

No anonymity order for former stripper: *A v Burke & Hare* (EA-2020-SCO-0000067-DT)

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Introduction

1. In *A v Burke & Hare* (EA-2020-SCO-0000067-DT) the Employment Appeal Tribunal, sitting in Scotland, determined an appeal of a case management decision of an Employment Judge not to grant an anonymity order to the Claimant, A.
2. A had worked as a stripper for three years while a student and had brought a holiday pay claim against the (grotesquely named) strip club at which she had worked, but sought an order that her name not appear in any published judgment. Her name was distinctive, she argued, and the judgment would readily be found using internet search engines.
3. The judgment of Lord Summers provides guidance on the balancing of Article 8 and Article 6 rights in considering applications of this kind in the Employment Tribunal, but the commentary may be applicable to similar orders in other jurisdictions.

Consideration of Anonymity Order by ET

4. The Employment Judge refused that application at a preliminary hearing. The basis (as described in the appeal judgment) was that the potential stigma and public embarrassment for A from her name being published in a judgment flowed from her choice of work as a stripper, and she was aware of this when she started this line of work.
5. He did not consider that there was evidence that A would be at risk of sexual violence and stigmatisation if her name were to be published on a judgment, and in any case followed their previous line of argument that violence and abuse was a risk she had willingly taken on when starting that line of work.

6. Nor, the EJ considered, was there evidence that her health would deteriorate if it were to be made public that she had worked as a stripper.
7. The application for that order was refused at a preliminary hearing, against which decision A appealed. A *pro tem* interim anonymity order was granted in relation to both the EJ's judgment and the appeal.

A's Appeal

8. A brought the appeal, supported by the United Voices of the World union, on the basis that:
 - (a) The EJ failed to consider matters, including A's honour and reputation, which are relevant to the issue of privacy rights;
 - (b) The EJ took into account an irrelevant factor by placing weight on the fact that A had chosen to work as a stripper;
 - (c) The EJ's decision, taken as a whole, was perverse.

Consideration of the Relevant Law

9. Anonymity orders may be made under Rule 50 of the Employment Tribunal Rules of Procedure. A Tribunal may make such an order "*so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person...*" (Rule 50(1)). In considering whether to make the order, the Tribunal "*shall give full weight to principle of open justice and to the Convention right to freedom of expression*" (Rule 50(2)).
10. It was agreed that the relevant European Convention rights were Article 8 (respect for private and family life) and Article 6 (right to a fair and public hearing). Article 10 (freedom of expression) might be relevant in some cases but had not been raised here.
11. Lord Summers noted that both Article 6 and Article 8 are qualified rights. Article 6 permits the press and public to be excluded from all or part of a trial where "the protection of the private life of the parties so require". Article 8 forbids interference with the exercise of the right to respect for a person's private life except "*as is necessary in a democratic society... for the protection of the rights and freedoms of others*". The two rights will need to be carefully balanced, depending on the facts of each individual case.

12. Lord Summers considered what was meant in Rule 50(2) by the requirement for the ET to give “full weight” to the principle of open justice. It was considered (with the benefit of relevant case law) that this could only indicate that “significant weight” was to be given to this factor. What is required, as per Lord Steyn in *Re: S (A Child)* [2005] 1 AC 593, is “*an intense focus on the comparative importance of the specific rights being claimed in the individual case*”.

Consideration of the Appeal

Ground 1

13. The EAT did not accept that the EJ had failed to address the question of honour and reputation, these being inherently part of his consideration of stigmatisation, although it would have been “*preferable*” if he had referred to Article 8 specifically [46].

14. The case law indicated that stigmatisation that is mere injury to honour and reputation, without more, was not considered sufficient to outweigh the importance of the principle of open justice: “*social opprobrium is not regarded as sufficient to justify an anonymity order*” [52].

15. Given this, it is not clear why Lord Summers also went on to state his view that if A and her friendship circle were young then “*it is possible that knowledge that she had been a stripper would have no or little impact on her dignity and reputation*” [58].

16. The EAT agreed with the EJ that there was “extremely thin” evidence on the risk of evidence to injury as a result of the judgment being publicised [54]. Nor was there evidence that it would harm her mental health [62].

17. In relation to an argument that A would suffer impairment on the labour market, there was again a lack of evidence before the EJ or the EAT. The judgment leaves open the possibility of that with more evidence on (e.g.) the practice of prospective employers searching the register of ET judgments, this harm may outweigh the principle of open justice [60-61].

Ground 2

18. Ground 2 was that the EJ ought not have taken into account the Claimant’s choice of work. The EAT accepted that her decision to work as a stripper does not remove article 8 rights

of privacy. Furthermore, it accepted that she took some steps to obscure her identity and maintain her privacy. However, given its finding in relation to Ground 1 this was insufficient to allow the appeal [63-64]. In addition, the Claimant submitted that if an anonymity order was not granted, the EAT would be forcing her to abandon her claim. The EAT was clear that *“the law does not exist to provide access to justice whatever the cost”* and *“The principle of open justice represents a commitment to transparency that is designed for the greater good. It may not always serve the interests of the individual”* [65].

Ground 3

19. As will be clear from the above, the EAT also rejected Ground 3 of the appeal. Anonymity orders are the exception to the rule, and in particular it was not sufficient that there was no public interest in it being known that A had worked as a stripper: there had to be specific reason why it should *not* be known [66].

Distinction between substantive and preliminary hearings

20. The refusal of the appeal left A and the EAT with the difficult situation that judgment of the appeal would contain her name, when the only purpose of the appeal had been to protect her anonymity. She intended to withdraw her claim if she could not bring it anonymously.

21. The EAT concluded that there was a distinction to be drawn between an order relating to only a preliminary stage and that attached to a judgment involving the substantive merits of the case. The principle of open justice was of greater importance in relation to a judgment on the evidence and merits. As such, the *pro tem* anonymity order was extended, in relation to both the EJ's judgment and the appeal, on the basis that the claim was to be withdrawn [68-71].

Conclusion and Commentary

22. Applications for anonymity orders need to be supported by robust evidence on harm that will arise to the party, going beyond mere embarrassment or social opprobrium. Evidence of impact on labour market outcomes is likely to be considered relevant and might be sufficient, depending upon the facts of the case.

23. Where an anonymity order is sought only in relation to a preliminary matter, and in particular where it relates to an application for a (wider) anonymity order, it is more likely

to be granted. This may provide some security to prospective claimants in the situation of A, where their wish to bring a claim depends upon anonymity in any published judgment.

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