [2011] EWHC 1427, the Fred Goodwin case).

(vi) If there are vulnerable individuals involved, their position may require special consideration.

(vii) It is easier to obtain an order limited to the duration of the case rather than a permanent order.

38. Of course every case is fact specific and these general suggestions must yield to particular circumstances.

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