


Litigants anonymous: the tribunal database and anonymity

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In February, HM Courts and Tribunals Service launched an online database of employment tribunal decisions. This could have serious implications for parties, their witnesses and anyone mentioned during the tribunal proceedings.

Previously, access to tribunal decisions required a trip to Bury St Edmunds and a physical search through the catalogue. Claimants and witnesses could reasonably expect that – unless their case was high profile, unusual or subject to appeal – future employers, and others, would be unlikely to stumble upon the details of their case. Now, anyone with access to the internet can perform a full text search in seconds. The database is also linked to search engines. Anyone researching an individual is likely to discover any proceedings that they have been involved in, whether they sought to find this information or not.

Obvious risks include victimisation, reputational damage and invasion of privacy. Recent EAT judgments have tended to emphasise the importance of open justice over anonymisation. However, the wider availability of tribunal judgments should herald a greater willingness on the part of tribunals to make anonymisation orders.

Employment tribunals' powers to order anonymity

Rule 50 of the ET rules gives tribunals wide powers to protect privacy, including the power, at rule 50(3)(b), to anonymise the identities of specified parties, witnesses and other persons referred to in the proceedings.

In considering whether to make such an order, the tribunal must perform a balancing exercise between competing (European Convention) rights: the right to a fair trial (Article 6); respect for private and family life (Article 8); and freedom of expression (Article 10). In *re S (A Child),* Lord Steyn formulated the balancing test that must be applied as follows: 'First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each (para 17).

The comparative importance of the rights being claimed

Recent EAT judgments on this issue, (*Fallows* and *Roden*), place particular emphasis on Article 10 rights. In the latter, Simler P stressed the 'paramount importance' of the principle of open justice, from which derogations can be justified only when strictly necessary to secure the proper administration of justice (para 22 [of *Roden*]). The default position is that names will be published. This applies irrespective of the subject matter of the case. It is not necessary to show a public interest in full publication. The burden of establishing any derogation is on the person seeking it and will require 'clear and cogent evidence' that harm will be done by the publication. Although in both judgments the President emphasised that neither article has precedence over the other, the tone of the judgments indicates that such orders may only be made in exceptional cases.

However, these decisions pre-date the online database. It is probable that the wide publication of tribunal judgments will shift the emphasis towards Article 8 rights. According to Underhill J (as he then was) in *F v G*: 'The nature and manner of publication of information relating to a person's private life must be relevant to whether his rights under Article 8 are infringed by the publication and if so whether such infringement can be justified' (para 55). Therefore, the new online database should make it easier for the applicant to demonstrate an unjustified infringement of their Article 8 rights.

The new database is likely to deter some litigants from seeking redress; for example, for fear of being blacklisted from future work. This is a relevant factor for the tribunal to consider when assessing the comparative importance of the

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rights being claimed. The courts have long recognised that the principle of open justice may be restricted where publication would 'reasonably deter a party from seeking redress, or interfere with the effective trial of the cause' (*Scott*, page 446). The 'broad principle' of open justice is subject to the 'paramount object' of the court – to ensure that justice is done (as per Viscount Haldane LC in *Scott*). This is particularly true where EU rights are in force, as the principle of effectiveness may require tribunals to consider regulating their procedures in order to prevent an applicant from being deterred from seeking redress (see *X v Commissioner*).

Proportionality

The final stage of Lord Steyn's balancing exercise is proportionality. If both Article 8 and Article 10 are engaged, it is on this stage that the tribunal's decision will turn. Interference with Article 10 is only permitted in order to achieve a legitimate aim. When making an order under rule 50, the tribunal will seek to minimise this interference.

Practical advice

Litigants arguing that their name should be anonymised will be in a stronger position if they can demonstrate that their rights under Article 8 are engaged. While this is not a strict requirement of rule 50, the tribunal's obligation to 'give full weight to the principle of open justice and to the Convention right to freedom of expression' (rule 50(2)), means that it will be difficult to persuade a tribunal to make an anonymity order in other circumstances.

To show that Article 8 is engaged, a litigant must demonstrate that there is a sufficiently serious level of threat to their personal autonomy and that they had a 'reasonable expectation of privacy' (see Laws LJ in *Regina (Wood)*, para 22). Details of personal relationships and interactions (even if developed in a business context), medical information and social activities may all engage Article 8. In *Re Guardian News*, the Supreme Court considered that an attack on a person's reputation may infringe Article 8 if it is serious enough to have a direct effect on the victim's private life. Information that is anodyne, generally expressed or of little significance, will generally not have such an effect. However, the fact that communications or events took place in the workplace will not mean that a litigant is prevented from relying on Article 8. The application should fully particularise the reasons why anonymity orders are being sought, identify the precise harm that will or might occur if the details in the litigation are published, and be supported by evidence. Litigants would be well advised to express applications with regard to the concept of proportionality.

Conclusion

The tribunal database was launched with little fanfare, but has the potential to change employment litigation. A claimant bringing a medium-to-low-value action for breach of contract in the county court can be relatively confident that no judgment will find its way onto an online database; however, the equivalent employment tribunal claim will.

The inevitable consequence is that applications for anonymity will become more frequent. Since intrusions into individuals' private lives are more likely with the public database, tribunals should be more sympathetic to such requests.

KEY:

ET rules	Employment Tribunal Rules 2013
Re S (A Child)	*Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593
Fallows	*Fallows v News Group Newspapers* [2016] ICR 801
Roden	*BBC v Roden* [2015] ICR 985
F v G	*F v G* [2012] ICR 246
Scott	*Scott v Scott* [1913] AC 417
X v Commissioner	*X v Commissioner of Police of the Metropolis* [2003] ICR 1031
Regina (Wood)	*Regina (Wood) v Commissioner of Police of the Metropolis* [2010] 1 WLR 123
Re Guardian News	*Re Guardian News and Media Ltd* [2010] 2 AC 697