Employment

Confidentiality in the Age of the Public Register

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Does your case involve matters of national security? Are those matters so important that the Crown has applied for it to be excluded from the Public Register of judgments? Probably not – and so any judgment in the case will be publicly accessible and the Employment Tribunal has no power to order otherwise. So held HHJ Eady QC in *Ameyaw v Pricewaterhousecoopers Services Limited* [2019] (UKEAT/0244/18/LA), in a judgment which should be required reading for anyone representing a client with concerns about publicity.

Miss Ameyaw had brought four claims in the Employment Tribunal against the Respondent, for whom she had been a senior manager. Those claims eventually resulted in a seventeen day merits hearing, but before that point, a number of preliminary hearings occurred. One of those preliminary hearings concerned an application by the Respondent to strike out the claims by reason of the Claimant's alleged scandalous and vexatious conduct, and therefore took place in public. The Respondent's application was dismissed and, shortly afterwards, a judgment was placed on the Public Register, as required by Rule 67 of Schedule 1 to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.

The Claimant then applied under Rule 50 ("privacy and restrictions on disclosure") to have the judgment removed from the Public Register. Her application was refused by the Regional Employment Judge, but made its way to the Employment Appeal Tribunal to be considered by HHJ Eady QC. It was held that the Employment Tribunal simply had no power under Rule 50 either to refuse to publish a judgment on the Public Register or later to remove it. Amongst other authority, the EAT cited Toulson LJ (as he then was) in *R (Guardian News & Media Ltd) v Westminster Magistrates Court and Another* [2012] EWCA Civ 420:

"Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed? … In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process".

Conducting a review of the relevant rules and authorities, HHJ Eady QC reached the conclusion that the only discretion possessed by the Employment Tribunal to withhold publication of a judgment is contained within Rule 94, which pertains to matters of national security and grants the initiative (under Schedule 2 of the ET Rules) to the relevant government Minister. Rule 50 simply does not allow for sufficient scope to withhold publication.

That being the case, what options are open to parties who do not wish to see confidential, sensitive or otherwise embarrassing data reaching the Public Register? Whilst Rule 50 does not allow for a refusal to publish a judgment, it does allow the Employment Tribunal to anonymise or redact that judgment. Specifically, the Tribunal:

"(1) … may at any stage of the proceedings on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person…

…(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression…"

The scope of an application under Rule 50 needs to be carefully considered, however. As explained by Simler P (as she then was) in both *BBC v Roden* [2015] (UKEAT/0385/14/DA) and *Fallows v News Group* [2016] (UKEAT/0075/16/RN), the principle of open justice is an important one, and the burden of establishing any departure from it lies upon the person seeking such a departure. It must be established by '*clear and cogent evidence'* that harm will be done to the privacy rights of those affected, and those privacy rights must in any event be balanced against the principles of open justice and freedom of expression.

However, the opinion of another previous President of the EAT – Underhill P (as he then was) – should also be noted. In his judgment in *F v G* [2011] (UKEAT/0042/11/DA), he held that "*so far as the public interest in full publication is concerned, important as it is, it is not an absolute".* He also pointed out that a spectrum of interference with the principle of open justice exists, from very substantial redactions to simple anonymisation: *"it should also be borne in mind that the restriction on open justice is only partial: the hearing was in open court, and the facts and issues are fully set out in the Tribunal's Reasons subject only to the anonymisation of the names of the parties and the omission of details which would identify them".*

In brief then, what is the position? Unless the government intervenes in a matter of national security, a judgment will be published on the Public Register. Rule 50 can be used by parties who desire the anonymisation of identities and the redaction of confidential data, but the scope of any redactions sought should be limited sensibly so as to preserve the principle of open justice. Such an approach is far more likely to find favour with the Employment Tribunal if it preserves the essential ability of the public to understand the issues of the case and the reasons for the Tribunal having reached its decision. Whatever the approach adopted, however, it is vital for those advising the parties to litigation to consider these points when planning their litigation approach. As ever, an appeal of the Tribunal's discretion is likely to be far more challenging and expensive than simple consideration of the issue before it arises.

Matthew Sellwood is frequently instructed in the Employment Tribunal, and has recently also appeared in the Employment Appeal Tribunal. He has conducted successful defences in a range of multi-day hearings involving elements of unfair dismissal, discrimination and whistleblowing, and also advises across the whole range of employment law. As both a former employer at a public authority and a former trade union representative at a national charity, he brings a pragmatic view to employment litigation and is able to view 'both sides' of any issue.