Appeal No. EA-2019-000983-VP
(Formerly UKEAT/0236/20/VP)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 27 July 2021
Judgment handed down on 16 September 2021

Before

HEATHER WILLIAMS QC, sitting as a DEPUTY HIGH COURT JUDGE

(SITTING ALONE)

TYU — APPELLANT

ILA SPA LIMITED — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MR AIDAN WILLS (of Counsel) Instructed by: AWO 2 John Street London WC1N 2ES
For the Respondent	MS TAMAR BURTON (of Counsel) Instructed by: Bates Wells Braithwaite 10 Queen Street Place, London EC4R 1BE

SUMMARY

PRACTICE AND PROCEDURE

The Appellant appealed the refusal of her application under Rule 50 of the **Employment Tribunal Rules of Procedure 2013** for an order that her name be redacted or anonymised in an earlier judgment in unfair and wrongful dismissal proceedings brought by two of her relatives. She had also worked for the Respondent but was not a party or a witness to those proceedings. The judgment indicated that she had been suspected of dishonesty offences in the workplace, which her employers had referred to the police and that employees told an internal investigation they were frightened by intimidatory behaviour involving her.

The Employment Appeal Tribunal ("EAT") allowed the appeal, holding that the Employment Tribunal ("ET") had erred in law: (i) in its conclusion that the Appellant's rights protected by Article 8, European Convention on Human Rights ("ECHR") were not engaged; and (ii) in the alternative conclusion that if Article 8 rights were engaged, they did not outweigh countervailing rights protected by Articles 6 and 10 ECHR and common law principles of open justice.

As regards the first issue, the ET erred in deciding that as information revealing her identity had been discussed at the public hearing of the dismissal claims, this was necessarily fatal to the engagement of the Appellant's Article 8 rights. It was not determinative, in particular as she relied upon the reputational aspect of Article 8 and the damage and associated distress occasioned by internet searches on her name, including by prospective employers, linking to the judgment.

As regards the second issue, the ET erred in failing to identify: the Article 8 rights in play, the nature and extent of the impact on the Appellant, the proportionality of the interference with her Article 8 rights if her application was rejected and the proportionality of the interference with countervailing open justice rights if the application was granted. In turn, the requisite balancing exercise, assessing the degree of interference with the competing rights was not conducted.

The EAT substituted a finding that the Appellant's Article 8 rights were engaged in relation to the right to protection of reputation, given the contents of the judgment and her lack of formal

involvement in the ET proceedings; and also in the privacy aspect, given the reference to police involvement. However, because of the lack of fact-finding as to the extent of the impact alleged by the Appellant and because more than one outcome of the balancing exercise was possible, the question of whether the Rule 50 application should be granted had to be remitted to the ET.

HEATHER WILLIAMS QC sitting as a Deputy High Court Judge

The appeal

1. This is an appeal against the refusal of the Appellant's application under Rule 50 of the **Employment Tribunal Rules of Procedure 2013** ("the **ET Rules**") for an order that her name be redacted from or anonymised in an earlier judgment in proceedings brought against the Respondent for unfair and wrongful dismissal by Sidra Rana and Mobina Saif. Both judgments were given by Employment Judge Vowles ("the Judge"), sitting in the Reading Employment Tribunal ("the ET"). The Reserved Judgment in relation to Ms Rana's and Ms Saif's claims was sent to the parties on 30 April 2018 ("the Dismissal Judgment"). The Appellant's Rule 50 application was heard on 12 August 2019 and the Reserved Judgment, dated 6 September 2019, was sent to the parties on 12 September 2019 ("the Rule 50 Judgment").

2. By an order sealed on 2 November 2020 following the Rule 3(10) hearing, HHJ Auerbach permitted the appeal to proceed on some of the grounds contained in the original Notice of Appeal. To avoid confusion with the original grounds, I will refer to these as "Ground A" and "Ground B". Ground A arises from the Judge's conclusion that the Appellant's rights under Article 8 of the **European Convention on Human Rights** ("**ECHR**") were not engaged. Ground B from his alternative conclusion that if the Appellant's Article 8 rights were engaged, those rights did not outweigh countervailing rights protected by Articles 6 and 10 ECHR and the common law principles of open justice.

3. More specifically, the Appellant's Ground A (previously Ground 2) contends:

> "**The learned judge wrongly concluded that the Appellant's rights under Article 8 ECHR were not engaged on her application to be anonymised…He wrongly interpreted and applied *Khuja v TNL* [2019] AC 161 to hold that the Appellant cannot make an Article 8 complaint because the serious allegations contained in the…Judgment were ventilated in open court. Article 8 ECHR protects a wider set of interests and its application does not depend solely on whether the information in question has been aired in court. An Article 8 ECHR complaint can be maintained on the basis of the impact or intrusion that the publication of certain information has on their private and family life (*Khuja* at [34(2) – (3)]. *Khuja* was not about the publication by a court of serious allegations about someone who had no**

> **involvement in the proceedings. Article 10 ECHR and the open justice principle do [not] vitiate Article 8 rights to procedural fairness."**

4. In its original form Ground B (Ground 3, as it then was) contained six sub-parts. HHJ Auerbach accepted that three of these were arguable, as follows:

> "**The learned judge fell into error in conducting the balancing exercise and assessing the proportionality of the interferences with the competing rights involved. In particular:**
>
> **(1) The learned judge did not address (i) the importance of the competing rights and principles, (ii) the justifications for interfering with each of the rights, and (iii) the proportionality of interfering with / restricting the competing rights;**
>
> **(2) The learned judge failed to identify and address the nature and strength of (i) the Article 8 rights, and (ii) the Article 10 rights and open justice considerations arising on the facts of the case;**
>
> **(3) The learned judge failed to consider whether measures could be adopted that would be less intrusive of A's Article 8 ECHR rights."**

5. By an order sealed on 22 July 2021, HHJ Auerbach granted the Appellant's application for a temporary anonymity order, to remain in force until promulgation of the Employment Appeal Tribunal's ("EAT") decision in this appeal, in order to "hold the ring". He directed that the Appellant's name be substituted with a cipher that did not reflect her initials, for example "TYU"; that the appeal be listed using this cipher; and that any matter likely to lead a member of the public to identify the Appellant be omitted from any publicly available register kept by the EAT and omitted / deleted from any order or other document available to the public in relation to the appeal. Provision was made for liberty to apply and for the EAT to discharge or vary the order on notice to the parties.

6. The Appellant's Rule 50 application related only to her anonymisation and/or redaction of certain details from the face of the Dismissal Judgment; she did not, and does not, seek a reporting restriction order ("RRO") preventing third parties from reporting any of the matters aired in the dismissal proceedings or the judgment. During the course of the appeal hearing and after some reflection on the topic, Mr Wills (who did not appear below) clarified the extent to which redactions were sought from the Dismissal Judgment, namely that references

to the Appellant's role within the Respondent company should be redacted and her name replaced with a cipher. He confirmed that no objection was now taken to the references to her family relationships. In order to further "hold the ring", I have adopted a comparable approach in terms of the details that I have and have not referred to in this judgment.

The background circumstances and the judgments below

7. On 24 October 2016 the Appellant resigned from her position with the Respondent. Initially, she was placed on gardening leave on full pay. However, on 28 November 2016 she was informed that payment of her salary had been deferred and she was directed to attend a disciplinary hearing. She then left the company with immediate effect and did not attend the hearing. The Appellant says she left because of the Respondent's failure to pay her and she disputes the allegations that were made. On 14 February 2017 she issued a claim against the Respondent for unlawful deduction from wages. The Respondent filed Grounds of Resistance, defending the claim and raising a counter-claim. On 4 April 2017 the Appellant withdrew her claim and the Judge dismissed it by an order sent to the parties on 9 May 2017.

8. On 27 – 28 March 2018 the Judge heard the claims brought by Ms Rana and Ms Saif ("the dismissal claims"). The Appellant accepts that she was aware of those proceedings. Shortly before the hearing, she provided two documents to the Claimants. However, she was neither a party nor a witness and says that she did not know the detail of the parties' cases and did not anticipate being referred to in the terms that she was in the Dismissal Judgment.

The Dismissal Judgment

9. The Dismissal Judgment, with written reasons, was published on the Register on 29 May 2018. The Judge rejected the Claimants' claims. The narrative indicates that the Claimants dismissal letters alleged they assisted another employee, Saeeda Rana, in misappropriating

company property, in particular (although not limited to) facilitating her removal of a 5 litre can of toner from the company's stock. The Judge concluded that this was the reason for their dismissals and that there was sufficiently reliable evidence of misappropriation of the Respondent's stock to support the fairness of the dismissals and the existence of gross misconduct by the Claimants (paras 35 and 43 – 45). The Appellant was not named in relation to these specific allegations either in the dismissal letters or in the ET's findings.

10. The Appellant's objections to the Dismissal Judgment (as clarified at the appeal hearing) are as follows:

    a. In para 8 after it was noted that "There were a number of staff members who were part of the same family" the Appellant was referred to by her name and her position in the Respondent company. The two Claimants and Saeeda Rana were then listed, along with their respective roles.

    b. Para 9, which said (as relevant):

> **"At the beginning of October 2016 concerns were brought to the attention of [the CEO] that Saeeda had been falsely claiming payment for hours not worked and that [the Appellant] had been signing off payment of invoices which were false…[The Appellant] was invited to a disciplinary hearing but resigned before the hearing took place. Saeeda's engagement was terminated."**

    c. Giving the Appellant's name in para 10 when referring to part of her role being taken up by another employee after her departure.

    d. Para 11, which said (as relevant):

> **"Because of the circumstances of the departure of [the Appellant] and Saeeda, Mrs Denise Leicester…invited staff to meet with her to talk confidentially about their experiences at work. Meetings were held on 25 and 26 October 2016. Although the meetings primarily concerned [the Appellant] and Saeeda, concerns were also raised in relation to the conduct of the Claimants. There were allegations that the Claimants were involved in or knew about thefts from the company…The police were consulted about the allegations of theft by Saeeda and [the Appellant] and by Miss Saif and Miss Rana. Saeeda was prosecuted for fraud but on 7 July 2017 at Oxford Crown Court the CPS discontinued the case due to an unrealistic prospect of conviction."**

    e. Para 12, which said:

> **"Mrs Steadman conducted further interviews with the staff on 9 November 2016. The statements of four witnesses implicated the Claimants' wrongdoing but only two witnesses, Gemma Norville and Rosanna Wilkins, were prepared to have statements disclosed to the Claimants. The other two witnesses stated that they were frightened about their statements being seen by [the Appellant] or her family members and referred to instances of threatening behaviour."**

f. In the quotation from Ms Rana's dismissal letter in para 21, the Appellant's name is referred to in the context of an allegation that she had told Ms Rana to make mistakes whilst she was on holiday, to show how much she was needed.

g. Para 34, which summarised the Claimants' unfair dismissal complaint as follows:

> **"Misconduct was not the true reason for the dismissals in this case. The true reason was the Claimants' family connection with Saeeda and [the Appellant]."**

h. Para 35, which said (as relevant):

> "**The Tribunal did not accept this submission. There was ample evidence to support the allegations against the Claimants…Although it is true that both Claimants were related to Saeeda and [the Appellant] and to each other and Mrs Hyde found that members of the family were "working in cooperation", there was no reliable evidence to support the assertion that the Claimants were dismissed solely because of the family connection."**

The Appellant's Rule 50 application

11. On 2 July 2018 the Appellant emailed the ET requesting removal of her name / redaction of certain material from that judgment. The Appellant said that naming her in the judgment was "highly damaging to my reputation and employment prospects" and that it had caused her a considerable amount of distress. On 1 August 2018 Employment Judge Byrne replied, indicating that she could make a Rule 50 application. After further correspondence with the ET, that application was made on 13 December 2018. On 22 February 2019 the Respondent indicated it opposed the application.

12. The Appellant gave evidence at the hearing on 12 August 2019. Her witness statement said that the circumstances in which she left the Respondent had led to a diagnosis of Post-Traumatic Stress Disorder, that she suffered from anxiety and had been prescribed anti-depressants. She described how being named in the judgment had made it difficult for her to

find a job or continue working in the spa industry. She said she was frightened to contact possible employers or partners for fear that they would Google her name and read about the allegations made about her in the Dismissal Judgment, as she had found that a search on her name returned a link to the judgment at the top of the first page of results. She said that she had felt unable to look for work and that this had left her and her husband in severe financial difficulties. Further, that although she had also thought about starting her own business, she had felt compelled to put this on hold for similar reasons. Mr Wills emphasises that the notes of her cross-examination (taken by the Respondent) do not suggest that she was challenged on this account. During her cross-examination, she accepted that she knew of the proceedings and that she had supplied the Claimants with two documents. She said she only became aware of what they had been accused of very shortly before the ET hearing.

The Rule 50 Judgment

13. The Rule 50 Judgment referred to the procedural history and quoted paras 8 – 12 and 35 of the Dismissal Judgment, without anonymisation or redactions. (It is not disputed that if the Dismissal Judgment is to be amended in the way sought; equivalent amendments to the Rule 50 Judgment would be appropriate.)

14. The Appellant's submissions were then set out at para 15. In summary, they were:

    a. The allegations faced by the Claimants were not intrinsically linked to the allegations made against her;

    b. She did not know that the false allegations made against her following her resignation would be aired during the hearing or that they would be included in the Dismissal Judgment;

    c. Her name could be removed without it affecting the clarity of the judgment;

d. The references to the family relationships were personal matters, which were unnecessary for the judgment. There was also unnecessary reference to her in relation to alleged threatening behaviour;

e. She had given notice of resignation *before* the disciplinary allegations she faced were first raised, contrary to the suggestion in paragraph 9 of the Dismissal Judgment; and

f. The fact that the judgment appeared on a Google search of her name showed the potential harm to her privacy rights and reputation. It was said that she "should not have to provide evidence from a third party that they have searched for her name, found the link and held a negative view of her after reading the relevant allegations. Future potential employers are very unlikely to admit that this was a reason for rejecting any job application. The same applies to neighbours or friends who might have Googled her name".

15. The Respondent's submissions were set out at para 16 and were, in summary, as follows:

a. Article 8 was not engaged as the Appellant could not have any reasonable expectation of privacy given she had brought her own proceedings without seeking anonymity, she knew of the Claimants' proceedings and it was inconceivable that she was unaware of the Respondent's concerns about her own conduct;

b. In any event, no necessity had been shown for departing from the fundamental principle of open justice;

c. References to the Appellant in the Dismissal Judgment were merely factual and were relevant background to the claims before the ET; and

d. Making a ruling would be ineffective, given the period of time that the Dismissal Judgment had been online already. Further, even with anonymisation her identity could be worked out from the details of her three relatives given in the judgment.

16. In concluding that the Appellant's Article 8 rights were not engaged, the Judge said that: "She could not have any reasonable expectation of privacy because information revealing her identity had been discussed in a public trial" (paragraph 24). In support of this proposition he cited para 34(1) in **Khuja v Times Newspapers Limited** [2019] AC 161 ("**Khuja**") and the reference to this in **Ameyaw v PriceWaterhouseCoopers Services Ltd** [2019] ICR 976 ("**Ameyaw**"). He then observed that "a third party who was not a party to proceedings, nor a witness, had no greater or lesser Article 8 rights than those who participated in the proceedings" (para 27).

17. In the alternative, the Judge concluded that even if the Appellant's Article 8 rights were engaged, they did not outweigh rights protected by Articles 6 and 10 and the common law principle of open justice referred to in Rule 50(2). His reasoning was as follows:

> "**28. …As was said in the *Ameyaw* case, there is a broad discretion under Rule 50 but it was likely to be a rare case where other rights were so strong as to grant an indefinite restriction. This was not such a rare case and I found no grounds to override the principle of open justice in this case.**
>
> **"29. The Applicant's circumstances, her family relationship with the Claimants, and her former employment relationship with the Respondent, were all intrinsically linked to the claims and issues which were considered and determined during the course of the full merits hearing.**
>
> **"30. I do not accept that the judgment reasons contained any findings of fact that the Applicant was guilty of misconduct. Although the Respondent had made allegations of wrongdoing by the Applicant, the Tribunal did not adjudicate on the truth or otherwise of the allegations. It would not have been possible to properly set out the factual background to the claims being made by the Claimants without reference to the allegations. The judgment reasons made clear that these were unproven allegations and no more than that. The unproven allegations were part of the intrinsic matrix of the case."**

18. No specific findings of fact were made, one way or the other, in relation to the alleged impact on the Appellant of being named in the judgment. There is no ground of appeal as such against the conclusions expressed in the Judge's paras 29 – 30, as HHJ Auerbach did not consider that an arguable error of law was disclosed by this aspect of the reasoning.

The applicable legal principles

ECHR rights and the open justice principle

19. Naming a person in a judgment may infringe their rights protected by Article 8 ECHR. Article 8(1) provides that "Everyone has the right to respect for his private and family life, his home and his correspondence". Article 8(2) permits interference with these rights where it is justified, in the sense of it being necessary and proportionate, for one of a number of specified reasons that include "for the protection of the rights and freedoms of others".

20. However, the making of an order anonymising a person in proceedings interferes with the right to freedom of expression guaranteed by Article 10 ECHR. Article 10 follows a similar structure to Article 8; interferences with the right are permitted, but only in the circumstances provided for in Article 10(2) and where necessary and proportionate. Further, as relevant, Article 6(1) ECHR provides that: "Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of…" and then a series of reasons are listed, including: "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". Where Article 8 rights are engaged on the one hand and Article 10 and/or Article 6 rights on the other, a balancing exercise must be undertaken, as described below.

21. An order anonymising someone who would otherwise be named in court proceedings is also an interference with the common law principle of open justice. As Lord Reed JSC described in **A v BBC** [2015] AC 588 at para 23: "It is a general principle of our constitutional law that justice is administered by the courts in public, and is therefore open to public scrutiny. The principle is an aspect of the rule of law in a democracy…In a democracy, where the exercise

of public authority depends on the consent of the people governed, the answer must lie in the openness of the courts to public scrutiny".

22. In **R (C) v Secretary of State for Justice** [2016] 1 WLR 444, para 1, Baroness Hale of Richmond DPSC said:

> **"The principle of open justice is one of the most precious in our law. It is there to reassure the public and the parties that our courts are indeed doing justice according to law. In fact, there are two aspects to this principle. The first is that justice should be done in open court, so that the people interested in the case, the wider public and the media can know what is going on….The second is that the names of the people whose cases are being decided, and others involved in the hearing, should be public knowledge."**

23. She went on to discuss the rationale for the second aspect of the principle at para 18:

> **"…in many, perhaps most cases, the important safeguards secured by a public hearing can be secured without the press publishing or the public knowing the identities of the people involved. The interest protected by publishing names is rather different, and vividly expressed by Lord Rodger of Earlsferry JSC in *In re Guardian News and Media Ltd* [2010] 2 AC 697, para 63:**
>
> > **"What's in a name? 'A lot' the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected…The judges [have recognised] that editors know best how to present material in a way that will interest the readers of their particular publication, and so help them to absorb the information. A requirement to report in some austere abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive."**

Powers of the ET to restrict publication of a judgment and the correct approach

24. In the Tribunal context, the principle of open justice is given effect by the requirement to maintain a public register of judgments. Regulation 14 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("**the ET Regulations**") provides:

> "**The Lord Chancellor shall maintain a register containing a copy of all judgments and written reasons issued by a tribunal which are required to be entered in the register under Schedules 1 to 3."**

25. Schedule 1 contains the **ET Rules**. Rule 1(1) defines "register" as the "register of judgments and written reasons kept in accordance with regulation 14" of the **ET Regulations**. Rule 67 provides that: "Subject to rules 50 and 94, a copy shall be entered in the register of any judgment and of any written reasons for a judgment." Rule 94 is concerned with national security cases and does not arise in the present instance.

26. As relevant, Rule 50 of the **ET Rules** provides that 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 or in the circumstances identified in section 10A of the Employment Tribunals Act.**
>
> **"(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.**
>
> **"(3) Such orders may include – (a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private; (b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the register or otherwise forming part of the public record; (c) an order for measures preventing witnesses at a public hearing being identifiable by members of the public; (d) a restricted reporting order…**
>
> **"(4) Any party, or other person with a legitimate interest, who has not had a reasonable opportunity to make representations before an order under this rule is made may apply to the tribunal in writing for the order to be revoked or discharged…"**

27. The application may be made after judgment has been handed down, as well as at an earlier stage: **X v Y** [2021] ICR 147 ("**X v Y**"), paras 46 and 48. As is apparent from Rule 50 itself, an application may be made by a non-party who contends their Convention rights require protection, as well as by the litigants. I note for completeness that whilst Rule 50 contemplates that in certain circumstances a Tribunal may make an order of its own initiative, the Appellant was not permitted to advance a ground of appeal contending that she should have been given advance notice of the judgment and an opportunity to respond.

28. Mr Wills suggested that this is one of the rare occasions where the EAT has been asked to consider Rule 50 in the context of an applicant who is neither a party nor a witness to the proceedings. If an application is made, whether by a party to the proceedings or otherwise, the determination of whether to make an anonymity order pursuant to Rule 50 will involve consideration of the open justice principle and of Articles 8, 10 and 6 ECHR. Where Articles 8 and 10 are both engaged, the balancing exercise to be conducted was described by Lord Steyn in **In re S (A Child) (Identification Restrictions on Publication)** [2005] 1 AC 593, para 17 as follows:

> "**What does, however, emerge clearly from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, when 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 are necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience, I will call this the ultimate balancing test.**"

29. The parties agree that the proportionality test to be applied is that identified by the Supreme Court in **Bank Mellat v Her Majesty's Treasury (No. 2)** [2014] AC 700, paras 20 and 74. This involves assessing: (i) whether the objective the measure pursues is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

30. In **Fallows v News Group Newspapers Ltd** [2016] ICR 801 ("**Fallows**"), para 48, Simler P (as she then was) drew the following points from the leading appellate decisions on the open justice principle as relevant to the appeal before her:

> "**(i) The burden of establishing any derogation from the fundamental principle of open justice or full reporting lies on the person seeking that derogation. It must be established by clear and cogent evidence that harm will be done by reporting to the privacy rights of the person seeking the restriction on full reporting so as to make it necessary to derogate from the principle of open justice.**

> **"(ii) Where full reporting of proceedings is unlikely to indicate whether a damaging allegation is true or false, courts and tribunals should credit the public with the ability to understand that unproven allegations are no more than that. Where such a case proceeds to judgment, courts and tribunals can mitigate the risk of misunderstanding by making clear that they have not adjudicated on the truth or otherwise of the damaging allegation.**
>
> **"(iii) The open justice principle is grounded in the public interest, irrespective of any particular public interest the facts of the case give rise to. It is no answer therefore for a party seeking restrictions on publication in an employment case to contend that the employment tribunal proceedings are essentially private and of no public interest accordingly.**
>
> **"(iv) It is an aspect of open justice and freedom of expression more generally that courts respect not only the substance of ideas and information but also the form in which they are conveyed…" [Reference was then made to Lord Rodger's speech in *In re Guardian News and Media Ltd*, which I have cited above.]**

31. In her earlier judgment in **British Broadcasting Corporation v Roden** [2015] ICR 985 ("**Roden**") Simler J (as she then was) had rejected the proposition that there was no public interest in the full publication of an essentially private employment claim (para 47). In **X v Y** Cavanagh J summarised the effect of the authorities as: "there have to be clear, cogent and proportionate grounds, before an employment tribunal can take any steps which conflict with the principle of open justice" (para 20).

32. An interference with open justice for a limited period is less objectionable than a permanent restriction on disclosure: **Roden** (para 31), citing ex **R v Legal Aid Board parte Kaim Todner** [1999] QB 966 AC ("**Kaim Todner**"). In his Rule 50 Judgment, the Judge referred to HHJ Eady QC's (as she then was) observation at para 45 in **Ameyaw** that "it is likely to be a rare case where other rights (including those derived from article 8 of the ECHR) are so strong as to grant an indefinite restriction on publicity". HHJ Eady was, in turn, citing para 42 in **Fallows**, a case concerning whether a RRO should be continued after a claim involving allegations of sexual misconduct had been settled by confidential agreement. The EAT dismissed the parties' appeal against the ET's revocation of an earlier order; and at para 42 Simler P said:

A

> "**Like the employment judge, I recognise that reporting restrictions which last indefinitely are a much more substantial restriction on freedom of expression than restrictions imposed for a limited period. Permanent protection may or may not be appropriate in a given case, but where it is sought it requires particularly careful consideration. It is likely to be a rare case where the article 8 rights at stake are so strong that it is necessary to grant indefinite restrictions as the means of striking the balance between article 8 rights on the one hand and the principle of open justice and rights of freedom of expression on the other.**"

B

The Engagement of Article 8

33. In the present case, the first stage of the inquiry, namely whether Article 8 is engaged, is in dispute. The need to conduct the balancing exercise with countervailing rights only arises if it is. The existence of a "private life" within the meaning of Article 8 depends on whether a reasonable expectation of privacy exists in the respect alleged. The engagement of Article 8 "must extend to every occasion on which a person has a reasonable expectation that there will be no interference with the broader right of personal autonomy recognised in the case law of the Strasbourg court. This is consistent with the recognition that there may be some matters about which there is a reasonable expectation of privacy, notwithstanding that they occur in public and are patent to all the world": **R (Catt) v Association of Chief Police Officers** [2015] AC 1065, para 4 (Lord Sumption JSC) ("**Catt**").

C

D

E

34. In a case concerning the repetition of material about the extra-marital sexual activities of a well-known couple that had been widely published in other countries and via the internet and social media, the Supreme Court confirmed that engagement of the right did not depend on existing confidentiality alone; the Article 8 right to respect for private life can also embrace the right to prevent unwanted intrusion into one's personal space by repetition of known facts where it added to the overall intrusiveness: **PJS v News Group Newspapers Ltd** [2016] AC 108, para 26 (Lord Mance JSC) ("**PJS**").

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35. The test involves an objective assessment of what a reasonable person of ordinary sensibilities would feel if s/he were placed in the same position as the claimant and faced with the same publicity: **ZXC v Bloomberg LP** [2021] QB 28, para 43 (Simon LJ) ("**ZXC**").

Damage to reputation

36. The right to protection of reputation constitutes an element of private life that falls within the scope of Article 8: **Clift v Slough Borough Council** [2011] 1 WLR 1774, para 32 (Ward LJ); see also **SW v The United Kingdom** (2021) application no. 87/18 ("**SW v UK**"), para 45.

37. In **Vicent Del Campo v Spain** (2019) application no. 25527/13 ("**Del Campo**"), the European Court of Human Rights ("ECtHR") found that the applicant's Article 8 rights had been violated by his named inclusion in a judgment given in proceedings to which he was not a party which found him responsible for acts of workplace bullying and harassment. The Court explained why Article 8 was engaged as follows:

> "**40. The Court reiterates that the concept of private life extends to aspects relating to personal identity, such as a person's name or physical and moral integrity, as well as to reputation and honour. In this connection, the Court notes that the judgment of the High Court of Justice…disclosed the applicant's identity and held that the applicant's conduct had amounted to psychological harassment and bullying. The publication of those findings was capable of adversely affecting his enjoyment of private and family life. Therefore, in the Court's view, the facts underlying the applicant's complaint fall within the scope of Article 8 of the Convention.**
>
> **"41. The Court also reiterates that Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence…The Court is of the opinion that in the instant case it can reasonably be supposed that the applicant could not have foreseen the consequences that the judgment of the High Court of Justice entailed for him. He had not been summoned to appear and was not a party to the proceedings…Furthermore, the complaint lodged against him by his colleague for psychological harassment in the workplace had been previous dismissed…and the colleague had taken no further action against him. The Court also lays emphasis on the fact that the applicant was never charged with or proved to have committed any criminal offence. It follows that the disclosure of the applicant's identity in the reasoning of the judgment of the High Court of Justice cannot be considered to be a foreseeable consequence of the applicant's own doing.**
>
> **"42. Accordingly, the Court finds that the inclusion by the High Court of Justice of the applicant's identity coupled with the statement on his acts as part of its own reasoning in the judgment constituted an "interference" with the application's right to respect for his private life…"**

38. Mr Wills relies on **Del Campo** as establishing that Article 8 is engaged by the publication of a judgment containing adverse imputations about a named third party capable of adversely affecting their enjoyment of their private (or family) life. Whilst this is correct, it should be borne in mind that the engagement of Article 8 will depend upon the extent to which the judgment in question is potentially damaging to the applicant's reputation and, if that is the case, whether the loss of reputation was a foreseeable consequence of their own actions (as discussed in para 41, cited above). As regards the former point, namely the threshold for engaging Article 8, I note that the judgment under consideration in **Del Campo** included specific findings of fact about the applicant's conduct, described by the Strasbourg court as "an authoritative judicial ruling…likely to have great significance by the way it stigmatised him and was capable of having a major impact on his personal and professional situation, as well as his honour and reputation" (para 48). In **SW v UK** at para 46, the Strasbourg court emphasised that in order for Article 8 to come into play, an attack on personal honour and reputation must attain a certain level of seriousness and must have been carried out in a manner causing prejudice to personal enjoyment of the right to respect for private life.

39. In **Del Campo**, the ECtHR went on to find that the interference with the applicant's Article 8 rights was not proportionate to the legitimate aim pursued (the public interest in the transparency of court proceedings), concluding that identifying the applicant was not required to resolve the issues before the Spanish court (para 50) and it was not apparent why it had failed to take measures to protect the applicant's identity, particularly given that he was not a party to the proceedings and had not been summoned to appear in them (para 51).

40. In **SW v UK** the Strasbourg court confirmed that the notion of a "private life" did not exclude activities of a professional or business nature "since it is in the course of their working lives

that the majority of people have a significant opportunity to develop relationships with the outside world…An attack on an individual's reputation which his or her ability to pursue a chosen professional activity may therefore have consequential effects" on the enjoyment of the right to respect for private life (para 46). A violation of the applicant social worker's Article 8 rights was found in the particular, striking circumstances of that case, where a judgment in family proceedings in which she appeared as a witness, concluded that she was responsible for serious professional misconduct that had never been put to her and which then caused the local authority she was working for to terminate her assignment. The ECtHR accepted that the applicant was unable to obtain alternative employment as a social worker until the Court of Appeal set aside the findings two years later and that they had "significantly affected her ability to pursue her chosen professional activity" (para 47).

Proceedings in open court

41. The Judge cited para 34(1) of Lord Sumption JSC's judgment in **Khuja** when concluding that the present Appellant had no reasonable expectation of privacy because her identity had been discussed in a public trial. In **Khuja** a majority of the Supreme Court dismissed an appeal from a refusal to grant a non-disclosure order sought by the claimant, who had been suspected of serious offences of child abuse. He had been arrested and was on police bail when others arrested as part of the same investigation were tried. He was not a witness at the trial. He was named in open court but, as the subject of pending criminal proceedings, he was protected by an order made under section 4(2) of the Contempt Court Act 1981. A majority of those tried were convicted. The claimant was subsequently released without charge and his application for an order protecting his identity was resisted by various media organisations. Lord Sumption JSC gave the leading judgment.

42. **Khuja** involved matters of great public concern and the order under consideration involved restricting the ability of the press to report on matters relating to the trial, rather than an application for anonymity. Lord Sumption JSC's reasoning highlighted these aspects, amongst others:

> "**34(1) PNM's [the claimant] application is not that the trial should be conducted so as to withhold his identity. If it had been, the considerations urged by Lord Kerr and Lord Wilson JJSC in their judgments in this case might have had considerable force. But it is now too late for that. PNM's application is to prohibit reporting, however fair or accurate, of certain matters which were discussed at a public trial. These are not matters in respect of which PNM can have had any reasonable expectation of privacy…**
>
> **"34(2) That is not the end of PNM's article 8 right, because he is entitled to rely on the impact which publication would have on his relations with his family and their relations with the community in which he lives…The immunity and the privilege [in defamation for fair, accurate and contemporaneous reports] reflect the law's conviction that the collateral impact that this process has on those affected is part of the price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public……**
>
> **"34(4) I would not rule out the possibility of a pre-emptive injunction in a case where the information was private or there was no sufficiently substantial interest in publication. But in relation to the reporting of public court proceedings such cases are likely to be rare. This is clearly not such a case. The sexual abuse of children, especially on an organised basis, is a subject of great public concern. The process by which such cases are investigated and brought to trial are matters of legitimate public interest…**
>
> **"35 …restrictions on the reporting of proceedings in open court are particularly difficult to justify. It may in some cases be easier to justify managing the trial in a way which avoids the identification of those with a sufficient claim to anonymity. Applications for anonymity in the courtroom will generally raise many issues other than the impact on the applicant or his family. They will include the fairness of the trial, the nature of the issues, and the existence and extent of any legitimate public interest in the applicant's identity. I am in no position to suggest that such an application would have succeeded in PNM's case, if it had been made. But if there is a solution to the problem of collateral damage to those not directly involved in criminal proceedings, that is where it is to be found."**

43. **Ameyaw** was concerned with an unsuccessful application to anonymise the claimant's name in a judgment determining an application to strike-out her claim. The objection to publication was based on references to her own disruptive conduct at an earlier hearing. The question of whether she had a reasonable expectation of privacy turned on the fact that although this conduct had occurred at a closed preliminary hearing, it had subsequently been the subject of the strike-out application which was heard in public (para 54). In these circumstances, unsurprisingly, HHJ Eady QC cited Lord Sumption's judgment in **Khuja**. However, I

respectfully agree with Cavanagh's J's observation at para 21 in **X v Y** that para 47 in **Ameyaw**: "was not intended to go so far as to mean that in any case in which the relevant information is given in evidence in the public hearing, article 8 is not even engaged and so there can never be grounds for a rule 50 non-disclosure order". At para 22, Cavanagh J said of para 34(1) in **Khuja**:

> "…**It is clear that Lord Sumption JSC was not there intending to lay down a general rule that article 8 could not be engaged in circumstances in which the information was referred to in open court. He was making a comment in the context of the specific and very different facts of the *Khuja* case, which concerned a complaint by a non-party to a criminal case about whom accusations had been made during the course of a trial. It is clear that article 8 can be engaged and in an appropriate case a rule 50 order can be made, even in cases in which the sensitive information had been given in evidence at an open hearing."**

Where the applicant is not a party

44. A number of cases have noted that it is not unreasonable to regard a person who brings proceedings as having accepted the normal incidence of their public nature, including the potential embarrassment and reputational damage inherent in being involved in litigation: **Roden** at para 31, citing **Kaim Todner** at 978E. Similarly, the fact that an applicant did *not* choose to be involved in the proceedings may be a relevant factor: **Ben Adams Architects Ltd v Q** (2019) WL 02578856, para 34. Of course, the significance of this feature will depend upon the circumstances. Lord Sumption JSC did not regard his lack of involvement in the criminal trial as a significant factor in the claimant's favour in **Khuja** at para 34(5); whereas, in **Del Campo** the ECtHR regarded the applicant's non-participation in the relevant proceedings and the fact that he did not know of them until after the judgment had been rendered as highly significant: see in particular paras 41 and 53.

Investigations by the state

45. In **ZXC**, paras 82 – 84, the Court of Appeal followed the approach of Mann J in **Richard v British Broadcasting Corpn** [2019] Ch 169 in holding that those who have come under suspicion by an organ of the state have, in general, a reasonable and objectively founded

expectation of privacy in relation to that fact. In giving the leading judgment, Simon LJ acknowledged "the human characteristic to assume the worst (that there is no smoke without fire); and to overlook the fundamental legal principle that those who are accused of an offence are deemed to be innocent until they are proven guilty". Para 248 of Mann J's judgment was cited by Simon LJ at para 58, including the following:

> "**If the presumption of innocence were perfectly understood and given effect to, and if the general principle were universally capable of adopting a completely open and broad-minded view of the fact of an investigation so that there was no risk of taint either during the investigation or afterwards (assuming no charge) then that position might be different. But neither of those things is true. The fact of an investigation, as a general rule, will of itself carry some stigma, no matter how often one says it should not. This was acknowledged in [*Khuja*]…The trial judge had acknowledged that some members of the public would equate suspicion with guilt but he considered that members of the public generally would know the difference between those two things: see para 32. Lord Sumption JSC was not so hopeful. He observed at para 34: 'Left to myself, I might have been less sanguine than he was about the reaction of the public to the way PNM featured in the trial.**"

46. There is some difference of emphasis between these observations and suggestions that the public can be trusted to distinguish between an allegation and a finding of guilt: for example **Fallows** at para 48(ii) (paragraph 30 above) and **Roden** at para 40. The latter case concerned whether an anonymity order should be granted in relation to serious allegations of a sexual nature that had been the subject of police investigation. Simler J referred to **In re Guardian News and Media Ltd**, observing: "If there was no warrant for concluding that the public might be incapable of drawing the distinction between mere suspicion and sufficient evidence to prove guilt in relation to terrorism offences, it is difficult to see what makes the different in the present case". The difference in emphasis may be at least partially explained by the fact that some of these statements were made when the court was considering the first stage of the inquiry, whether there was a reasonable expectation of privacy (and thus Article 8 was engaged) and others in the context of the balancing exercise, assessing whether the potential interference with open justice was justified (usually a more demanding requirement).

The test on appeal

47. The appeal will only succeed if the Judge below erred in law. As regards the outcome of the balancing exercise between the countervailing rights, the EAT should not intervene unless the judge below erred in principle or reached a conclusion that was plainly wrong or outside the ambit of conclusions that s/he could reasonably reach: **AAA v Associated Newspapers** [2013] EWCA Civ 554, para 8. However, the judge's decision may be "wrong" not only because of an error of principle, but also because of an identifiable flaw in the reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion: **R (R) v Chief Constable of Greater Manchester Police** [2018] 1 WLR 4079, para 64 (Lord Carnwarth JSC).

The EAT's powers to grant anonymity orders

48. The EAT's power to grant anonymity orders was considered by Cavanagh J in **X v Y**. He concluded at para 52:

> "**I have no doubt that the appeal tribunal has power to order that parties' names can be anonymised; this has been done on many occasions. The appeal tribunal has been granted power to regulate its own procedure by section 30(3) of the Employment Tribunals Act 1996 and, in any event, in my judgment, it has an inherent power to take steps to protect the parties' privacy rights under the Convention (see *X v Comr of Police of the Metropolis* [2003] ICR 1031)."**

49. Furthermore**,** as a public authority under section 6(3)(a) of the Human Rights Act 1998, the EAT is under a duty to act compatibly with Convention rights. This includes a positive obligation to conduct proceedings in a manner which ensures compliance with the Article 8 rights of anyone affected: **CVB v MGN Ltd** [2012] EMLR 29, para 21 (Tugendhat J).

The parties' submissions

The Appellant

50. As regards Ground A (the conclusion that Article 8 was not engaged), Mr Wills submits that the Judge erred in treating **Khuja** as determinative of the application because the Appellant's name had been referred to at the public hearing of the dismissal claims. He says that the passage in Cavanagh J's judgment in **X v Y**, which I have already cited, shows that the assessment is fact sensitive to the particular case. He submits the Appellant had a reasonable expectation that she would not be named as the subject of serious criminal allegations and a criminal investigation in a public judgment. He contends that **Del Campo** and **SW v UK** establish that publication of a judicial decision containing information capable of adversely affecting an individual's reputation, including in terms of their profession, can affect the enjoyment of their rights to private and/or family life and so engage Article 8. He says that given the contents of the Dismissal Judgment, damage can be inferred without the need for the Appellant to provide supporting evidence of it.

51. In support of Ground B concerning the balancing exercise, Mr Wills submits that the Judge failed to identify or evaluate the competing rights in play; that he did not identify the nature or extent of the interference with the Appellant's Article 8 right, nor the extent of the incursion upon the principle of open justice / Article 10; and he did not consider the proportionality of the interference with each of the rights in question. More specifically, he contends that the Judge erred in failing to recognise that the Appellant's Article 8 rights were stronger than those of a party or witness to the proceedings. He says that the Judge failed to consider the Appellant's largely unchallenged evidence as to the impact of her being named in the proceedings and failed to make findings in relation to this. Mr Wills also submits that the

A Judge wrongly concluded that Article 6 was engaged, given that the parties' civil rights and obligations had already been determined.

B 52. Mr Wills' position is that in light of these errors of law, the Judge's decision should be set aside and the EAT should itself grant the Rule 50 application, removing the Appellant's name from the judgments below, as it is clear that Article 8 was engaged and that the interference with her rights, if the application is not granted, outweighs the interference with Article 10 C and open justice principles that would be caused by granting her anonymity. In the alternative he argues that the EAT should at least find that Article 8 was engaged, even if the balancing exercise issue has to be remitted. He invites the EAT to anonymise its own judgment.

D 53. In support of his contention that it was clear that an anonymity order should be granted, Mr Wills emphasises the potential impact on the Appellant's reputation and the fact that each repeated entering of her name into a search engine, for example by a potential employer, E would bring up a link to this judgment and the damaging allegations it contained. Accordingly, even if there has been some reporting of the judgment and her name already, this had not extinguished her Article 8 right to protection against further distressing intrusions. He also submits that the interference with open justice rights was limited given F that no RRO was sought. He says the restriction sought is relatively minor and that reference to the Appellant by name was not necessary to an understanding of the Dismissal Judgment.

The Respondent

G 54. As regards Ground A, Ms Burton submits that there was no error in the Judge's application of **Khuja**, as on the facts of this case the Appellant could have no reasonable expectation of privacy. She emphasises the lack of supporting evidence from the Appellant in terms of the H medical or employment consequences for her of being named in the Dismissal Judgment. Further, she notes that the Appellant had not sought an anonymity order in her own

proceedings; that she knew of the dismissal claims and, she submits, must have known of the nature of the allegations canvassed in those proceedings. She refers to the length of time since the judgment first appeared online and she relied on the points made below as to why an anonymity order made at this stage would not be effective.

55. In the alternative, Ms Burton submits that any error as to the engagement of Article 8 was not material, as the Judge lawfully identified and undertook the balancing exercise required by the second stage of the inquiry, rightly concluding that the open justice principle outweighed any interference with the Appellant's Article 8 rights. She says the Judge was right to highlight the importance of the open justice principle and that it would only be rare cases where an indefinite restriction would override this. The Judge was in the best position to make the assessment and his conclusions that it was made clear that the allegations were unproven and that they were part of the intrinsic matrix of the case are not open to challenge on this appeal. The burden is on the Appellant to provide clear and cogent evidence to support the proposed derogation from the fundamental principle of open justice and she failed to do so.

56. If, contrary to Ms Burton's primary submissions, there was any material error of law in relation to Ground B, she contends for remission to the ET as there is more than one possible outcome. She is neutral as to whether the EAT should make any temporary anonymity order for the interim period and neutral as to whether the EAT should anonymise its own judgment.

Conclusions

Ground A: Engagement of Article 8

Is the ground of appeal established?

57. As I have identified at paragraphs 41 – 43 above, the fact that the information in question has already been mentioned at a public hearing and/or in the published judgment does not

necessarily preclude the engagement of Article 8. Indeed, Ms Burton accepted that this is the position. The existence of prior publicity is likely to be highly significant where Article 8 is asserted to protect what is said to be private information, but less so where the aspect of a right to a private life relied upon is ongoing or future reputational damage and/or the impact on the applicant or family members of repetition of the material in question: see my earlier references to **PJS** and to Lord Sumption JSC's observation in **Catt** (paragraphs 33 - 34 above). In **Del Campo**, where the ECtHR found a violation of Article 8, the proceedings and the Spanish court's judgment had been public (paragraphs 37 - 39 above). I have already discussed why the circumstances and issues in both **Khuja** and **Ameyaw** were distinct from the present case (paragraphs 42 - 43 above).

58. Accordingly, the fact that the information has been referred to in open court or is otherwise already in the public domain will be something to take into account when assessing the engagement of Article 8, but it is not necessarily fatal to that proposition and was not so in the circumstances of this case, given that, at least in substantial part, the Appellant relied upon future reputational damage, in particular from potential employers / business partners checking her via a search engine and on the consequential anxiety and distress that this prospect was causing her and on the chilling impact on her employment / business activities.

59. Although Ms Burton sought to persuade me otherwise, in my judgment it is clear from the structure of the Rule 50 Judgment and the terminology of para 24 that the Judge wrongly regarded the prior publicity as necessarily fatal to her application: "She could not have any reasonable expectation of privacy *because* information revealing her identity had been discussed in a public trial" (emphasis added). The absence of specific fact-finding and conclusions about the Appellant's particular circumstances and the lack of focus on the Article 8 rights that she asserted, is in my judgment only consistent with the proposition that

A the Judge concluded that the public hearing was determinative of the non-engagement of Article 8, without the need for a fact-sensitive assessment.

60. I therefore conclude that Ground A is well-founded and that the Judge did err in law in B concluding that Article 8 was not engaged.

61. The Judge next observed that the Appellant's status as a non-party and non-witness was not a distinguishing feature. It is unclear whether he relied on this as supporting his decision that C Article 8 was not engaged, or only when he came to his alternative conclusion as to the outcome of the balancing exercise. Mr Wills relies on this reasoning in support of his Ground B. However, he also relies on the Appellant's status as supporting the engagement of Article D 8 and so I will address the point at this stage. I agree that it may bear on the engagement of Article 8, not least for the reason discussed in **Del Campo**, namely whether the loss of reputation in issue is a foreseeable consequence for the applicant (paragraph 37 above).

E 62. A number of cases have drawn a distinction, in particular, between the position of a party, who has elected to bring proceedings and the position of someone who has not chosen to be involved in the proceedings (paragraph 44 above). The Judge did not explain why he rejected F this distinction; he appears to have done so as a matter of general principle ("I took the view that a third party who was not party to proceedings…") rather than on the basis of the particular facts. In my judgment, in light of the case law I have discussed, this is a relevant factor, in particular where Article 8 is relied on in relation to the protection of reputation and G the Judge erred in concluding otherwise.

<u>Consequences of the errors identified</u>

H 63. Having concluded that the Judge erred in law in deciding that Article 8 was not engaged, I turn to the consequences of this. Essentially, there are three possibilities: (1) Article 8 is

clearly not engaged in the circumstances and therefore this has not affected the result (the Respondent's position); (2) Article 8 is clearly engaged having regard to the circumstances and the undisputed facts, so I should allow the appeal, substituting a finding to that effect (the Appellant's position); or (3) the appeal should be allowed and the question remitted for re-determination by the ET, as the issue admits of more than one possible answer. As is well-known, the EAT should remit an issue unless no further fact finding is needed in order to resolve it *and* only one outcome is reasonably possible: **Jafri v Lincoln College** [2014] ICR 920 ("**Jafri**").

64. In my judgment it is clear that Article 8 is engaged in the circumstances. I am mindful of the absence of fact-finding below as to the impact on the Appellant. However, given what can be safely inferred from the undisputed facts and given that the test at this stage of the inquiry is an objective one (albeit based on the expectations of a reasonable person in the applicant's circumstances), I have concluded that I am able to resolve this first issue at this stage. Furthermore, unlike the more evaluative process involved in the balancing exercise, the question of whether Article 8 is engaged is a hard-edged "yes / no" question of law, likely to admit of only one correct answer.

65. As I have noted, Mr Wills relies on the Appellant having "a reasonable expectation that she would not be named as the subject of serious criminal allegations and a criminal investigation in a public judgment". He said that the Dismissal Judgment contains allegations that are "self-evidently extremely serious", as it indicates that there were "reasonable grounds to suspect" the Appellant of fraud, theft and "intimidating witnesses in judicial proceedings". This appears to me to involve a degree of over-statement. Firstly, para 12 of the Dismissal Judgment referred to two witnesses telling the Respondent's *internal* investigator that they were frightened by the prospect of the Appellant being shown their statements as a result of

unspecified threatening behaviour. There was no suggestion that the Respondent had referred this aspect to the police or taken other formal steps. Secondly, although para 11 indicated that police had been "consulted" about the theft allegations and by implication there had then been some form of police investigation, as Saeeda had been prosecuted, the extent to which the Appellant had been the subject of a criminal investigation was unclear.

66. As regards the potential for reputational damage, it appears to me that the ordinary reasonable reader would understand the relevant passages in the Dismissal Judgment as conveying that the Appellant had been suspected of dishonesty offences in the workplace and her previous employers had been sufficiently concerned about the prospect of her having committed criminal offences that they had referred these allegations to the police; and that witnesses to an internal investigation indicated they were frightened by intimidatory behaviour involving her. Accordingly, the relevant questions are: (i) whether the Appellant had a reasonable expectation that she would not be named in the Dismissal Judgment in relation to these matters; and if so, (ii) whether that expectation is one protected by Article 8. Whilst these questions primarily concerns the reputational aspect of Article 8, the police referral brings into consideration the privacy aspect as well.

67. I accept that the Appellant did have a reasonable expectation that she would not be named in this context in the Dismissal Judgment. She was not formally involved in the proceedings. Whilst she was aware of them and, latterly at least, knew of the allegations the Claimants faced (paragraph 12 above), it was not suggested when she gave evidence below that she had reason to believe that her name would be used in relation to allegations concerning her own conduct. Even if she knew the Claimants' case was that they were dismissed because of the family connection to other employees, it does not follow that there was reason to anticipate that she would be personally named in circumstances where she would not be appearing and

would not have the opportunity to respond to the allegations. As I noted earlier, the Appellant was not mentioned in the particular allegations that led to the Claimants' dismissal.

68. Although there was factual interlinkage between the Claimants' dismissals, the reasons that they claimed they were dismissed and the background circumstances involving other family members, (as the Judge recorded at paras 29 – 30), it does not appear to me that naming the Appellant would be reasonably anticipated as essential to the narrative or intelligibility of the Dismissal Judgment. The Judge does not say why a cipher could not have been used, as opposed to explaining why *the allegations* had to be referred to. In fairness to the Judge, he may have focused on the factual interlinkage between family members because it was submitted to him that references to the family connection should also be removed. However, as I am now considering afresh whether Article 8 is engaged (as opposed to whether the Judge erred in law), I can proceed on the basis of the case that is now presented, namely that objection is only taken to the Appellant's name and role. As regards the later, I can see no apparent need to refer to her particular position in the company. Further, the factual interlinkage referred to by the Judge appears to relate, or relate predominantly, to the dishonesty allegations; the reason for the passing reference to the Appellant's name in relation to alleged intimidation felt by potential witnesses is unclear to me.

69. That the Appellant did not seek anonymity in her own claim is not directly relevant, given she elected to withdraw it at an early stage and thus would not have anticipated a public hearing or a public judgment referring to allegations about her conduct in those proceedings.

70. I have already explained why the public nature of the hearing and the fact that the Dismissal Judgment has been online does not preclude the engagement of Article 8 in these circumstances (paragraph 41 - 43). Whilst further factual findings may assist in determining the impact on her and thus the *strength* of the Appellant's Article 8 rights for the purposes of

the balancing exercise I discuss below, I accept that the prospect of damage to her reputation is sufficiently self-evident for the purposes of Article 8 engagement, in particular given that a link to the Dismissal Judgment features prominently in search engine results on her name and given the contents relate to her suspected dishonesty and intimidatory behaviour in the workplace. I also accept that whilst aspects of her account may be challenged as insufficiently evidenced, it is evident that reputational concern is the source of anxiety and distress for the Appellant, as she has described, particularly in relation to prospective employers and business associates. Whilst the Respondent points to the lapse of time, the Appellant first raised her concerns with the ET relatively promptly (paragraph 11 above).

71. I conclude that these matters attain the requisite level of seriousness. The allegations concerned potential criminal acts of dishonesty by the Appellant in her workplace. Whilst there was no suggestion that they had been proven, context is significant. The Dismissal Judgment indicated that the concerns were thought to warrant police involvement; that her relative, Saeeda, was prosecuted for related offences; and that both Claimants were responsible for the stock misappropriation that they were accused of having undertaken with Saeeda, which amounted to gross misconduct. As I have discussed at paragraph 46 above, a neat distinction between proven and suspected wrong-doing is not always apposite, particularly when considering if Article 8 is engaged (as opposed to violated). I also note that a specific disclaimer of the kind referred to at para 48(ii) in **Fallows** (paragraph 30 above) was not used in this case. Accordingly, whilst the facts are significantly less strong than in the two Strasbourg cases I have discussed, where violations were found, I accept that the principles there identified apply and that a sufficient element of likely reputational damage is present to engage Article 8. However, as I have already noted, the *extent* of that damage, actual and/or anticipated, will likely be pertinent when it comes to conducting the balancing

exercise. I also accept that this damage could not have been foreseen in the sense discussed in **Del Campo** para 41 for the reasons I have identified in paragraphs 67 – 68 above.

72. Mr Wills also relies on a secondary basis for the engagement of Article 8 given the Dismissal Judgment's reference to police involvement and the presumptively private nature of such information until charge (paragraph 45 above). This submission is based on the Court of Appeal's decision in **ZXC** which was not relied on below and thus does not form a ground of appeal; but in considering afresh whether Article 8 is engaged, I conclude that there was a reasonable expectation of privacy in relation to naming the Appellant in the context of the referral of the theft allegations to the police. Whilst the extent of inquiries made by the police in relation to her is unclear from the judgment, in the context this was a "no smoke without fire" reference, capable of carrying a stigma.

73. In so far as the Appellant also relies upon the impact on her private and family life, in terms of her health and the alleged impact on the family finances, I make clear that I do not consider that these are matters I can take into account at this stage, in the absence of relevant findings of fact made below. They are not aspects that can simply be inferred. They may be relevant to the balancing issue considered below, but for the reasons I have explained, I conclude that Article 8 is clearly engaged in any event.

Ground B: The balancing exercise

Is the ground of appeal established?

74. I can dispose swiftly of the Appellant's Article 6 point. The Judge's reference to the engagement of Article 6 was clearly on the basis that I referred to in paragraph 20 above, namely the public nature of the judgment in the proceedings. I can see no error in the Judge referring to Article 6 in this context. Accordingly, even if this complaint is included within

the formulation of Ground B, which is at best debatable, it does not assist the Appellant. (I also note that the balancing exercise is essentially the same in a case such as the present whether the countervailing rights to be weighed in the balance are only Articles 10 and the common law principle of open justice or include Article 6 as well; I have therefore focused on Article 10 in my analysis that follows.)

75. However, I agree with the central thrust of the Appellant's Ground B. Although he acknowledge that a balancing process was involved, when setting out his alternative conclusion that the balance lay in favour of Articles 10, 6 and open justice, the Judge did not identify the Appellant's Article 8 rights in play, nor the proportionality of the interference with the same if her application was rejected. He did not make any findings about the alleged impact on her. Nor did he determine the extent of or proportionality of the interference with Article 10 protected rights and open justice if the application were granted. It also follows that he did not conduct a balancing exercise between the proportionality of interfering with these competing rights. In this regard, the Judge erred in principle. Alternatively, this can be characterised as a flaw in his reasoning or a failure to take relevant considerations into account. In my judgment it was insufficient for him to refer to the circumstances in which the principle of open justice is overridden as "rare". This is a reference to the *outcome* of applying the requisite test, not a test in itself; and in any event the judicial observation cited by the Judge was made in **Fallows**, where, unlike this case, a permanent RRO restricting the rights of third parties was sought (paragraph 32 above). The Judge's approach suggests a search for some exceptional feature, rather than a balancing of the competing rights in light of the relevant circumstances.

76. No doubt there are instances where the balancing exercise can be conducted quite concisely, but some identification of the competing rights in play, including the alleged basis of the Article 8 engagement and the nature and extent of the impact relied upon; the reasons for the potential interference with each of the competing rights and the relative proportionality of the same will usually be required. I note the Respondent's submission that the conclusion was open to the Judge, who was best placed to conduct the assessment. However, that is an insufficient answer in circumstances where the Rule 50 Judgment contains no findings of fact in terms of the alleged impact upon the Appellant and no identification of the nature and extent of the Article 8 rights in play.

77. Whilst the conclusion I have expressed is sufficient for me to uphold Ground B, I will also address two further submissions made by Mr Wills. Firstly, I agree with the third part of Ground B, namely that the Judge erred in failing to consider whether measures could be adopted that would be less intrusive of the Appellant's Article 8 rights. I have already noted the absence of a clear disclaimer emphasising that the allegations concerning her had not been adjudicated upon and the ET had not heard the Appellant's account as she was not a party or a witness in the proceedings (paragraph 71 above). Ms Burton accepts that disclaimers of this kind are not uncommon. Further, the Rule 50 Judgment does not address the impact of using a cipher upon its intelligibility (paragraph 68 above). I note the significance accorded to the latter point by the ECtHR in **Del Campo** (paragraph 39 above). Secondly, I agree with the Appellant's submission concerning the distinction in this context between her position and that of a party to proceedings, which I have already considered when addressing Ground A.

78. Accordingly, I accept that Ground B is also well-founded.

Consequences of the errors identified

79. In these circumstances, the potential outcomes are analogous to those that I identified when discussing Ground A. However, in terms of the balancing exercise, I consider that remittance to the ET is inevitable given the current absence of fact-finding, one way or the other, as to the alleged impact on the Appellant and thus as to the strength of her Article 8 rights; and because there is more than one possible outcome. I arrive at this position with reluctance given the further period of time and the additional hearing in the ET that this will entail. During the appeal hearing I canvassed the possibility of the parties consenting to my determining the issue (as discussed by Underhill LJ at para 47 in **Jafri**), but the Respondent declined this course.

80. In the circumstances it would not be appropriate for me to express a view on the outcome of the balancing exercise. However, I will recap matters that are likely to require consideration.

81. In terms of the interference with Article 10 freedom of expression rights and the open justice principle that would follow from granting the Rule 50 application, an assessment of the proportionality of the same will include the following considerations:

    (i) The fundamental importance attached to open justice, which encompasses employment law disputes between private parties (paragraphs 30 - 31 above);

    (ii) The nature and extent of the restriction sought. It is unlimited in time, but, on the other hand, does not seek to curtail a public hearing or to restrict the ability of third parties to report matters from that hearing or contained in the current form of the Dismissal Judgment, where they are aware of the same. As clarified, the Appellant seeks anonymisation of her name by use of a cipher and redaction of

her position within the Respondent, but does not seek any further redactions to the text of the judgment;

(iii) The extent to which naming the Appellant is in the public interest and relevant to the contents of the Dismissal Judgment, including whether the intelligibility of the judgment would be impacted upon by taking the steps she seeks; and

(iv) The reason for the proposed interference, that is to say the nature and strength of the Article 8 rights in play (as addressed in the next paragraph).

82. In terms of the interference with the Appellant's Article 8 rights that would follow from refusing the Rule 50 application, an assessment of the proportionality of the same will include the following considerations:

(i) The nature and strength of her Article 8 rights and the degree of interference with them. I have already described in detail the Article 8 rights that I conclude are engaged in terms of the protection of her reputation and the privacy of the police's involvement and do not repeat that analysis. I have also identified that the extent of and the strength of her Article 8 rights in play may well depend upon factual findings that have not yet been made in terms of the impact on the Appellant's health, the extent to which her search for employment / business opportunities has been or will be affected and/or the impact on the family's finances, in so far as she continues to rely on the same. Her witness statement is relatively brief on these matters and the absence of supporting evidence beyond that is highlighted by the Respondent, who does not accept the extent of the impact she describes. It will be recalled that the onus lies on the Appellant to provide clear and cogent evidence, save where matters are agreed or can safely be inferred;

(ii) The extent to which the order sought would mitigate this impact, bearing in mind both the particular concerns that are raised by the Appellant and the extent to which the order sought would meet them. The Respondent, noting that an RRO is not sought, says some public identification of the Appellant may still take place, including, potentially, by jigsaw identification via the stated family connections. On the other hand, the Appellant relies on the continued inclusion of her name leading to the search engine results I have referred to;

(iii) That the Appellant was not a party or a witness to the dismissal claims (although she had some knowledge of the proceedings);

(iv) Whether less intrusive measures in relation to the Dismissal Judgment are possible, as I have already discussed; and

(v) The reason for the interference, namely the rationale for and strength of the Article 10 right in play in these circumstances (as discussed above).

83. It will then be necessary for the ET to weigh the relative importance of the rights in play and weigh the scale of the potential interferences with these countervailing rights if the application were to be granted or refused.

Appropriate orders

84. Accordingly, for the reasons I have identified, I allow the appeal on both Grounds A and B. I substitute for the determination below that the Appellant's Article 8 rights were not engaged, a finding that they are engaged in the respects I have described; and I remit the question of whether the Rule 50 application should be granted, in particular the question of whether the Appellant's Article 8 rights outweigh Article 10 and the common law principle of open justice. For the avoidance of doubt, for the reasons I have explained, additional fact-finding

may bear on the nature and extent of the Article 8 rights engaged as well as on the balancing exercise.

85. I understand that the Judge may now have retired and so I will not restrict remission of the application to him, although I see no reason why my decision on this appeal precludes him from sitting on the remitted hearing if he is still available.

86. I will grant the anonymisation sought by the Appellant in relation to this judgment and I will continue the terms of the order made by HHJ Auerbach in relation to the omission of identifying material from any register kept by the EAT which is available to the public and from any order or other document that is available to the public in relation to this appeal. I will provide for liberty to apply and for the order to be discharged / varied on notice, to allow for future developments, including the outcome of the remitted hearing. Ms Burton indicated that the Respondent was neutral regarding this, although, of course, that does not remove the need for me to consider this carefully, given the interference with the open justice principle. My reasons for granting this order are: I have found that the Appellant's Article 8 rights are engaged; I have concluded that a potential outcome of the remission is that her Rule 50 application could succeed; the orders I propose to make are limited to protecting her anonymity; the order is not permanent and is intended to further the "hold the ring" approach pending the remitted determination; and the order does not restrict the rights of third parties' to communicate information of which they are aware.

87. Plainly it would be desirable for the ET to hear this matter as soon as availability and resources permit. However, given that some lapse of time is inevitable, when I circulated the draft of this judgment to Counsel, I indicated that I would consider written submissions as to

any additional terms I should include in the EAT's order regarding temporary protection of the Appellant's anonymity pending the remitted ET hearing.

88. The Respondent adopted a neutral position. The Appellant submitted I should order that references to the Appellant in the Dismissal Judgment and in the Rule 50 Judgment be anonymised and references to her role in the Respondent's company redacted, pending the Tribunal's determination of the remitted application. I am persuaded that this is the appropriate course, given I have found that the Appellant's Article 8 rights are engaged and balancing these against open justice considerations.

89. I have summarised the EAT's powers at paragraph 48 above. Mr Wills also reminds me that pursuant to section 35(1)(a) of the **Employment Tribunals Act 1996**, the EAT may exercise any powers of the ET. The reasons I identified for ordering anonymity in relation to the EAT's proceedings (paragraph 86 above) apply to the grant of this order too. A potential outcome of the remitted determination is that the Appellant's Article 8 rights are held to outweigh the competing rights, so that a permanent Rule 50 order is made. I accept Mr Wills' submission that it may reasonably be inferred that the handing down of this judgment will generate further interest in the proceedings below and increase the likelihood of a non-party seeking to obtain either or both of the Dismissal Judgment and the Rule 50 Judgment from the public register. Without an interim order preventing the Appellant from being identified in those documents, there is a real risk of undermining the order made on this appeal and the assessment and outcome at the remitted determination. I emphasise that this order only applies until resolution of the remitted Rule 50 application. It relates purely to the interim position and should not be regarded as any kind of indicator as to the final outcome.