Appeal No. UKEAT/0206/09/SM

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 12 October 2009
Supplementary judgment handed down 5 March 2010

Before

THE HONOURABLE MR JUSTICE UNDERHILL (PRESIDENT)

MR C EDWARDS

MR J MALLENDER

A APPELLANT

B RESPONDENT

Transcript of Proceedings

SUPPLEMENTARY JUDGMENT

APPEARANCES

For the Appellant	A (The Appellant in Person)
For the Respondent	MR THOMAS LINDEN (One of Her Majesty's Counsel) Instructed by: Messrs Allen & Overy LLP Solicitors 1 Bishop's Square London E1 6AD

SUMMARY

PRACTICE AND PROCEDURE – Restricted reporting order and anonymisation

Claimant dismissed as a result of police disclosure of unsubstantiated suspicions of paedophile activity - Employment Appeal Tribunal entitled to anonymise judgment and reasons in order to protect Claimant's art. 8 rights.

THE HONOURABLE MR JUSTICE UNDERHILL (PRESIDENT)

INTRODUCTION

1. We handed down judgment in this case on 28th January 2010. The names of the parties were anonymised, and particulars which would have facilitated the identification of the Claimant were confined to a closed section. However, as appears from paragraph 1 of the judgment, we were concerned about the basis of our jurisdiction to take that course, and we asked for further submissions in writing. Such submissions have been duly provided, and this supplementary judgment gives our reasons for deciding to maintain the anonymisation. The Claimant is unrepresented, and in his submissions he freely acknowledged that he was unable to offer much by way of assistance on the question which was troubling us. We are all the more grateful, therefore, to Mr Linden for his helpful submissions, which were essentially provided in order to assist the Tribunal since the question of anonymisation was of its nature of less significance to the Respondent.

2. The background to the question which we have to consider is to be found in our main judgment. In the barest outline, the Claimant was dismissed by the Respondent as a result of a formal disclosure from the Child Abuse Investigation Command of the Metropolitan Police ("CAIC") alleging that he had been involved in paedophile activity in Cambodia and was believed to represent a risk to children. The Claimant has been (in effect) acquitted by the Cambodian courts on the only occasion that any formal accusation has been made against him, and there is no reason to believe that he faces prosecution in this country. He has always denied the allegations and claims that they have been made against him maliciously. In the proceedings before the Tribunal the Respondent did not seek to establish that the allegations

against the Claimant were true but only that it was reasonable for it to dismiss him on the basis of them.

THE PROBLEM

3. The Employment Tribunal made not only a restricted reporting order under rule 50 of the **Employment Tribunal Rules of Procedure**, which prohibits the identification of a party only during the currency of the proceedings, but also an order under rule 49, which provides as follows:

> ***"Sexual Offences and the Register***
>
> **In any proceedings appearing to involve allegations of the commission of a sexual offence the tribunal, the Employment Judge or the Secretary shall omit from the Register, or delete from the Register or any judgment, document or record of the proceedings, which is available to the public, any identifying matter which is likely to lead members of the public to identify any person affected by or making such an allegation."**

Such orders are variously described. The Tribunal referred to its order as an "omission or deletion order", but in an authority to which we refer below Burton P used the phrase "register deletion order". At the risk of confusing the nomenclature further, we prefer the term "permanent anonymity order", which identifies the essential distinction between an order under rule 49 and one under rule 50. For practical purposes, the most obvious feature of a permanent anonymity order is that the judgment and written reasons as promulgated will contain nothing from which the public may readily establish the identity of the protected person.

4. Rule 49 is made under powers conferred by s. 11 (1) of the **Employment Tribunals Act 1996**, which provides (so far as material) as follows:

> **"Employment tribunal procedure regulations may include provision-**
>
> **(a) for cases involving allegations of the commission of sexual offences, for securing that the registration or other making available of documents or decisions shall be so effected as to prevent the identification of any person affected by or making the allegation, and provision-**
>
> **(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."**

By s-s. (6) "sexual offence" is defined by reference to various specified statutes applying to England and Wales and Scotland and must therefore be taken as referring only to conduct which would be an offence under English or Scottish law.

5. The Tribunal does not in the Reasons spell out why it believed that a permanent anonymity order should be made. Perhaps reasons were given on an earlier occasion, or perhaps it believed that the basis for the order was self-evident. In any event, the basis does indeed seem to us both obvious and correct. The proceedings plainly did "involve allegations of the commission of a sexual offence", since the CAIC disclosures included allegations that the Claimant had indecently assaulted a child and had frequented child brothels. (The only potential qualification which we should note is that, since the offences were alleged to have taken place in Cambodia, the conduct charged would only constitute a "sexual offence" within the meaning of s. 11 of the 1996 Act if it fell within the terms of s. 72 of the **Sexual Offences Act 2003**, which extends the jurisdiction of the English courts, exceptionally, to offences committed overseas. However, since that section applies to virtually all forms of sexual activity with children, s. 72 is very likely to have applied.) It is well established that a person "affected

by" the making of an allegation of the commission of a sexual offence may include the alleged perpetrator.

6. One would naturally expect that this Tribunal enjoyed a similar power to that conferred on the Employment Tribunal by rule 49, and that it would, absent any special circumstances, employ it to make an equivalent order when dealing with an appeal against a decision in proceedings where such an order had been made below. At first sight, rule 23 (2) of the **Employment Appeal Tribunal Rules 1993** satisfies that expectation. It reads:

> **"In any such proceedings where the appeal appears to involve allegations of the commission of a sexual offence, the Registrar shall omit from any register kept by the Appeal Tribunal, which is available to the public, or delete from any order, judgment or document which is available to the public, any identifying matter which is likely to lead members of the public to identify any person affected by or making such an allegation."**

But the sting is in the opening words "any such proceedings". That refers back to paragraph (1), which reads:

> **"This rule applies to any proceedings to which section 31 of the 1996 Act applies."**

S. 31 of the 1996 Act provides, so far as material:

> **"(1) Appeal Tribunal procedure rules may, as respects proceedings to which this section applies, include provision-**
>
> > **(a) for cases involving allegations of the commission of sexual offences, for securing that the registration or other making available of documents or divisions shall be so effected as to prevent the identification of any person affected by or making the allegation, and**
> >
> > **(b) for cases involving allegations of sexual misconduct, enabling the Appeal Tribunal, on the application of any party to the 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 Appeal Tribunal.**
>
> **(2) This section applies to-**

> **(a) proceedings on an appeal against a decision of an employment tribunal to make, or not to make, a restricted reporting order and**
>
> **(b) proceedings on an appeal against any interlocutory decision of an employment tribunal in proceedings in which the employment tribunal has made a restricted reporting order which it has not revoked."**

Thus the effect of s-s. (2) is, quite explicitly, that s. 31 only applies in the limited class of case there specified and does not apply in any case where this Tribunal is considering an appeal against the substantive order of an employment tribunal.

7. It seems to us extremely unlikely that s. 31 was meant to have so limited an effect, because it is hard to see the point of the power conferred by s-s. (1) (a) if the section only applies in the circumstances specified by s-s. (2); and the provisions of rule 23 (2) are likewise for all practical purposes redundant. But neither we nor Mr Linden could see any escape from the literal meaning of the sub-section; and, as will appear, at least two other divisions of this Tribunal have come to the same conclusion.

8. On the face of it, therefore, this Tribunal has no power to make a permanent anonymity order affecting its own record, even in circumstances where the employment tribunal has been required to do so. That produces a remarkable anomaly and a wholly unfair situation. A party who Parliament, and the Secretary of State in exercising his rule-making power, has believed should have the benefit of permanent anonymity (so far as the records of the employment tribunal go) loses that protection if either he or the other party brings an appeal against that decision. The unfairness is compounded by the fact that the party in question is most unlikely to be aware that the rules are different in this crucial respect and will initiate his proceedings in the belief that he is entitled to a protection which may prove wholly empty. This is a problem to which a solution must be found if it is at all possible.

THE SOLUTION

9. Similar, but not identical, problems have had to be faced by this Tribunal in a series of cases involving the protection of the identity of trans-sexual applicants bringing sex discrimination claims – **A v B, ex p News Group Newspapers Limited** [1998] ICR 55, **Chief Constable of West Yorkshire Police v A** [2001] ICR 128, and **X v Commissioner of Metropolitan Police** [2003] ICR 1031. In the first two of those cases the appeal was against a final order, and it was accepted by both Morison P and Lindsay P that rule 23 gave this Tribunal no power to make a restricted reporting order; but in the latter case Lindsay P was nevertheless prepared to make such an order. In the **Metropolitan Police Commissioner** case the problem was slightly different. The employment tribunal had refused to make a restricted reporting order because there was no allegation of sexual misconduct, and the relevant rule (which reflected the language of s. 11 (1) which we have set out above) did not apply. But Burton P was prepared nevertheless not only to hold that the tribunal was entitled to make a restricted reporting order but also to express the view that this Tribunal could do so, and – further – could make a permanent anonymity order. Both Lindsay P and Burton P felt able to make the orders that they did by relying on the provisions of the **Equal Treatment Directive**, which proscribed sex discrimination in employment. Art. 6 of the Directive required member states to give parties an effective remedy for breaches of the rights conferred by the Directive. However, Lindsay and Burton PP differed as to the means by which the requirements of art. 6 could be given effect to under the Rules. Lindsay P held that it directly conferred the necessary jurisdiction. Burton P preferred to proceed by reference to an expansive construction of the provisions by which each tribunal enjoys the right to regulate its own procedure. In the case of this Tribunal, that is s. 30 (3) of the 1996 Act, which reads:

> **"Subject to Appeal Tribunal procedure rules … the Appeal Tribunal has power to regulate its own procedure."**

10. Neither version of that particular route is available in the present case. The Claimant's claim is not based on any right deriving from EU legislation and the "principle of effectiveness" is accordingly not in play. However, it is necessary to consider whether there may not be an analogous route by reference to the provisions of the **Human Rights Act 1998**. If the loss of the Claimant's anonymity would involve a breach of his Convention rights it would be the duty of this Tribunal, pursuant to s. 6 of the Act, to interpret its powers, so far as possible, so as to protect that anonymity. Burton P's reasoning in the **Metropolitan Police Commissioner** case shows that there is no difficulty in principle in construing s. 30 (3) of the 1996 Act so as to permit the making of a permanent anonymity order. It is true that on a traditional approach to statutory construction (such as was adopted by Morison P in **A v B**) the limited terms of s. 31 (2) would be taken as excluding the implication of any wider power; but it was confirmed in **Ghaidan v Godin-Mendoza** [2004] 2 AC 557 that it is legitimate to "read up" the terms of a domestic statute in order to achieve conformity with the requirements of the Convention even where the reading in question is contrary to the literal terms of the statute - provided only that it "goes with the grain" of the legislation and that no positive contrary intent on the part of Parliament can be shown. There could of course be no question of the latter here: on the contrary, as we have already observed, the limitation on the effect of s. 31 appearing from s-s (2) makes little sense.

11. The question therefore is whether the denial of anonymity to the Claimant would breach his Convention rights. We consider first the position under art. 8. It is now well-established that the "right to be protected in one's honour and reputation" falls within the scope of art. 8. It is self-evident that if it becomes public knowledge that CAIC believes that the Claimant is an active paedophile and a risk to children that would have a devastating effect on that right. (It is fair to note that the allegations against him have had some publicity in Cambodia and also that, partly as a result of the Claimant's own e-mail campaign, they are known to a number of

official bodies here. But there is no evidence that they are known in the wider community so as to impact on the Claimant's reputation in this country.) It does not of course necessarily follow that any publication of CAIC's suspicions or the allegations on which they are based – whether by CAIC (or some similar authority) or by a newspaper – would be unlawful. That is not the question for us. Rather, we are concerned with the much more specific question of whether this Tribunal should itself publicly identify the Claimant so as to put the allegations against him into the public domain – which would effectively deprive him of such protection as he might otherwise have under art. 8.

12. The question of the use of anonymisation orders in order to protect the art. 8 rights of litigants was recently thoroughly reviewed by the Supreme Court in **HM Treasury v Ahmed** [2010] UKSC 1 ([2010] 2 WLR 325), to which Mr Linden helpfully referred us. It is clear that the common law position, under which a litigant in effect forfeited his privacy in all circumstances if he chose to bring proceedings (subject only to some limited statutory exceptions), requires modification in the light of the Convention. In a case where full publication of the proceedings before a court is liable to impact on the art. 8 rights of a party, that court will have to conduct a balancing exercise between that right and those protected by art. 10: see the judgment of Lord Rodger in **Ahmed** at para. 43.

13. In the present case the balance seems to us to come down clearly in favour of preserving the Claimant's anonymity. It is essential to appreciate that no party in the present case was seeking to establish that the Claimant was in fact a paedophile. The case proceeded on the basis that these were unsubstantiated allegations, some of which had, in effect, been dismissed by the Cambodian courts and in respect of which no proceedings were contemplated by the domestic authorities. The fact that they were made, though not their truth, was ventilated in the proceedings because, and only because, to do so was a necessary consequence of the Claimant

seeking to vindicate his right to claim for unfair dismissal. That is not by itself a complete answer: in **Ahmed** too, in which the Supreme Court discharged the anonymity order, the claimants could have said that the allegations against them were only ventilated because it was necessary to refer to them in order to protect their rights. But this case has none of the particular features on which the Court relied in **Ahmed** as tipping the balance in favour of the publication of the identities of the appellants: see in particular paras. 67-71 of Lord Rodger's speech. Although no doubt the press has a lively interest in the subject of paedophilia, and can at least plausibly contend that that reflects the interest of many members of the public, the Claimant's own case raises no issues of public interest in the stricter sense. It is in itself no more than an individual employment claim. If the Claimant does indeed pose a risk to children, the disclosure machinery has already operated in his case and will no doubt do so again where appropriate. In circumstances where nothing has ever been proved against the Claimant we see no public interest that would outweigh the damage which it is reasonable to assume would ensue if the allegations against him were put into the public domain.

14. We accordingly believe that the effect of art. 8 is that this Tribunal should, in the exercise of its powers to regulate its procedure under s. 30 (3) of the 1996 Act, confirm the steps already taken to protect the Claimant's identity (so far as these proceedings are concerned) by anonymising the judgment and by deleting from the public record any matter which is likely to lead members of the public to identify the Claimant.

15. It may be that a similar result could have been achieved by reference to art. 6 of the Convention. It seems to us arguable that the risk of losing the benefit of anonymity which he has enjoyed at first instance may so inhibit a party's right of appeal that it constitutes a breach of his right of effective access to justice. But the argument is not straightforward, and in

circumstances where we have had no detailed submissions we prefer to go no further than we need.

16. We reach our conclusion all the more readily because, as we have already observed, it seems to be only as a result of an accident of drafting that this Tribunal does not enjoy the same powers as the employment tribunal to make permanent anonymity orders in cases which involve allegations of the commission of a sexual offence. It is not in fact altogether clear why Parliament has thought it right to afford routine protection not only to the alleged victims of such an offence but to the alleged perpetrators or other persons "affected by" the allegation (cf. **Tradition Securities and Futures SA v Times Newspapers Limited** [2009] IRLR 354, at paragraph 5 (p. 356)); but the provisions of s. 11 (1) (a) of the 1996 Act must be taken as a recognition that justice requires anonymity in such cases, and it makes no sense that such anonymity should be available at first instance and not on appeal.

17. We should note by way of postscript that we are aware of at least two other cases in which anonymity orders have been made by this Tribunal in reliance on art. 8. In **B & C v A** (UKEAT/0503/08/DA) the circumstances were somewhat different, but the reasoning is broadly consistent with that adopted here. (There are however some minor differences in the analysis, and what we said about the powers of the employment tribunal overlooked rule 49.) In **J v DLA Piper LLP**, in which the substantive appeal was heard last month, Cox J made an anonymity order last year, although her judgment was *ex tempore* and did not address the issues in detail. We take the opportunity to repeat the observation made in **B & C v A** that in cases where tribunals decide to follow the course of anonymisation, it would be helpful if they rang the changes on the letters of the alphabet used: there is already a confusing profusion of reported cases called "A v B" or "X v Y".