Permanent anonymity orders

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XY v AB [2025] EAT 66

The facts

The Claimant brought claims for sex and race discrimination against her former employer, a City bank. She also brought a claim of sex discrimination against the Respondent, a fellow employee. The Claimant complained about the way in which the Respondent had treated her during a relatively brief relationship and said it amounted to sexual harassment. The Respondent accepted that he had been in a relationship with the Claimant but denied that he had mis-treated her and denied the details of the allegations made against him.

The Claimant unilaterally withdrew her claim against the Respondent after the Claimant settled her claim with her employer. The Claimant's allegations against the Respondent were not tested in evidence and were not the subject of a determination by the ET.

The Respondent made an application for costs against the Claimant. A hearing took place to determine that application. At that hearing, a permanent anonymity order was made in favour of the Respondent. The permanent anonymity order was not resisted by the Claimant and no application was made on her behalf for a similar order. The ET declined to order costs against the Claimant.

Whilst the Claimant had not resisted the permanent anonymity order, she swiftly changed her mind after the hearing. The following day, she applied to lift the order. The Claimant also sent messages to various people connected to the Respondent, including the Respondent's new partner and to senior managers at his new employer. In an email to the Respondent's new employer, the Claimant said that she had won a sexual harassment claim in Tribunal and that if they wanted to see the details she would be happy to provide them.

The ET

At a reconsideration hearing, the Claimant challenged both the making of a permanent anonymity order and the fact that no equivalent order was made in her favour.

The ET concluded that it was in the interests of justice to make an order to protect the Respondent's identity and his reputation and concluded that it was a proportionate derogation to the principles of open justice. The ET also concluded that there was evidence to show a real risk to his Article 8 rights if he was named and the detail of the claim entered the public domain without any testing of the merits.

The ET noted that the Claimant had shared her allegations with others, had threatened press involvement during the proceedings and even after withdrawing and avoiding a costs order despite her unreasonable behaviour, had contacted the Respondent's new employer, his friends, and even his current partner. The ET concluded, applying Articles 6 and 10, that the restrictions on the disclosure of the Respondent's identity was justified because the protection of his private life required it and publicity would undermine faith in the justice system.

The ET refused the Claimant's application for a permanent anonymity order in respect of her own identity. The ET noted that the Claimant had chosen to bring the claims, make the allegations, had actively threatened publicity by going to the press, and had chosen to withdraw the claim before the allegations could be tested by the ET. The ET found that the interests of justice did not require a derogation from the principle of open justice. The ET was not satisfied that the Claimant's Article 8 rights justified a restriction on the disclosure of her name when balanced against the rights under Articles 6 and 10.

The Claimant appealed against the decision of the ET.

The EAT

The key issue in this appeal was whether the ET was wrong to grant a permanent anonymity order in favour of the Respondent in circumstances in which the claims against him had been withdrawn (and so had not been tested in evidence or been the subject of a ruling), and in which there was evidence before the ET that the Claimant had breached a Restricted Reporting Order and had falsely stated that she had won her sexual harassment claim against the Respondent.

Cavanagh J provided a thorough analysis of the relevant law. He summarised the relevant points of law and principles which are of particular relevant to the case as follows:

The approach that should be taken by a Tribunal

(1) The same approach should be applied to derogations from open justice, including anonymisation, in employment claims in the ET as in any other type of claim (*F v G [2012] ICR 246*);

(2) The principles of open justice still apply, even if a case has been settled and there has been no determination on the merits (*Fallows v News Group Newspapers [2016] IRLR 827*);

(3) The burden rests with the party seeking a derogation from open justice to establish that it is necessary (*Roden v BBC [2016] IRLR 627*);

(4) The ET should first ask itself whether the derogation sought is justified by the common law exception to open justice, and should then go on to check its conclusion against the relevant Convention rights (Rule 50(2) and *Millicom Services UK Ltd and others v Clifford [2023] IRLR 295*);

(5) The ET must undertake a balancing exercise (*Kennedy v Information Commissioner (Secretary of State for Justice Intervening) [2014] UKSC 20* and *A v BBC [2014] UKSC 25*);

(6) The question whether there should be a derogation from the principle of open justice in a particular case is fact-specific (*Kennedy* and *A v BBC*);

(7) An ET is generally better placed than the EAT to carry out the assessment that is required when considering a derogation from open justice (*Fallows*);

The common law stage of the analysis

(8) The open justice principle is paramount and so any derogation from it must be avoided unless justice requires it (*Global Torch Ltd v Apex Global Management Ltd [2013] 1 WLR 2993*);

(9) A derogation from open justice will, in general, only be justified if it is concerned with the promotion of the interests of justice. This includes circumstances in which justice would otherwise be prevented from being done in the particular case, or where it is necessary to promote the requirements of the due administration of justice in the proceedings. A derogation may also be justified where the derogation is necessary to ensure that justice is done in other proceedings (*Millicom*). The Court of Appeal in Millicom did not say, however, these were the only possible justifications;

Considerations that are relevant to the common law stage of the analysis include:

(10) The burden of establishing that a derogation from the general principle of open justice is necessary lies with the person seeking it (*In re Guardian News and Media Ltd v City of Westminster Magistrates' Court [2013] QB 618*);

(11) The need for the derogation must be established by clear and cogent evidence (*Guardian News and Media*);

(12) The ET should take into account the importance to the case of the information that is sought to be withheld and the harm that the disclosure would cause (*Millicom*);

(13) The ET should also take account of the role of the applicant in the proceedings, i.e. whether they are claimant, defendant, or witness (*Millicom*);

(14) The ET should take account of the purposes of open justice that were identified by Baroness Hale in *Dring v Cape Intermediate Holdings Ltd [2019] UKSC 429*, namely to enable public scrutiny of the courts and tribunals and to promote public confidence in, and understanding of, the courts;

Considerations that are relevant to the check against Convention rights

(15) There must be an intense focus on Convention rights (*In re S [2005] 1 AC 593*);

(16) In most (though not necessarily all) cases, the relevant Convention rights will be those under Article 6 (fair hearings); Article 8 (right to family life, which includes privacy rights); and Article 10 (freedom of speech);

(17) The Convention Rights should be balanced against each other. The balancing exercise is necessary because, in many cases, considerations relating to Convention rights will point in different directions (especially where, as will usually be the case, Arts 8 and 10 are engaged). No Convention right takes precedence over the others (*Re S*);

(18) A proportionality test must be applied (*Re S*);

Considerations that are of particular relevance in anonymity cases such as this

(19) As a general principle, parties to litigation should expect that their names will be made public (*R v Legal Aid Board ex p Kaim Todner [1999] QB 966*);

(20) A desire for anonymity is not a reason in itself to grant it: publicity is the price to be paid for open justice and the freedom of the press (*Khuja v Times Newspapers Ltd [2017] UKSC 49*);

(21) The fact that ventilation of allegations is painful or humiliating is not a reason in itself to grant anonymity (*Scott v Scott [1913] AC 417* and *A v Burke and Hare [2022] IRLR 142*);

(22) The burden of showing that a derogation from open justice is greater where the applicant is seeking indefinite anonymity as compared to when the applicant is seeking anonymity for a limited period, such as until judgment at the end of a trial (cf *Fallows* and *M v Vincent [1998] ICR 74*);

(23) A respondent is in a different position from a claimant. A respondent may have an interest equal to the claimant in the outcome of the proceedings, but the respondent has not chosen to initiate court proceedings which are normally conducted in public. In general, though, all parties have to accept the embarrassment and potential damage to their reputation from being involved in litigation (*Kaim Todner*);

(24) Where an allegation is made but is not finally determined, the public can generally be trusted to understand that unproven allegations that were made and then withdrawn are no more than that, but that does not mean that the fact that the truth or falsity of the allegations were never determined after a full hearing is an irrelevant consideration (*Fallows* and *A v X [2019] IRLR 620*); and

(25) Therefore, if an application for a derogation from open justice relates to an interlocutory application, this is a less significant intrusion into the general rule than interfering with the public nature of the trial (*Kaim Todner*). The public interest in open justice is at its strongest when it restricts or interferes with reporting or publishing the merits of the case. This will usually be after evidence has been led (*A v Burke and Hare*).

EAT conclusion

The appeal against the permanent anonymity order made in favour of the Respondent was dismissed. The EAT also decided to grant permanent anonymity to the Claimant for reasons which were not connected with the subject-matter of the proceedings.

The EAT concluded that every one of the considerations that was taken into account by the ET was a relevant and legitimate consideration. The EAT also concluded that the weight to be placed upon those considerations was a matter for the ET.

The EAT could not say that the conclusion the ET reached, after applying the correct legal test, was plainly wrong or was one that no reasonable ET could have reached. The EAT said it was important to note that the ET did not decide to grant anonymity to the Respondent solely because the Claimant withdrew her claim and the allegations were never tested at trial. The ET took this into account, but the ET also took into account the egregious way that the Claimant had behaved, including by behaving vindictively towards the Respondent, and by continuing to do so even after she had withdrawn her claim. It was the cumulative effect of all of the considerations in this unusual case that persuaded the judge to make the anonymity order in favour of the Respondent.

Comment

Whilst the decision to make a permanent anonymity order in this case was fact-specific, the EAT decision gives a very helpful and comprehensive synopsis of the principles to be considered in cases involving applications for such orders.

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