Employment

John Platts-Mills in privacy appeal providing comprehensive guidance on Rule 49 Orders

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Introduction

1) In a far-ranging Judgment (XY v AB [2025] EAT 66), Mr Justice Cavanagh has reviewed the law relating to derogations from open justice in the Employment Tribunal as it relates to privacy orders under Rule 50 in Schedule 1 to The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("Rule 50"), the substance of which is now to be found in Rule 49 of The Employment Tribunal Procedure Rules 2024.

2) The EAT dismissed an appeal against permanent privacy orders imposed in favour of the Respondent to a claim involving allegations of sexual misconduct. Whilst the facts of the case were unusual and, in the view of the EAT, "perhaps, extreme" Cavanagh J set out 25 points of law and principle distilled from the key cases, including: Fallows v News Group Newspapers Ltd [2016] IRLR 827; Millicom Services UK Ltd and others v Clifford [2023] IRLR 295; and PMC (a child by his mother and litigation friend FLR) v A Local Health Board [2024] EWHC 2969 (KB) at paragraph 107.

3) The main considerations that led the Employment Judge to make the permanent anonymity order were that the Appellant had unilaterally withdrawn her claim against a named senior colleague (the "Respondent") before her allegations were tested in evidence and ruled upon, and that she had continued to make allegations against the Respondent in breach of rule 50 orders, and had falsely asserted to third parties that she had won a sexual harassment claim against the Respondent when she had not.

Key points of practise

4) Mr Justice Cavanagh dismissed the appeal and maintained the orders in favour of the Respondent. In so doing, extensive guidance was given as to applications under Rule 50 (now Rule 49).

5) First, following Millicom there are two stages to the analysis in determining an application under Rule 50 (see para 93). The ET should first ask itself whether the derogation sought is justified by the common law exception to open justice and should then check its conclusion against the relevant Convention rights. Cavanagh J held that the common law test is one of "strict necessity" and that Soole J's statement in A v X [2019] IRLR 620 to the contrary is not an accurate statement of the law (para 94).

6) Second, as regards both stages, an appellate court should not intervene unless the court below has erred in principle or reached a conclusion which was plainly wrong or outside the ambit of conclusions that a judge could reasonably reach. It follows that "in many cases, there will be no absolute, or binary, right or wrong answer to the question whether a permanent anonymity order should be made in a particular case" (see para 91). This permits interference where the EJ has, in the course of the balancing exercise, taken into account irrelevant factors and/or failed to take account of a relevant factor. Cavanagh J held that AMM v HXW [2010] EWHC 2457 (QB) is no longer good law and therefore the Master of the Rolls' Practice Guidance (Interim Non-Disclosure Orders) [2012] 1 WLR 1003 should not be followed (see

para 90).

7) Third, when considering the matter, the appellate court should have in mind that the first instance judge was best placed to undertake the balancing exercise. Cavanagh J observed that: "The EJ presided over a number of hearings; she saw how the parties behaved; and, particularly at the hearing on 2 October 2023, she saw and considered a large bundle of documents, and witness statements, that were not placed before me. In March 2023, she had seen the Appellant give evidence and be cross-examined" (para 92).

8) Fourth, practitioners familiar with this area will be aware of the apparent tension between the views of Simler J in Fallows at para 68 and Soole J in A v X at para 64, as regards the public's understanding of untested allegations and its relevance to such applications.

(a) Simler J in Fallows: "the public is to be trusted to understand that unproven allegations made and then withdrawn, are no more than that".

(b) Soole J in A v X: "I do not agree that a Tribunal is required to proceed on the basis that distress and damage to reputation from the report of unproven allegations of sexual offences have to be ignored; nor that the public must be taken to understand the difference between such allegations and their proof".

9) Cavanagh J held that there was no "hard-and-fast rule" on this issue: "Whilst account can be taken of the common sense of the public, it is not necessary to ignore that there is always the risk of some sections of the public assuming that there is "no smoke without fire", and so the fact that the claim has been settled or withdrawn is relevant to the rule 50 balancing exercise(s) amongst other considerations" (see para 100). The "weight to be placed upon it is a matter for the EJ" (para 116).

10) Fifth, at paragraph 107, Cavanagh J set out 25 points of law and principle.

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 (FG);

(2) The principles of open justice still apply, even if a case has been settled and there is no determination on the merits (Fallows);

(3) The burden rests with the party seeking a derogation from open justice to establish that it is necessary (Roden);

(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);

(5) The ET must undertake a balancing exercise (Kennedy and A v BBC);

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

(7) An Employment Tribunal 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);

(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 (Guardian News and Media);

(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, 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 (Re S);

(16) In most (though not necessarily all) cases, the relevant Convention Rights will be those under Article 8 (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 (Kaim Todner and PMC);

(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);

(21) The fact that ventilation of allegations is painful or humiliating is not a reason in itself to grant anonymity (Scott v Scott and A v Burke and Hare);

(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 at 63, and M v Vincent [1998] ICR 74, at 76C-E, per Morison J);

(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); 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).

11) Sixth, whilst privacy orders were granted in favour of the Respondent in this case, Cavanagh J said that: “in the great majority of cases, even where [a claim has been withdrawn], the outcome of the balancing exercise is likely to be that the name of the respondent should not be anonymised” (Judgment para 119).

John Platts-Mills appeared for the appellant on a pro bono basis instructed by Advocate.