Neutral Citation Number: [2012] EWHC 774 (QB)

Case No: HQ12X01042

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/03/2012

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

- -

Between :

BUQ	**Claimant**
- and -	
HRE	**Defendant**

- -
- -

Matthew Nicklin (instructed by **Eversheds**) for the **Claimant**
Akhlaq Choudhury (instructed by **Thomas Mansfield**) for the **Defendant**

Hearing date: 16 March 2012

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Judgment

Mr Justice Tugendhat :

1. On 13 March 2012 Bean J heard the Claimant's application, made on short notice to the Defendant, for an injunction to run until 16 March 2012 prohibiting the disclosure of information of a sexual nature concerning the Claimant and his wife (who is not a claimant):

> "to any other person (other than (1) by way of disclosure to legal advisors instructed in relation to these proceedings ('the defendant's legal advisors') for the purpose of obtaining legal advice in relation to these proceedings or (2) for the purpose of carrying this order into effect)."

2. The order was substantially in the form of the Model Order which is included in the Guidance on Non-Disclosure Orders issued by the Master of the Rolls in August 2011. Under the heading "Public Domain and Other Permitted Disclosures" there was not only the public domain proviso, but also a further proviso that nothing in the order should prevent the Defendant from disclosing the information in question to certain individuals named in a confidential schedule. Those individuals were officers or employees of the company which was the controlling shareholder of the group of companies by which each of the parties to this action had been employed. It has since been agreed that the Claimant's wife should be added to the list of persons in the order to whom disclosure can be made.

3. Bean J also heard the application in private, granted anonymity to the parties, limited access to the hearing papers, and made other provisions, all substantially in the form of the Model Order. He was satisfied that it was necessary to include these measures in the Order in the interests of justice, if the purpose of the proceedings was not to be defeated.

4. I too was so satisfied of that at the hearing on 16 March. So I heard the matter in private and continued the order of 13 March 2012 until the making of a further order following the handing down of this judgment.

5. In compliance with undertakings given to the court, the Claimant issued his claim form and an Application Notice returnable on 16 March. He applied for the continuation of the injunction in terms similar to those granted on 13 March to run until trial, or further order in the meantime.

6. The Defendant served a witness statement and appeared before me represented by Mr Choudhury. He was content that the order should continue provided that there were variations as follows. One such variation is not contested. It is to permit disclosure to legal advisors instructed by the Defendant in relation to any Employment Tribunal proceedings arising out of his employment and/or the termination thereof for the purpose of obtaining legal advice in relation to such Employment Tribunal proceedings.

7. The second variation sought is contested. And this is the principal subject of this judgment. The Defendant seeks an exception to the non-disclosure order to permit the information sought to be protected "by inclusion in any claim presented to the Employment Tribunal". In other words, he wants to be free to submit his claim in a form of his own choosing, as would any other claimant, and without having to ask the Claimant, or this court, for permission.

8. The Claimant does not in principle object to the Defendant advancing in the Employment Tribunal whatever claim he may be advised to advance. But he submits that any proviso to the effect that the information in question may be included in form ET1 must be subject to a prior condition that a draft of that form be first submitted to the Claimant for agreement. If the Claimant does not agree, there must be provision enabling the parties to come back before this court, for the purpose of this court resolving the question as to what information the Defendant is to be permitted to include in the form ET1.

FACTUAL BACKGROUND

9. This is an interim application and so this judgment contains no findings of fact. The facts as recited are those stated to be facts by the Claimant, although much is not in dispute, as now appears from the witness statement of the Defendant.

10. The Claimant is the Managing Director of a group of companies ("The Group"). The Group has a large majority shareholder ("the Group Owner"). The Defendant was the Chief Executive of one of the Group's subsidiary companies. He reported to the Claimant.

11. For many years, the Claimant and Defendant enjoyed a good relationship. As part of that, they also exchanged text messages and e-mails, many of which related to such encounters and other matters of a sexual nature. These included references to the Claimant's wife. The Claimant states that messages relating to his wife unknown to her and that this and other references were a "joke". The Defendant states that they are what they purport to be.

12. The Claimant was notified of allegations of wrongdoing concerning the Defendant in his position in the company of which he was Managing Director. The same day the Claimant spoke to the Defendant about the allegations and told him that he would be the subject of an investigation. The Defendant requested a meeting with the Claimant; and the two men duly met the following day. The Claimant states that he showed the letter containing the allegations to the Defendant. He states that the Defendant became agitated and said he needed to leave his job.

13. It is common ground that, in addition to being an employee, the Defendant holds a valuable shareholding in the Group company.

14. The Claimant states that the Defendant suggested that he should be paid the sum of £xm as a severance package, to include the price of the shares, which he would thereby sell as part of an agreement. The Claimant states that this is a gross over inflation of the actual value of the shares by the Defendant. The Defendant states that he did ask that, as part of the deal under which he would leave his employment, his shares would be bought out. But he states that he had said to the Claimant that the shareholding could be worth a figure which is half that which the Claimant alleges he mentioned, and that was based on a conversation he had had with the Claimant a few years previously relating to the prospective purchase of the company in question. He states that he resents the suggestion that he was inflating the value of his shares.

15. The Claimant states that he said that he was not in a position to deliver what was asked. He states that, following this, the Defendant became aggressive and said that

he would "bring other people down with him". The Defendant also made a reference to having been "physically abused" which the Claimant said he did not understand.

16. The following day, the Defendant sent an email to the Claimant with the subject heading threatening to disclose his allegation to the public and to The allegations included that the Claimant and his wife had been sexually abusing the Defendant. He stated that this could be proved in court by "e-mails, text messages, reports, statements, photos and witnesses".

17. The Claimant met with the Group Owner and a decision was taken to suspend the Defendant pending an investigation into the allegations made against him.

18. Two weeks later the Defendant attended a meeting with the Group Owner accompanied by his solicitor. He presented a copy of the document which had been sent as an attachment to his e-mail threatening to disclose his allegations to the public.

19. The Claimant states that the accusations against himself and his wife are completely untrue. He states that the Defendant made further threats at the meeting, but the precise terms are not set out.

20. About a week after that the Defendant sent a note to the in house counsel of the Group Owner. It contains a number of complaints, including repeated complaints that he had been the victim of sexual harassment. He threatened to "tell my story which is 'the Truth' by whatever means necessary to expose [the Claimant]". On the same day the Defendant sent copies of the print outs of the communications that had taken place between the Claimant and the Defendant.

21. These were communicated to the Claimant and were made exhibits to the witness statement in support of the application made on 13 March 2012.

22. The notice given on behalf of the Claimant to the Defendant was in the form of a letter dated 13 March received by solicitors for the Defendant some time before 13.45, at which time there was a conversation between the two solicitors. The letter included the allegation that the Defendant "has made a number of attempts to obtain money from our client that are tantamount to blackmail". This is in fact a reference to proposals made by the Defendant to the Group Owner, as the following paragraph makes clear. The Claimant asked for 72 hours' clear notice to him of the Defendant's intention to publish the information sought to be protected.

23. At 14.42 solicitors for the Defendant replied stating that he had good claims for breach of contract, constructive unfair dismissal and sexual harassment which he was discussing with the Group Owner and that his demands were not "tantamount to blackmail". He offered a limited undertaking (not to publish confidential material relating to the Claimant to any third party save employees of the Group Owner), but said he had instructions to issue proceedings in the Employment Tribunal. In the telephone conversation it had been made clear that the Defendant would not agree to any restriction to his right to refer to or produce in any ET1 that he decided to file the information sought to be protected including copies of texts, photographs or e-mails.

24. Less than an hour before the start of the hearing before Bean J the solicitor for the Defendant wrote stating that it was not practicable for the Defendant to be represented

at the application and asking that the following be put before the judge, as it was. He said that the Defendant had made no demands for money from the Claimant. He was in without prejudice discussions with the Group Owner regarding the sale of his shares and the compromise of his claims against the Group. This was a legitimate discussion and did not amount to blackmail, and the Group Owner had not made that allegation. The Defendant could not be stopped from presenting a claim to the Employment Tribunal and neither should he be fettered in any without prejudice discussion.

25. The Claimant in his witness statement states that the publication threatened by the Defendant would, in addition to rendering his employment position untenable, also be severely distressing to his wife and family, and might result in the breakdown of his marriage. This would cause distress to his young son and to his stepchildren one of whom is still a child. There is no evidence from the Claimant's wife.

26. The Defendant in his witness statement states that the proposal that he should be paid the sum he says he asked for, amongst other terms of any agreement, was his opening figure and that any agreement would include a waiver of claims, including claims for unfair dismissal and sexual harassment. He states that the Group Owner had never suggested that he was blackmailing them. Negotiations are continuing. He regrets having threatened to tell his story to members of the public. The e-mail was sent out of frustration. As to the form ET1 he says he must be able to include the details of his complaint in the form in order to set out his case. Failure to provide such details would be likely to be held against him as a failure to properly particularise his complaint. He has been advised that the Employment Tribunal can impose a Restricted Reporting Order as Tribunals commonly do in cases where there are allegations of sexual bullying.

THE LAW

27. The starting point is the Human Rights Act 1998 ("HRA"). By s.6 the court (as a public authority) is required to act compatibly with Convention Rights. By s.1(1) the court is also required to take into account judgments of the European Court of Human Rights ("the Strasbourg Court").

28. The Convention rights which might possibly arise for consideration in this case are the rights of the Claimant under Art 8, and of the Defendant, both to freedom of expression (Art 10) and of access to the Employment Tribunal (Art 6). So far as material to the present case these provide:

> "*Article 6 Right to a fair trial*
>
> (1) In the determination of his civil rights and obligations … 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, … where … 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.

> *Article 8 Right to respect for private and family life*
>
> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (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 … for the protection of the rights and freedoms of others.
>
> *Article 10 Freedom of expression*
>
> (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…
>
> (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 … for the protection of the … rights of others, for preventing the disclosure of information received in confidence ..."

29. The exception in Article 10 relating to the protection of the rights of others and the disclosure of information received in confidence can apply only where conditions are satisfied. The restrictions must pursue a legitimate aim or aims, and be necessary in a democratic society for the protection of the legitimate aim or aims: the protection of the rights of others, or for preventing the disclosure of information received in confidence. They must also be proportionate to the end pursued, securing what is necessary for the protection of these aims and no more.

30. When considering whether the publication of information which is said to be private should be permitted, the first question the court must consider is whether the claimant has a reasonable expectation of privacy in respect of that information such that the claimant's rights under Article 8 of the European Convention on Human Rights are engaged. If the answer to the first question is yes, the second question the court must address is what are the rights of the defendant. See e.g. *Murray v Express Newspapers Plc* [2009] Ch 481at [24], [27], [35] and [40]. Finally the Court must weigh the rights claimed by the claimants against the rights of the other individuals concerned.

31. The Court should approach the ultimate balancing exercise in accordance with the guidance given by the House of Lords in *Re S (A Child) (Identifications: Restrictions on Publication)* [2005] 1 AC 593, Lord Steyn at [17]. Where both Article 8 and Article 10 rights are involved: (i) neither Article as such has precedence over the other; (ii) 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; (iii) the justifications for interfering with or restricting each right must be taken into account; (iv) finally, the proportionality test – or "ultimate balancing test" - must be applied to each.

32. In *Murray* the Court of Appeal said at [36]:

> "36. As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher."

33. The Court of Appeal at para [35] also quoted with approval Lord Hope's formulation of the test in *Campbell v MGN* [2004] 2 AC 457, [99]:

> "The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the Claimant and faced the same publicity"

34. In considering the questions the Court must give separate consideration to different items or classes of information, and the different persons to whom disclosure is at risk of being made, eg the public at large, or those who may have a particular interest in the information in question. See, for example, *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] QB 103, Sir Anthony Clarke MR at [36], [47], [49] and [62] (in that case different considerations applied to information about the use by the claimant's sexual partner of property and facilities of the claimant's employer).

35. Details of their sexual lives are high on the list of those matters which people ordinarily regard as confidential: *Lord Browne* at para [85].

36. The best interests of any child involved in a case must be a primary consideration for the court, but the interests of children do not automatically take precedence over the Convention rights of others: *K v News Group Newspapers Ltd* [2011] EWCA Civ 439; [2011] 1 WLR 1827 para [19].

37. In *Thorne v Motor Trade Association* [1937] AC 797 (at pp. 806-807 a case under the Larceny Act 1916 s.29(1)) Lord Atkin said:

> "The ordinary blackmailer normally threatens to do what he has a perfect right to do namely, communicate some compromising conduct to a person whose knowledge is likely to affect the person threatened. Often indeed he has not only the right but also the duty to make the disclosure, as of a felony, to the competent authorities. What he has to justify is not the threat, but the demand of money. The gravamen of the charge is the demand without reasonable or probable cause: and I cannot think that the mere fact that the threat is to do something a person is entitled to do either causes the threat not to be a 'menace' ... or in itself provides a reasonable or probable cause for the demand (at pp. 806-807)". (emphasis added)

38. In *AMM v HXW* [2010] EWHC 2457 at para 38 I concluded from that passage from Lord Atkin's speech in *Thorne*:

> "The fact that a person is making unwarranted demands with threats to disclose information does not of itself mean that that person has no right to freedom of expression. As Lord Atkin pointed out in *Thorne*, the blackmailer may even be under a duty to disclose the information. But if a person is making unwarranted demands with threats to publish, that is a factor in deciding whether that person has any Art 10 rights, and, if so, then the weight to be accorded to them in balancing them with the applicant's Art 8 rights."

39. The Court may grant an injunction to prohibit the use of documents in legal proceedings in order to protect the Art 8 rights which persons who are not parties to that litigation may have. But the deployment by a litigant of documents at trial is itself a form of expression within Art 10, and a form which should attract a high degree of protection from the courts: *Commissioner of Police of the Metropolis v Times Newspapers Ltd* [2011] EWHC 2705 paras [70], [72]. Other collateral proceedings for injunctions have been brought, the best known being *Lord Ashburton v Pape* [1913] 2 Ch 469. The case of *Commissioner of Police of the Metropolis* is different, in that the purpose for which the order was sought and made was to prevent private and confidential information from being disclosed to the claimant who was suing the Times Newspapers Ltd for libel in another action. There was no allegation in the libel action of wrongdoing for which the Commissioner of Police was responsible. Mr Nicklin did not cite the *Commissioner of Police* case or any of the other collateral proceedings cases, no doubt because none is comparable to the present one.

40. Since the injunction sought will affect the Convention right to freedom of expression of the Defendant and others, the Human Rights Act s12 applies. It includes the following:

> "12. - (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression…
>
> (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
>
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to-
>
> (a) the extent to which-
>
> (i) the material has, or is about to, become available to the public; or

> (ii) it is, or would be, in the public interest for the material to be published; …."

41. In *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253 at paragraph 22 the test to be applied at this stage is set out:

> "Section 12(3) makes the likelihood of success at the trial an essential element in the court's consideration of whether to make an interim order. But in order to achieve the necessary flexibility the degree of likelihood of success at the trial needed to satisfy section 12(3) must depend on the circumstances. There can be no single, rigid standard governing all applications for interim restraint orders. Rather, on its proper construction the effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood makes the prospects of success 'sufficiently favourable', the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ('more likely than not') succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on article 10 and any countervailing Convention rights. But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include those mentioned above: where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal." (emphasis added)

42. The Employment Tribunal is a public authority. It is bound by HRA s.6 to the same extent as this Court is bound: *XXX v. YYY* [2003] UKEAT 0729_01_0904 (9 April 2003). In that case X worked as a nanny for Y and Z's son J. She submitted an application to the Employment Tribunal complaining that she had been the victim of sex discrimination under section 6 of the Sex Discrimination Act 1975 and had been constructively and unfairly dismissed. The basis of her complaint was her allegation that Y, J's father, had made unwelcome and improper sexual advances towards her. Unknown to Y or Z and on an unknown date X secretly made a video recording of events one morning in the kitchen of the family home of Y, Z and J. The video recorded sexual advances made by Y to X in the presence of J, who is shown in much of the footage depicting that conduct. At para [22] Mitting J said:

> "22. In this case the Article 8 rights of J (and Y and Z if relevant) and the Article 6 rights of X must be weighed. Both can be securely protected if the course suggested by this Tribunal in argument is followed. The Employment Tribunal is

> a public authority under section 6 of the Human Rights Act 1998. The admission of the video recordings in public session would infringe J's (and possibly Y and Z's) Article 8 rights. Therefore, Rule 10 (3) of the Employment Tribunal Rules of Procedure 2001 is engaged. It provides [the same powers as are set out in the 2004 Rules rule 16(1)(a) below].
>
> 23. The public playing of the video recording would contravene a prohibition against the infringement of those rights by virtue of section 6. Therefore the video recordings should be viewed by the Employment Tribunal in private. Their relevance will be a matter for the Employment Tribunal to determine in the light of all the other evidence, not just the parties' pleaded cases."

43. The Court of Appeal reversed the decision of the EAT on the ground that the video was in any event inadmissible because it was irrelevant, but that court recorded that it had not been suggested that, if the evidence had been admissible, it was outside the powers of the EAT to make the order it did: [2004] EWCA Civ 231 para [16].

44. The Employment Tribunals rules of procedure are set out in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 SI 2004 No 1861. The Rules include the following:

> "**1.** - (1) A claim shall be brought before an employment tribunal by the claimant presenting to an Employment Tribunal Office the details of the claim in writing. Those details must include all the relevant required information ...
>
> (4) … the required information in relation to the claim is - … (e) details of the claim;…
>
> **2**. - (1) On receiving the claim the Secretary shall consider whether the claim or part of it should be accepted in accordance with rule 3. If a claim or part of one is not accepted the tribunal shall not proceed to deal with any part which has not been accepted (unless it is accepted at a later date). If no part of a claim is accepted the claim shall not be copied to the respondent.
>
> (2) If the Secretary accepts the claim or part of it, he shall -
>
> (a) send a copy of the claim to each respondent and record in writing the date on which it was sent;…
>
> **10.** - (1) Subject to the following rules, the chairman may at any time either on the application of a party or on his own initiative make an order in relation to any matter which appears to him to be appropriate. Such orders may be any of those listed in paragraph (2) or such other orders as he thinks fit. Subject to the following rules, orders may be issued as a result of a

chairman considering the papers before him in the absence of the parties, or at a hearing…

16. - (1) A hearing or part of one may be conducted in private for the purpose of hearing from any person evidence or representations which in the opinion of the tribunal or chairman is likely to consist of information -

(a) which he could not disclose without contravening a prohibition imposed by or by virtue of any enactment;

(b) which has been communicated to him in confidence, or which he has otherwise obtained in consequence of the confidence placed in him by another person; …

18. - …

(7) Subject to paragraph (6), a chairman or tribunal may make a judgment or order: -

(a) as to the entitlement of any party to bring or contest particular proceedings;

(b) striking out or amending all or part of any claim or response on the grounds that it is scandalous, or vexatious or has no reasonable prospect of success;

(c) striking out any claim or response (or part of one) on the grounds that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;…

50. - (1) A restricted reporting order may be made in the following types of proceedings: -

(a) any case which involves allegations of sexual misconduct;…

(3) A chairman or tribunal may make a temporary restricted reporting order without holding a hearing or sending a copy of the application to other parties….

(7) Any person may make an application to the chairman or tribunal to have a right to make representations before a full restricted reporting order is made. The chairman or tribunal shall allow such representations to be made where he or it considers that the applicant has a legitimate interest in whether or not the order is made….

> (8) Where a tribunal or chairman makes a restricted reporting order -
>
> (a) it shall specify in the order the persons who may not be identified;
>
> (b) a full order shall remain in force until both liability and remedy have been determined in the proceedings unless it is revoked earlier; and
>
> (c) the Secretary shall ensure that a notice of the fact that a restricted reporting order has been made in relation to those proceedings is displayed on the notice board of the employment tribunal with any list of the proceedings taking place before the employment tribunal, and on the door of the room in which the proceedings affected by the order are taking place."

45. All that Bean J had to decide was whether to grant an injunction to last until a further interim hearing to be held within a few days, at which the Defendant would be represented. The hearing before me is that interim hearing. It is not the trial.

SUBMISSIONS

46. Mr Nicklin submits that the Claimant has a reasonable expectation of privacy in respect of the text messages and photos in question. The fact that the communications were between business colleagues does not affect the reasonable expectation of privacy, but is relevant if at all, to the second question the court must address.

47. Mr Nicklin also submits that the Claimant's wife's rights are engaged, and the court must have regard to these. In so far as the Defendant's Art 10 rights are engaged, the court must direct its attention to the disclosure that the Defendant states that he wishes to make. He has already made disclosure to the Group Owner and representatives of his employer with whom he has been negotiating. If the Defendant had a right to make any disclosure, it was to persons within the Group whose responsibility it was to deal with such matters, and to no one else.

48. Mr Nicklin submits that a non-disclosure order in the terms sought would not be an interference with the Defendant's Article 6 rights, because those rights are always subject to the rules of court and to any orders that the court might make.

49. In his skeleton argument Mr Nicklin persisted in the allegation that the threats to publish the private information was part of an exercise by the Defendant to obtain a massive sum of money to which he was not otherwise entitled. He referred to this as 'blackmail'. But in his oral arguments did not pursue the use of the word 'blackmail', rightly in my view. He said the word was unhelpful, and that word had only ever been used in a colloquial sense, and not to refer to the Theft Act 1968 s.21. I do not so read the solicitors' letter, but in any event, when lawyers use legal terms in pre-action correspondence, they cannot complain if they are understood as using them in a legal sense.

50. Mr Nicklin submits that even if he has an entitlement to compensation for unfair dismissal, or for the sexual harassment, as he alleges, the Defendant had no entitlement to be paid for his shares save from a buyer who has agreed to buy them. So he was wrong to demand that he should be paid so large a sum, whether it be the £10m that the Claimant alleges or the £5m that the Defendant says he asked for. And it makes no difference that the demand was made to the Group rather than to the Claimant.

51. Therefore, submits Mr Nicklin, his claim for respect for his Art 10 rights is weak. His freedom to frame his claim in the Form ET1 has been forfeited by his wish to seek publicity. Once a Form ET1 has been submitted, the Claimant will not know to whom the information in it is disclosed, or at what point that information might enter the public domain.

52. Mr Nicklin submits that it is immaterial whether the Claimant is telling the truth or not when he says that the communications were a joke. A person does not have to say whether private information is true or false (*McKennitt v Ash* [2008] QB 73).

53. As to the Employment Procedure Rules, Mr Nicklin submits that they do not require the Defendant to submit the copies of the text messages and photographs. The rules do not give a non-party to proceedings, such as the Claimant would be, any clear right to object to material submitted in an ET1. The Employment Tribunal is a public authority, but it does not have control over what the ET1 contains until after it has been submitted. There is a real risk that the contents of the ET1 might get into the public domain and the Claimant would have great difficulty in preventing that.

54. Mr Choudhury submits as follows. The Defendant's demand to be paid for his shares in the context of a settlement of all issues arising out of the termination of his employment was not unwarranted. He had reasonable grounds to believe that the shares were worth what he asked for them. The court cannot resolve any issue as to the figure that the Defendant mentioned.

55. The evidence discloses no menaces to disclose details of sexual behaviour. What he threatened to disclose was his complaint that he had been physically abused. Even when the Defendant made his threat to disclose matters to the public he did not threaten to disclose salacious details.

56. In any event, the Claimant's evidence that his wife was not party to the explicit communications purportedly involving her is incredible, and that the proper inference is that his wife was complicit. He provides evidence of other instances of sexual activity and unlawful activity in his presence in which he states that the Claimant's wife was complicit.

57. Where sexual relations are not consensual, but involve abuse or harassment, there can be no reasonable expectation of privacy, and that is the Defendant's case here. Rights to complain of such treatment strongly engage Art 10 and Art 8.

58. The Claimant cannot resile from the allegation of blackmail without consequences. That allegation was the basis of his application to Bean J.

59. The provisions of the Rules of Procedure, and the application of HRA s.6, set out above give to the Claimant all the legal protection that is required. It is not necessary for this court to intervene. The Form ET1 does require details of the claim to be submitted, but there is no real risk of wider disclosure than is necessary for the purposes of the proceedings, and none to the public at large. There is no right of the public to access to the Forms ET1 on an Employment Tribunal file. The Claimant's subjective fears of disclosure are misplaced.

DISCUSSION

60. The position in summary is that the Claimant is a fellow employee with the Defendant of the same group of companies, and the Claimant wishes to be able to have a say in the way in which the Defendant presents to an Employment Tribunal a complaint against their common employer based on allegations of a very serious nature to be made against the Claimant himself. If the Claimant objects to the contents of the Form ET1 drafted by the Defendant, it is to be envisaged that there could be a further application to this court, again on an interim basis (as I understand) before the Defendant would be able to submit his claim. Meanwhile the Defendant is unemployed, there are only a few weeks available to the Defendant to submit his Form ET1, and the outcome of the Employment Tribunal proceedings will be important to his prospects of obtaining further employment. It is because the timescale for submitting the Form ET1 is so short, that it is not to be contemplated that there will have been a trial of this action in this court before that period expires.

61. While there is no doubt that a person normally has a reasonable expectation of privacy in respect of sexual activity, that cannot be the case where the activity is abusive or amounts to sexual harassment.

62. It is, of course, the case that work is one of the common means through which people meet each other and form personal relationships, whether sexual or otherwise. So the fact that an activity took place with a work colleague is not determinative. However, if the activity occurs at the employer's premises, that is relevant, since in *Murray* "the place" is one of the circumstances specifically mentioned.

63. In my judgment, the fact that the activity occurred in a meeting between employees is also one, but only one, of the circumstances of the case to which the court must have regard in deciding what a reasonable person of ordinary sensibilities would feel if he was placed in the same position as the Claimant and faced the same publicity (i.e. in the Form ET1 to be submitted to the Employment Tribunal). Unless the activity did take place at work (or with a fellow employee), a person is unlikely to be faced with publicity of that particular kind. So if parties to a personal relationship are also in a work related relationship, that must in my view, be relevant to what a reasonable person of ordinary sensibilities who is a party to such dual relationships would feel. This is the more so if one party is in a more junior position than the other, and reports to the other.

64. In such a case a reasonable person of ordinary sensibilities in the position of the more senior would recognise the possibility that apparent consent by the more junior person may actually be non-consensual submission, or at least that, if anything goes wrong, the junior party might allege that. The senior party ought in such a case to feel that the disclosure of information which would otherwise be private ought to be disclosed to

those responsible for determining disputes that arise at the work place, including, if it came to that, an Employment Tribunal.

65. Whether the Claimant's admitted communications were part of such abuse or harassment is the very issue that the Defendant wishes to put before the Employment Tribunal. So this court cannot assume in the Claimant's favour that his employer will succeed in any Employment Tribunal proceedings brought by the Defendant.

66. Whether this point arises at the first question the court has to ask, or at the second question, is not something that I have to decide on this interim application.

67. As to the concern that the Claimant expresses for his wife and her rights, she has not given evidence, and there is little material on the basis of which the court can form any view as to how at trial a court would be likely to weigh her rights. If indeed she was not complicit in any of the matters alleged, the court cannot be required to accept at face value his claim to speak for her, in circumstances where her rights are as significantly engaged as they are in this case. He may be confusing his own interests with hers. If, on the other hand, she was complicit, then there is no reason why she should not be a claimant and speak for herself. The allegations made by the Defendant against the Claimant's wife would be far from trivial matters, if viewed from the point of view of a person of ordinary sensibilities in the position of the Claimant's wife. The fact that they may be the subject of litigation in the Employment Tribunal could only make them more serious.

68. The position of the children is a factor to be taken into account. The interests of children may be more closely assimilated to those of an adult the older they are. There are no submissions before the court for the children, and Mr Nicklin does not rely on this point as determinative of the question I have to decide.

69. It is the case that persons involved in legal proceedings can attempt to abuse the process of the court by seeking to publicise under the protection of absolute privilege allegations for which they would not have such protection elsewhere. But in this case the Defendant is advised by solicitors, and he has expressed regret for the one occasion when he did make a threat, namely on 10 March, which went wider than disclosure to persons with a legal interest in his allegations. To seek to put before a tribunal material known to be irrelevant which interferes with the rights of others is an abuse: irrelevant evidence is also inadmissible evidence. It may happen without malice if a litigant is in person, but the risk can normally be much reduced when the parties are legally represented. It did happen, as the Court of Appeal found, in the *XXX* case, but there is not normally a high risk of it happening where there is legal representation.

70. The allegation of blackmail, if well founded, might have given some basis for a finding that there was a significant risk of such abuse. That is how I understood it to be relied upon for as long as it was being advanced. But once that allegation is put on one side, there is no basis for the court to apprehend a real risk that the Defendant is likely to try to abuse the process of the Employment Tribunal. The risk that he might attempt to abuse the process of the Employment Tribunal is not in my judgment a real risk at all.

71. Moreover, as any reader of the law reports will know, where litigation is heard in public the courts treat the interests of the public in open justice as necessary and proportionate reasons for overriding what would otherwise be the rights of litigants and third parties to confidentiality and privacy.

72. On the basis of these conclusions alone, I would have refused to continue this injunction.

73. However, even if I had been satisfied that the Claimant was likely to succeed at trial in showing that there is a real risk that the Defendant might disclose to the Employment Tribunal irrelevant material in respect of which the Claimant had a reasonable expectation of privacy, I would still have refused an injunction in its present form, without the disputed amendment proposed by the Defendant. I would have done so on the grounds that it is neither necessary nor proportionate, because the Employment Tribunal has the rules and powers to deal with this, and will be incomparably better placed than this court to decide what is, and what is not, proper to be put before it by the Defendant.

74. Moreover, this court should be very reluctant to give to a person accused of such serious wrongdoing as this Claimant is accused of the opportunity to cause delay to, or place obstructions in the way of, the complainant's attempts to seek redress for the alleged wrongdoing. There is a high public interest in litigants having their right under Art 6, which is also a right under Art 10, to commence proceedings in a tribunal unfettered by interventions from another person against whom the litigant is making allegations. The rights of such other persons can adequately be secured in the course of the proceedings, once the proceedings have been commenced.

CONCLUSION

75. For these reasons I have no hesitation in accepting that the contested variation sought by the Defendant to the order is a proper one. So the order is to be continued with the disputed variation in the form sought by the Defendant, and with other variations which have been agreed.