Neutral Citation Number: [2022] EAT 74

Case No: EA-2020-001099-JOJ

IN THE EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11 May 2022

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

Between :

MILLICOM SERVICES UK LIMITED (1)
MARTIN FRECHETTE (2)
CARA VIGLUCCI (3)
HL ROGERS (4) **Appellants**

- and –

MICHAEL CLIFFORD **Respondent**

- -
- -

Ms Catherine Callaghan QC (instructed by Morgan Lewis & Bockius UK LLP) for the **Appellants**
Mr Greg Callus and Mr Ben Hamer, of counsel (instructed by Kingsley Napley, LLP) for the **Respondent**

Hearing date: 10 March 2022

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.

The date and time for hand-down is deemed to be 10:30am on 11 May 2022

SUMMARY

Practice and procedure – rule 50(1) schedule 1 of the ***Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013***

The respondents made an application under rule 50(1) schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules") to prohibit the disclosure of information relating to specified matters on the basis that this was said to be necessary in the interests of justice, to protect rights under articles 3, 5, 6 and 8 of the **European Convention on Human Rights** ("ECHR"), and/or pursuant to an obligation of confidence; in particular, it was said to be necessary to protect the safety and security of non-participants in the litigation located outside the United Kingdom, in a country that was not a signatory to the **ECHR**. It was the evidence of the second respondent that, if the application was not granted, he would not be prepared to give evidence in the employment tribunal ("ET") proceedings or let the first respondent continue to defend those proceedings. The ET refused the application, holding that it had no power under rule 50 to protect the rights of individuals under the **ECHR** who were located outside the jurisdiction of the signatory states. In the alternative, it concluded that the evidence adduced by the respondents was speculative and there was no objective verification of the potential risks such as would meet the necessary threshold for the orders sought. The ET further found that the subjective fears raised by the second respondent were insufficient to engage article 8 **ECHR** and did not consider it should take account of his stated intentions in relation to the proceedings (if the application was refused): there was no breach of article 6 **ECHR**, this was a matter of choice for the respondents. Although the ET accepted there was a contractual duty of confidence on the claimant, it did not accept that outweighed the principle of open justice. The respondents appealed.

Held: *allowing the appeal in part*

Although the ET was correct in its understanding of the territorial limitation of the **ECHR**, that did not answer the question whether the derogations sought were necessary in the interests of

justice, whether that question was approached on common law principles or in conformity with the article 6 right to a fair trial.

The ET had been entitled to find that there was no objective verification of the respondents' concerns such as to meet the necessary threshold to demonstrate a materially increased risk for the purposes of articles 3 and 5 **ECHR**. Different considerations arose, however, in relation to the ET's assessment of the evidence at common law and in respect of the protections sought under articles 6 and 8 **ECHR**, in particular given that article 8 could extend to include concerns regarding the safety and security of work colleagues. The respondents' subjective fears could be relevant for those purposes and the ET had erred in failing to consider whether those concerns – even if not well-founded – were such as would prejudice the administration of justice if the application was not granted. Although it would be open to the ET to discount the second respondent's evidence as to his intentions if the application was refused, this was still a relevant matter for it to weigh in the balance and it had erred in failing to carry out any balancing exercise, whether at common law or under articles 6 and 8 ECHR.

The ET had also erred in its rejection of the application on confidentiality grounds. Having found that the claimant had owed a contractual duty of confidence, the ET failed to take that into account as a relevant circumstance: the question was not merely whether it was legitimate for the respondents to seek to keep the information confidential but whether it was in the public interest for the duty of confidence to be breached.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. This appeal concerns an application to prohibit the disclosure of information in employment tribunal ("ET") proceedings. The proposed derogation from the open justice principle is said to be necessary in the interests of justice, to protect rights under the **European Convention on Human Rights** ("ECHR"), and/or pursuant to an obligation of confidence. In particular, it is said to be necessary to protect the safety and security of non-participants in the litigation located outside the United Kingdom, in a country that is not a signatory to the **ECHR**.

2. In this judgment I refer to the parties as the claimant and the respondents, as below. My judgment follows the oral hearing of the respondents' appeal against the decision of Employment Judge Henderson, sitting in private at the London Central ET on 23 October 2020, refusing the respondents' application under rule 50(1) schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules"). By order seal dated 11 August 2021, HHJ Auerbach granted the respondents' interim application for non-disclosure and restricted reporting orders, to "hold the ring" until the determination of the appeal. Subsequently, Jason Coppel QC (sitting as a Deputy Judge of the High Court) directed that the appeal should proceed to a full hearing. That hearing took place before me remotely, by MS Teams; no issues of connectivity or audibility arose during the course of the hearing.

The Background

3. The first respondent is a company in the Millicom group ("Millicom"), which provides a range of digital services to emerging markets in Latin America and Africa. The claimant was

employed by the first respondent as a global investigations manager from 3 January 2017 until 30 November 2019; in this role, he was responsible for conducting and overseeing internal investigations into potential fraud, dishonesty, corruption and other wrongdoing in Millicom's operations. It is the respondents' case that the claimant's employment contract contained express confidentiality clauses, relevantly, as follows:

> "15.2 The Employee hereby undertakes that he will not, during or after the termination of his service … without proper authority by the Company, disclose or communicate to any person or legal entity, or make use of or divulge to any person, either directly or indirectly, confidential information of any kind whatsoever of the Company or its associated companies or its respective clients which he may secure in the course of his service … or which he may hereto forth have received or obtained whilst at the service of the Company.
>
> 15.3 This clause shall not apply to information which … (c) is ordered to be disclosed by a court of competent jurisdiction or otherwise required to be disclosed by law.
>
> …
>
> 15.4 The obligation of secrecy and confidentiality is binding on the Employee during his term of employment with the Company and following its termination for whatever reason. …"

4. The claimant's employment was terminated with effect from 30 November 2019. It is the respondents' case that the reason for his dismissal was redundancy.

5. On 28 February 2020, the claimant commenced ET proceedings, claiming unfair dismissal, automatic unfair dismissal due to having made protected disclosures, protected disclosure detriment, and disability discrimination. In support of his claims of automatic unfair dismissal and protected disclosure detriment, the claimant relies on what are claimed to have been six protected disclosures. The application made by the respondents with which I am concerned primarily relates to the first of those disclosures. Specifically, it is the claimant's case that he investigated and reported on concerns that a Millicom subsidiary supplied the mobile telephone data and live tracking data of a customer to a government agency without lawful

authority and that, subsequently, a very serious criminal offence was committed; the claimant alleges that the respondents subjected him to a detriment, and ultimately dismissed him, because of his investigation and reports on this matter.

6. On 2 September 2020, the respondents made an application under rule 50 **ET Rules**, supported by (relevantly) the first witness statement of the second respondent, dated 1 September 2020, and the witness statement of Mr Mifsud-Bonnici, an environmental, social and governance consultant, dated 28 August 2020. By the time of the hearing on 23 October 2020, that evidence had been supplemented by a further statement from the second respondent dated 21 October 2020 and a witness statement from a Mr Stones, a business intelligence consultant who had previously worked for the secret intelligence service, of 22 October 2020. The ET also had a witness statement from the claimant, dated 12 October 2020. The respondents sought an order prohibiting the disclosure to the public, or the publication or reporting by any means, of the name and identity of the customer referred to by the claimant; of the serious criminal offence in question; and of any reference to the alleged connection between the Millicom subsidiary company, and its employees, and that event; or of any information likely to lead to identification of those matters ("the specified matters"). The respondents' proposal was for codes to be used to refer to the country in question and to relevant persons, events and dates. The application did not seek anonymity orders more generally nor did the respondents ask that the final hearing be conducted in private. It was contended, however, that disclosure or reporting of the specified matters was:

> "… likely to put at serious risk the safety and security of current and former Millicom employees, including the Second, Third and Fourth Respondents, and the Claimant himself."

7. In his evidence to the ET, the second respondent – the first respondent's vice president legal-corporate - stated that Millicom operated in the relevant country through a subsidiary, which employed some 360 people. Explaining the political and commercial background in the

country in question, the second respondent cited a commentator who had stated: "*if you are an executive of a telco operating in [that country]… and have not gone to jail in the last two or three years, it would be wise to consider imprisonment as one of your top risks*". The second respondent also stressed the level of corruption in the public sector, saying that police, prosecutors and judiciary could not be relied on to act impartially or independently of the government: "*The rule of law does not operate there*".

8. The second respondent said that he had travelled to the country in question on approximately 33 occasions in the four years preceding the outbreak of the coronavirus pandemic and would sometimes have a bodyguard due to concerns regarding his personal safety. He further explained that he had "*very real concerns about safety and security and, in particular, the possibility of serious violence being inflicted on myself or other Millicom employees in the event that any connection between Millicom and the [specified matters] … are made public*" and believed that the claimant's references to the specified matters "*pose a serious risk to the safety and security of a large number of people*", stating:

> "32. I believe there are several kinds of risk. First, there is a real risk of reprisals or physical violence from the [criminals] themselves, who remain unidentified and at large, or people connected with them, if they consider there is any possibility of Millicom's investigations revealing their identities or the identity of the person or persons who gave the order to carry out [the criminal activity]. Second, there is a real risk of reprisals or physical violence from agents acting for [the victims] if they learn that Millicom employees provided information … that may have been used by [the criminals] … I also believe there is a risk that the … authorities may arrest and detain employees of [the subsidiary] or Millicom. … The … Government may feel under pressure to be seen to be taking action against Millicom employees, to try to distance itself from the [criminal activity]."

9. The second respondent stated that those primarily at risk were employees of Millicom or its subsidiary, particularly those located in the country in question. There were also four senior managers of the subsidiary who had been named by the claimant who, it was said, would be "*particularly at risk of reprisals*" and the second respondent stated his belief that he would

"*personally be at risk of physical violence or arrest and detention … if these matters enter the public domain*", explaining that he had "*a real appreciation of the risks arising from this matter, from years of working in [the country in question]*". Although he saw the greatest risk of reprisals as being within the country in question itself, the second respondent also considered there was a risk in the UK and Europe given the number of people from that country who were now living in the UK and the fact that it had a High Commission in London. If the ET declined to make the order sought, the second respondent said he would not be willing to give evidence or permit the first respondent to defend the proceedings because of the risk to Millicom employees.

10. For his part, the claimant pointed out that the second respondent lived in France, working out of the first respondent's London office, and had worked from home for much of the pandemic. Given that online meetings had become the norm, the claimant did not accept that the second respondent would have to travel to the country in question, especially if he believed he was at risk of physical harm by doing so. As for the third and fourth respondents, they were (respectively) based in Miami and South Korea, with little reason to return to the country (in particular given that the fourth respondent no longer worked for Millicom) and would be unlikely to be at risk even if they did so. The claimant observed that no evidence had been presented by the respondents of threats to employees of the subsidiary; indeed, the only evidence in this regard arose from his own account of having been threatened in vague terms by a senior employee of the subsidiary, as she believed he had tried to prejudice her position in the company over the specified matters, which had resulted in his being harassed by five government officials, albeit not in a way that presented a risk such as to engage articles 2 or 3 **ECHR**. The claimant said he had notified Millicom of this event but it had not considered it to be of serious concern at that stage.

11. In responding to the claimant's evidence, the second respondent said he was likely to travel to the country in question within the six weeks following the ET hearing (subject to covid-19 restrictions), and several times over the next few months, as part of the progression of the sale of the first respondent's business there and to assist with on-going legal issues. The second respondent also gave examples of occasions on which he said Millicom employees had been harassed by government officials of the country in question and countered the claimant's suggestion that the respondents had not been concerned, or taken action, regarding the claimant's report of having been harassed himself.

12. In his statement, Mr Mifsud-Bonnici confirmed the second respondent's evidence regarding the political environment in the country in question. Similarly, Mr Stones also confirmed the second respondent's evidence as to the political and cultural situation in that country (albeit he had not been there himself), although he expressed the view that it was not among the most dangerous of countries in that continent in which to operate, noting that Millicom had been able to conduct business there for several years and "*does not appear to have run into too much difficulty so far*". Mr Stones further confirmed that it was not unusual for governments to harass and intimidate employees of Western countries; provided Millicom employees were careful, he would not expect them to be in danger, albeit he considered the situation would be different if Millicom were perceived to oppose the ruling party in government. As for the particular risks relating to the specified matters, Mr Stones offered his opinion that it would be a "*game changer*" if this information entered the public domain, characterising the story as "*incendiary*" and likely to be picked up by the international press. Mr Stones opined that placing information relating to the specified matters into the public domain was "*likely to result in a material increase in risk to Millicom employees*" in that country, as follows:

> "a. First, I consider it would generate a real and immediate risk that members of the public could take matters into their own hands and target Millicom offices or employees in [the country], with the use of violence. In this context,

> I understand a "real" risk to connote a risk that is substantial or significant, as opposed to remote or fanciful. In my view, the risk is greater than 10-20%. I understand "immediate" to mean "present and continuing", though not necessarily imminent. Unfortunately violence is a swift reflex in [the continent] and is never far below the surface in … politics [in that continent]. This could take the form of action against Millicom offices or the homes of Millicom employees, or the beating up of Millicom employees. … I consider Millicom employees located in [the country] would face a risk of serious violence if this information was placed in the public domain …
>
> b. Second, I consider that there is a real and immediate risk that the … police (acting on the Government's directions) will arrest and detain Millicom employees, including expatriate employees if physically present in [the country], for questioning. I would not expect the authorities to physically harm Millicom employees in detention (although fellow inmates may do so). However, conditions in detention are unlikely to be pleasant … [and] [t]he authorities are unlikely to give Millicom employees, even expatriate employees, access to telephones or lawyers. …"

13. Outside the country in question, Mr Stones did not consider there was a risk of harm to current and former Millicom employees. On the understanding, however, that the second respondent was planning to travel to the country several times in the next few months, Mr Stones considered he would face a material increase in risk if information about the specified matters was placed in the public domain, as would be the position for any Millicom employee who travelled to the country, or lived or worked there, in these circumstances.

The ET's Decision and Reasoning

14. The respondents' application was made under all three limbs of rule 50(1) **ET Rules**, namely that it was necessary in the interests of justice and/or in order to protect rights under the **ECHR** and/or to protect confidential information. The respondents had initially relied on article 2 **ECHR** (right to life) but by the time of the hearing before the ET this was no longer pursued and the application was put on the basis of a need to protect rights under articles 3, 5, 6 and 8 of the **ECHR**, albeit the arguments founded upon articles 5 and 8 were raised at a late stage, only shortly before the hearing. Short notice was also given of the respondents' contention that the order sought was necessary to protect confidential information, and the employment

contract – on which that contention was based – was only adduced into evidence at about 3pm during the course of the ET hearing. In the circumstances, the ET asked whether the claimant wished to seek an adjournment but it was confirmed that no such application was to be made. Furthermore, before Article 8 and confidentiality were relied upon and when the application was limited to Articles 2, 3 and 5 (or their common law equivalents), both parties had agreed that no oral evidence would need to be heard and there would be no cross-examination and the ET's determination of the respondents' application proceeded on the basis of the written statements and documentation, together with the parties' written and oral submissions.

15. The ET accepted the claimant's submission that it did not have power under rule 50(1) **ET Rules** to protect the rights of individuals under the **ECHR** who were outside the jurisdiction of the signatory states. In the alternative, the ET concluded that its findings on the evidence meant that the respondents had not met the threshold necessary for the orders sought.

16. Under the heading "Common Law", the ET reminded itself that the right to open justice was a fundamental principle from which it should depart only in cases of strict necessity. Whilst accepting that the evidence demonstrated that the country in question was volatile and politically unsettled, with many risks for foreign businesses (that was not in dispute), the ET nevertheless considered that it did not support the restriction sought in this case. The ET found there was no objective evidence as to why the general level of risk present in the country in question would be heightened by disclosure of the specified matters; concluding that the evidence did not support the fears expressed by the second respondent that such disclosure would place him, the other respondents, and Millicom employees in the country in question, at risk of the level of harm and fear of arbitrary arrest set out in articles 3 and 5 of the **ECHR**. Specifically, on the basis of the evidence presented, the ET considered that, even if it had jurisdiction to protect **ECHR** rights of Millicom employees in the country in question, the respondents had failed to demonstrate a "*real and immediate risk*" under articles 3 or 5. While

the second respondent and Mr Stones had "*speculated as to what may happen*" if information regarding the specified matters entered the public domain, the ET found that there was no objective evidence to support their views.

17. As for the second respondent's suggestion that there was a risk to Millicom employees in the UK or elsewhere in Europe, the ET considered that was implausible and contradicted by Mr Stones' evidence.

18. The ET further noted that the third and fourth respondents were not based in the country in issue and had no reason to travel there; they were, therefore, not at risk of physical harm. Although the second respondent had said he needed to travel to that country in the following months, to finalise the sale of Millicom businesses, the ET found this to be implausible: the second respondent had been able to conduct his business remotely from France and London during the pandemic and the ET did not accept he could not facilitate the sale remotely.

19. The ET further considered that the subjective fears raised by the second respondent were insufficient to engage article 8 **ECHR** and that, as a result, it did not need to go on to consider the balancing exercise under article 8(2), concluding:

> "110) As a result both under the common law and under Convention rights, if applicable, the respondent has not demonstrated the clear and cogent evidence necessary to establish a departure from the principle of open justice."

20. The respondents had also relied on article 6 **ECHR**, based on the second respondent's evidence that, if the orders were not made, he would decline to give evidence and would not allow the first respondent to continue to defend the proceedings. Allowing that the second respondent's intention "*may well be a genuine one*", the ET did not consider it should take this into account in its deliberations (ET, paragraph 96). So far as article 6 was concerned, the ET did not agree that the respondents would thus be deprived of their rights to a fair trial, rather they would be exercising a choice as to whether to proceed with the hearing. On the

evidence presented, there were no special circumstances, nor had a risk to the private life of the parties been established, such as to outweigh the principle of open justice.

21. Finally, while the ET accepted that the claimant's contract of employment established a duty of confidentiality as regards matters undertaken in his employment duties, it concluded that this could not outweigh the principle of open justice.

The Parties' Arguments on Appeal

The Grounds of Appeal and the Respondents' Case

22. The respondents having previously withdrawn grounds 6 and 11 of the notice of appeal, the remaining grounds of challenge were summarised in argument, as follows:

(1) The ET wrongly held that it had no power under the **ECHR** or at common law to make an order restricting the disclosure of information to protect persons from harm who (a) were located outside the jurisdiction of the UK and/or the **ECHR** signatory states, and/or (b) were not parties or witnesses to the proceedings but were nonetheless affected by them (grounds 1 and 2).

(2) The ET fell into error when considering whether the evidence satisfied the test of harm of the kind qualifying for protection under articles 3 or 5 **ECHR** (or their common law equivalent); specifically, the distinction drawn between "*objective evidence*" and "*only speculation*" was perverse when the witnesses were necessarily engaged in an assessment of future risk and where the evidence demonstrated a material increase in risk which the ET had not rejected as implausible or insufficient. The evidence met the necessary legal threshold and the ET was wrong not to so find (grounds 3 to 5).

(3) The ET misunderstood the relevance of the second respondent's subjective fears, both for himself and for employees of the first respondent, and his unwillingness to give

evidence or defend the proceedings without protection in place. It had thus erred in law in concluding that the second respondent's subjective fears were insufficient to engage his article 8(1) rights (or were irrelevant at common law) and in refusing to take account of his intentions when considering the issue. As a result, the ET had failed to carry out the requisite balancing exercise under article 8(2); had it done so, it would have made the orders sought (grounds 7 and 8).

(4) The ET erred in law in finding that, although the claimant owed the respondents a duty of confidentiality in respect of information relating to the specified matters under his contract of employment, that duty could not justify restrictions on disclosure under rule 50 **ET Rules**; as a result the ET wrongly failed to conduct any, or any adequate, balancing exercise involving considerations of confidentiality (grounds 9 and 10).

23. Before addressing the specific points of challenge thus raised, the respondents made general criticisms of the ET's approach. It was submitted that the ET had failed to have regard to the limited nature of the derogations sought or to the peripheral relevance to the proceedings of the information in issue; both material considerations in the balancing exercise it was required to carry out. It was further contended that the ET had wrongly seen the application as one that sought to protect "*the identities of 'other persons'*" (ET, paragraph 2), when the protection sought was for the safety and security of those persons. The ET had also appeared to regard the application as defective in not seeking anonymity orders (ET, paragraphs 33 and 98), which suggested a misunderstanding of the application being made, and it had described the restrictions sought as "*draconian*" (ET, paragraph 108) without explaining why that would be so given the nature of the risks identified.

24. Turning then to the grounds of appeal, and first addressing grounds 3-5, the respondents argued that the ET's finding that the evidence did not establish the requisite risk under articles

3 and/or 5 **ECHR** was perverse (ground 3). It had not found the respondents' evidence was not credible, only that it was speculative; that, however, was necessarily the case given that the second respondent and Mr Stones were engaged on a predictive exercise. The only way of satisfying the standard applied by the ET would have been to place the information in the public domain, which would risk causing the very harm the respondents sought to avoid. The ET had failed to carry out any assessment of risk and had perversely concluded that general evidence of risk (demonstrating a reasonable basis for the prediction that people would respond with violence) was irrelevant.

25. Considering the ET's approach to article 3 (ground 4), it had been the respondents' contention that any risk of serious physical assault or harm would suffice, whereas the claimant had argued that a risk of being "*beaten up*" would not be enough (ET, paragraphs 94 and 95). The ET had failed to explain how (if at all) it had resolved that dispute and had, yet further, failed to have regard to the position at common law, which recognised the right to life and security of a person and the need to protect against a risk to personal safety or risk of physical violence. Equally, the ET had failed to grapple with the respondents' case under article 5 (ground 5). The ET had thus reached a perverse conclusion as to whether the evidence was sufficient to demonstrate the necessary risk and had set too high a threshold in its approach to the rights established under articles 3 and 5 **ECHR**.

26. Turning to grounds 7 and 8 (put in the alternative to grounds 3-5), the respondents contended that the ET had been wrong to hold that the second respondent's fears were insufficient to engage his article 8 **ECHR** rights or his rights at common law (ground 7). Where the evidence was insufficient for article 3 purposes, it might still engage article 8 and/or provide a common law basis for derogating from the open justice principle, allowing that subjective fears (even if not well-founded) could be sufficient for such purposes. The ET ought to have carried out a balancing exercise under article 8 and/or common law (ground 8) and, having accepted that

the second respondent's stated intentions (that, if the application were refused, he would not give evidence or permit the first respondent to contest the proceedings) "*may well be … genuine*" (ET, paragraph 96), the ET had erred in then refusing to take that into account.

27. In addressing the question of confidentiality (ground 9 and 10; again, put in the alternative), the respondents argued (ground 9) that it was contradictory for the ET to find there was a duty of confidence owed under the claimant's contract of employment (ET paragraph 112) and yet to hold that it had not been shown that it was legitimate to seek to keep the information confidential in this case (ET paragraph 113). Yet further (ground 10), the ET had failed to carry out the requisite balancing exercise under the **ECHR** or common law.

28. Finally turning to grounds 1 and 2, the respondents argued that the ET erred in finding it had no power to make the order sought. First (ground 1), the ET's duty under section 6 **Human Rights Act 1998** ("the HRA") required it to give effect to **ECHR** rights and the territorial limit imposed by article 1 **ECHR** did not operate to prevent the ET from considering the risks to persons outside the jurisdiction in its exercise of its powers under rule 50 **ET Rules**, rule 50(1) expressly providing that the ET might make an order "*to protect the Convention rights of any person*". Secondly, and in any event, the ET had failed to consider the position at common law (ground 2). As the case-law made clear, the interests of justice thus enabled the ET to protect the rights of those outside the jurisdiction, even if they were not parties or witnesses in the proceedings.

The Claimant's Case

29. In addressing the respondents' general criticisms of the ET's approach, the claimant refuted the suggestion that any error had arisen from the failure to carry out a balancing exercise – taking into account the extent of the derogations sought - in this case. There could have been no balancing of competing rights if the respondents had met the threshold

for protection of absolute rights owed under articles 3 and/or 5 **ECHR**. As for article 8, the second respondent had failed to provide evidence that demonstrated his right to a private and family life was engaged: unless the respondents could make good the challenge under ground 7, there could be no criticism of its failure to go on to carry out the balancing exercise required under article 8(2) **ECHR**.

30. Turning to the grounds of appeal and adopting the same order in oral submissions as the respondents, the claimant noted that grounds 4 and 5 were expressly contingent upon the perversity challenge in ground 3; the respondents thus had to meet the high threshold for such appeals ("*an overwhelming case … that the [ET] reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached*", per Mummery LJ paragraph 93 **Yeboah v Crofton** [2002] EWCA Civ 794). The word "*objective*" was a facet of the word "*real*" in "*real and immediate risk*" - the relevant threshold test, which the ET had expressly addressed (ET, paragraph 67); it would have been an error of law if the ET had not considered whether an objective basis had been shown for the fears relied on. Having thus approached its task correctly, the ET had reached a conclusion that was open to it on the evidence available (which did not begin to compare to that cited in the case-law relied on).

31. Addressing grounds 7-10, the claimant contended that these were also contingent on the respondents making good a perversity challenge to the ET's decision. Grounds 7 and 8 required the respondents to show that the ET had erred in concluding the evidence did not establish that article 8 was engaged in this case, such as to require a balancing of the right to a private and family life against article 10 rights to freedom of expression. Even allowing that subjective fears might be sufficiently severe as to impact on article 8 rights (and that article 8 could feature in a workplace context), there was nothing in the second respondent's evidence to support any engagement with his right to a private and family

life. Similarly, grounds 9 and 10 required the respondents to demonstrate that the ET had erred in finding that the duty of confidentiality could not justify restrictions on disclosure. Here the respondents had sought to rely on the contract of employment, adduced late in the ET hearing, but there was a dispute on this evidence and the ET had been entitled to find that it did not demonstrate a duty of confidence that would justify the derogation from the open justice principle sought.

32. Turning to grounds 1 and 2, the claimant submitted that the duty imposed on the ET under section 6 **HRA** (the ground 1 point) could not confer a power in respect of persons outside the territory of the **ECHR** which was not otherwise provided by rule 50 **ET Rules**. The respondents had to rely on the common law duty of fairness (the ground 2 point) but: (1) that duty did not extend indefinitely to all persons, including those who were strangers to the litigation; (2) the duty was limited to that which would be necessary to support the administration of justice, ensuring that participants in court proceedings were free from adverse effects; (3) the only potential relevance of the risk to non-participants would be if the ET had found that this might impact upon the participation in the proceedings by those who were parties or witnesses; (4) on the evidence in the present case, that could only arise in relation to the second respondent but, given that he had failed to demonstrate that article 8 **ECHR** was engaged, he would be equally unable to establish the necessary need for protection for fear of the potential impact on others.

Relevant Legal Principles

Derogations from the Principle of Open Justice – the Approach

33. The principle of open justice provides the starting point for the consideration of an application to prevent or restrict the public disclosure of any aspect of court or tribunal proceedings; the burden of displacing that principle will fall on the party seeking the restriction in question

(here, the respondents). The principle that justice is administered in public, and is open to public scrutiny, is part of the rule of law in a democracy and is a fundamental principle of the common law; **A v British Broadcasting Corporation (Scotland)** [2015] AC 588 SC, at paragraph 23, per Lord Reed; **Ameyaw v Pricewaterhousecoopers Services Ltd** [2019] ICR 976 EAT, at paragraphs 30-31. The principle of open justice is, moreover, inextricably linked to the freedom of the media to report on court and tribunal proceedings; **A v BBC**, paragraph 26.

34. Under the **ECHR**, the principle of open justice is an aspect of the right to fair trial protected by article 6(1), which provides *inter alia* that, in the determination of a person's civil rights and obligations, everyone is entitled to a public hearing and judgment shall be pronounced publicly. The principle is further reflected in the article 10 right to freedom of expression, encompassing the right to receive and impart information and including the right of the media to report legal proceedings; **Ameyaw**, paragraphs 32-33. The position at common law broadly reflects the position under the **ECHR**, see **Yalland v Secretary of State for Exiting the European Union** [2017] EWHC 629, Div Ct, paragraph 22; in this area, the **ECHR** and domestic law can be seen to "*walk in step*", per Lord Reed at paragraph 57 **A v BBC**.

35. Whether approached on common law principles or under the **ECHR**, therefore, the presumption must be that ET proceedings will be held in public and full reporting will be permitted. It is, however, well established that there can be exceptions to the principle of open justice where it is necessary in the interests of justice, or to protect rights under the **ECHR**, or pursuant to a statutory power, although any derogation should represent the minimum necessary to be effective for the purpose for which it is made; **A v BBC**, paragraphs 31-32. Whether a departure from the principle of open justice is justified will always depend on the particular facts of the case and will require a fact-specific balancing exercise. Central to that evaluation is the purpose of the open justice principle, the potential value of the information

in question in advancing that purpose, and conversely, any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others; **A v BBC**, paragraph 41.

36. Where such a derogation is sought, the harm relied on must be established by "*clear and cogent evidence*" so as to demonstrate that it is necessary to make the order in question; **Fallows v News Group Newspapers** [2016] ICR 801 EAT, at paragraph 48(i). Given the fact-specific nature of the decision made, however, an appellate court or tribunal will not interfere if the first-instance judge has adopted the correct approach in determining the application before them; **R v Legal Aid Board ex p Kaim Todner** [1999] QB 966, CA, p 977 A-B. The scope of challenge on appeal is thus limited to those cases in which it can be said that the first-instance judge erred in principle or reached a conclusion that was plainly wrong or outside the range of conclusions that might reasonably be open to the court in the circumstances of the case; **AAA v Associated Newspapers Ltd** [2013] EWCA Civ 554, at paragraphs 8-9, and **Fallows v NGN**, paragraph 51.

37. In considering the application for anonymity in **Kaim Todner**, it was noted that it would be appropriate to take into account the extent of the interference with the principle of open justice that would be involved:

> "6. … If the interference is for a limited period that is less objectionable than a restriction on disclosure which is permanent. If the restriction relates only to the identity of a witness or a party this is less objectionable than a restriction which involves proceedings being conducted in whole or in part behind closed doors." (**Kaim Todner** at p 978B-C)

38. The importance of the information that is sought to be protected to the issues in the case will also be a material consideration; **Libyan Investment Authority v Societe Generale SA and ors (No. 1)** [2015] EWHC 550 (QB) at paragraph 34(3). As may the status within the litigation

of the individual whose interests are under consideration, see the observations in **Kaim Todner**, as follows:

> "8. A distinction can also be made depending on whether what is being sought is anonymity for a plaintiff, a defendant or a third party. It is not unreasonable to regard the person who initiates the proceedings as having accepted the normal incidence of the public nature of court proceedings. If you are a defendant you may have an interest equal to that of the plaintiff in the outcome of the proceedings but you have not chosen to initiate court proceedings which are normally conducted in public. A witness who has no interest in the proceedings has the strongest claim to be protected by the court if he or she will be prejudiced by publicity, since the courts and parties may depend on their co-operation. …" (p 978E-F)

39. The court in **Kaim Todner** went on to warn, however, that:

> "9. … Although the foundation of the exceptions is the need to avoid frustrating the ability of the courts to do justice, a party cannot be allowed to achieve anonymity by insisting upon it as a condition for being involved in the proceedings irrespective of whether the demand is reasonable. There must be some objective foundation for the claim which is being made." (p 978G-H)

And see the endorsement of that view in **Moss v Information Commissioner** [2020] EWCA Civ 580 at paragraph 55.

Rule 50 ET Rules

40. Rule 50 **ET Rules**, made pursuant to section 7(1) **Employment Tribunals Act 1996**, provides the ET with the power to derogate from the principle of open justice. Rule 50(3) provides examples of what such orders "*may include*", but is not exhaustive of the types of orders that may be made and it is apparent that Parliament intended ETs to have the power to make orders under rule 50 in a broad range of circumstances; **Fallows v NGN** at paragraphs 38 and 41.

41. Under rule 50(1) **ET Rules**, it is provided that an ET:

> "(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."

42. Section 10A of the **Employment Tribunals Act 1996** provides (relevantly) that:

> "(1) … regulations may enable an employment tribunal to sit in private for the purpose of hearing evidence from any person which in the opinion of the tribunal is likely to consist of … (b) information which has been communicated to him in confidence or which he has otherwise obtained in consequence of the confidence reposed in him by another person, …"

43. In considering whether to make an order under rule 50(1), the ET is required to "*give full weight to the principle of open justice and to the … right to freedom of expression*" (rule 50(2)).

*The Principle of Open Justice and the Protection of Rights Under the **ECHR***

44. Although the respondents' arguments were founded both on rights under the **ECHR** and as protected at common law, it is convenient to start by considering the legal principles relating to the former.

45. Considering first the territorial scope of the **ECHR**, by article 1 it is provided that:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

46. This is generally understood as meaning that rights under the **ECHR** are limited to the territories of the contracting states, with only exceptional circumstances capable of giving rise to the exercise of jurisdiction by a contracting state outside its own territorial boundaries; **Al-Skeini v UK** (2011) 53 EHRR 589 at paragraphs 131-132, **Smith v Ministry of Defence** [2014] AC 52 SC at paragraphs 42-55.

47. The respondents contend, however, that the territorial limit on jurisdiction in article 1 did not operate to prevent the ET from considering risks to persons outside the jurisdiction in the exercise of its powers under rule 50(1) **ET Rules**, which expressly allows that the ET may

make an order *"to protect the Convention rights of any person"* (emphasis added). More than this, the respondents argue that the ET, as a public authority, owes a duty under section 6 **HRA** to act compatibly with rights under the **ECHR**, including parties' fair trial rights under article 6.

48. Section 6 **HRA** provides (relevantly) as follows:

> "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) Subsection (1) does not apply to an act if— (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
>
> (3) In this section "public authority" includes— (a) a court or tribunal, …"

49. Article 6(1) **ECHR** provides that:

> "(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or 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."

50. In the alternative, the respondents rely upon the common law protection of the fairness of the court's proceedings (considered below under the sub-heading "*The Interests of Justice*").

51. Turning then to the specific **ECHR** rights relied on by the respondents, article 3 provides that:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

52. This is an unqualified right; as the ECtHR observed in **Kudla v Poland** (2002) 35 EHRR 11, article 3:

> "90. … enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour."

53. Where there is a conflict between a qualified right, such as the article 10 right to freedom of expression, and an unqualified right such as article 3, there can be no derogation from the latter; as was observed in **In re Guardian News and Media Ltd** [2010] 2 AC 697 SC, at paragraph 27:

> "where threats to life or safety are involved, the right of the press to freedom of expression obviously has to yield: a newspaper does not have the right to publish information at the known potential cost of an individual being killed or maimed. In such a situation the court may make an anonymity order to protect the individual."

54. That said, not all ill-treatment will fall within the scope of article 3: it must "*attain a minimum level of severity*", albeit:

> "… The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim." (paragraph 91, **Kudla v Poland**)

55. The threshold at which article 3 will be engaged is the same as for article 2 (right to life), variously described as: "*the real possibility of serious physical harm and possible death*"; "*a continuing danger of serious physical and psychological harm to the applicant*"; an "*extremely serious risk of physical harm*" (see the summary provided at paragraph 35(iii) **RXG v Ministry of Justice** [2020] QB 703, Div Ct).

56. As for what is to be considered "*inhuman*" or "*degrading*", it was noted in **Kudla** that:

> "92. The Court has considered treatment to be 'inhuman' because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering. It has deemed treatment to be "degrading" because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. On the other hand, the Court has consistently stressed that the suffering and

> humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment."

57. In **Price v United Kingdom** (2002) 34 EHRR 53, the ECtHR observed that:

> "24. … In considering whether treatment is 'degrading' within the meaning of Article 3, one of the factors which the Court will take into account is the question whether its object was to humiliate and debase the person concerned, although the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3."

58. Recognising that measures that deprive a person of their liberty may often involve a degree of suffering and humiliation, the ECtHR has made clear that this will not, of itself, raise an issue under article 3 (**Kudla**, at paragraph 93). That said, as the Divisional Court noted in **Henriques v Judicial Authority of Portugal** [2019] EWHC 1998 (Admin):

> "21. … Ill-treatment will offend Article 3 ECHR if the suffering or humiliation involved goes beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment."

59. In assessing a risk for article 3 purposes, the test is one that is both objective and qualitative. It is not an assessment on a balance of probabilities (see paragraphs 87-89 **Venables v News Group Newspapers Ltd** [2001] Fam 430, cited at paragraph 35 (iv) **RXG v Ministry of Justice**), or as to whether there is a "*likelihood or fairly high degree of risk*" (paragraph 38 **Rabone v Pennine Care NHS Trust** [2012] 2AC 72 SC). Rather, the evidence must:

> "demonstrate convincingly the seriousness of the risk and raise a real possibility of significant harm: in other words, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm", (per Butler-Sloss P at paragraphs 87-89 **Venables v NGN**).

The burden on the applicant is to demonstrate, by cogent evidence, that there is a "*real and immediate risk*" of the ill-treatment envisaged by article 3; **RXG v Ministry of Justice** at paragraph 35(v). As explained in **In re Officer L** [2007] 1 WLR 2135 HL(NI) (approving the approach of Weatherup J in **In re W's Application** [2004] NIQB 67, at paragraph 17):

> "20. … a real risk is one that is objectively verified and an immediate risk is one that is present and continuing. … the criterion is and should be one that is not readily satisfied: in other words, the threshold is high. …"

60. Where there is a general pre-existing level of risk – not itself giving rise to a real and immediate risk of harm - the relevant question is whether proceeding with the hearing without the protections sought would give rise to a materially increased, objectively verified, risk such as to meet the threshold for article 3 purposes; see **In re Officer L** at paragraphs 23-25 and **R (oao M) v Parole Board** [2013] EMLR 23 Div Ct at paragraphs 35 and 50.

61. Turning then to article 5 **ECHR**, it is provided that:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."

62. In **Archer v Commissioner of Police for the Metropolis** [2021] EWCA Civ 1662, having summarised the case law of the ECtHR, it was stated that article 5 "... *enshrines the right of the individual not to have his or her liberty interfered with arbitrarily by the state*", noting that what may or not amount to arbitrariness is context-dependent and may vary depending on the type of detention involved, although detention will be arbitrary where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities (see paragraphs 68-69). In the extradition context, the test for whether article 5 is engaged is whether there is a real risk of a flagrant breach of article 5 rights; **Government of USA v Giese** [2015] EWHC 2733 Div Ct at paragraph 4. Detention that falls outside the provisions of the exceptions listed in article 5(1) gives rise to a real risk of a denial of the very essence of a person's liberty, and therefore amounts to a flagrant denial of article 5; **USA v Giese,** paragraph 62.

63. Moreover, in **R (oao M) v Parole Board** [2013] EMLR 23 Div Ct, it was allowed that, if the response of the state to a prisoner's claim for judicial review (by permitting disclosure of the prisoner's details) were to place the prisoner at risk of harm, there would be "*a real danger of a chilling effect upon the prisoner's right of access to the court to challenge the lawfulness of his detention under art.5(4)*" (see paragraph 43). As the claimant observes, however, the underlying judicial review in **R (oao M) v Parole Board** was primarily a challenge to detention, including under article 5 **ECHR**: it was not suggested that publicity would *cause* a breach of article 5, only that the claimant would be deterred from bringing an article 5 case.

64. As for article 8 **ECHR**, it is provided that:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the

> economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

65. As noted in **RXG v Ministry of Justice**, at paragraph 35(viii), where evidence of a threat to a person's physical safety does not reach the standard that would engage articles 2 and/or 3 **ECHR**, the evidence as to the risk of harm:

> "… will usually fall to be considered in the assessment of the person's article 8 rights and balanced against the engaged article 10 rights. Whilst the level of threat may not be sufficient to engage articles 2 or 3, living in fear of such an attack may very well engage the article 8 rights of the person concerned".

66. The article 8 right to respect for private life can also extend to professional life, in the sense that it protects the right to establish and develop relationships with others in the workplace, **Niemietz v Germany** (1993) 16 EHRR 97 at paragraphs 29-31; and it has been held to be wide enough to protect against a person's fears of verbal or physical attack in the workplace, either for themselves or for their colleagues, see **Abbasi v Newcastle** [2021] EWHC 1699 Fam, at paragraphs 105-107.

67. Where qualified rights such as articles 8 and 10 are in conflict, an "*ultimate balancing test*" must be undertaken, as explained by Lord Steyn in **Re S (A Child) (Identification: Restrictions on Publication)** [2005] 1 AC 593 HL, at paragraph 17:

> "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. …."

And, in the Rule 50 **ET Rules** context, see **Fallows** at paragraphs 49-50, and **TYU v ILA** [2022] ICR 287 EAT at paragraph 28.

68. The proportionality test to be applied is that set out by the Supreme Court in **Bank Mellat v HM Treasury (No 2)** [2014] AC 700 at paragraphs 20 and 74, and **TYU v ILA** at paragraph 29. 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 those matters and the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

The Interests of Justice

69. As for whether an order should be made "*in the interests of justice*", the ET's consideration is not limited to its interest in reaching a just decision on the issue in dispute between the parties, it can take steps to ensure that the interests of justice more generally (and whether current or future) will not be defeated: recognising that "*the administration of justice is a continuing process*", a court or tribunal can "*take steps in current proceedings in order to ensure that the interests of justice will not be defeated in the future*"; see the discussion in **A v BBC**, paragraphs 38-41.

70. The interests of justice may thus necessitate derogations from the open justice principle analogous to those required pursuant to articles 2 and 3 **ECHR**, to protect "*the right to life and security of a person*" and to ensure that court and tribunal proceedings "*do not risk life and limb*"; **Libyan Investment Authority (No. 1)**, paragraph 31, and **Libyan Investment Authority v Societe Generale and ors (No. 2)** [2016] EWHC 375 Comm, paragraph 26. Although the focus will be on the administration of justice, the question for the court or tribunal will be the same as under the **ECHR**, save that subjective fears of such risks may be taken into account even in the absence of objective verification (see **Libyan Investment Authority (No. 1)**, paragraph 32; **Libyan Investment Authority (No. 2)**, paragraph 26); as

Lord Carswell observed in **In re Officer L** [2007] 1 WLR 2135 (there addressing a risk to life but the principles would apply equally to the protection from ill-treatment that would be required under article 3):

> "22. The principles which apply to a tribunal's common law duty of fairness towards the persons whom it proposes to call to give evidence before it are distinct and in some respects different from those which govern a decision made in respect of an article 2 risk. They entail consideration of concerns other than the risk to life, although … an allegation of unfairness which involves a risk to the lives of witnesses is pre-eminently one that the court must consider with the most anxious scrutiny. Subjective fears, even if not well-founded, can be taken into account … It is unfair and wrong that witnesses should be avoidably subjected to fears arising from giving evidence, the more so if that has an adverse impact on their health. …"

71. Where there is a general pre-existing level of risk posing something less than a real and immediate risk of harm, the approach will be the same as under article 3 **ECHR**; the question for the court or tribunal will be whether proceeding with the hearing without the protections sought would give rise to a materially increased risk: "*If the risk has not been increased, then it is not unfair to require witnesses to testify without anonymity …*" see **In re Officer L**, paragraph 26.

72. As for the scope of the common law protection, as was explained in **Libyan Investment Authority (No. 2)** at paragraph 26:

> "…the common law's protection of the fairness of the court's proceedings extends to ensuring that those proceedings do not risk life and limb whether within the jurisdiction or without." (emphasis added)

73. The issue between the parties in this regard relates to how far this protection can extend. Accepting that the interests of justice may require a court or tribunal to make orders derogating from the open justice principle so as to protect parties and witnesses in the litigation (thus ensuring the fairness of the proceedings in question), can regard be had to the potential risks to non-participants such as the Millicom employees living and working in the country in issue

in this case? Acknowledging that the protection thus provided by common law may further extend to others who are directly affected by the litigation in question (see the description of the "Alphabet Individuals" at paragraph 2 **Libyan Investment Authority (No. 2))**, the claimant objects that the duty cannot be owed to all persons in the world, including strangers to the litigation who are overseas.

74. In **Khuja v Times Newspapers** [2019] AC 161, SC, Lord Sumption helpfully summarised the development of the inherent power of the courts to make orders for the conduct of proceedings in a way that would prevent disclosure in open court of "*the names of the parties or witnesses or of other matters*" if the interests of justice so require. The interests of justice are not, therefore, seen as limited to the protection of parties or witnesses, but might also extend to "*other matters*". Thus, in **Brearley and ors v Higgs & Sons (a firm)** [2021] EWHC 1342 Ch, the concerns of a client of an expert witness were held to justify an anonymity order in respect of that client, although he was neither a party nor witness and had no direct interest in the litigation. The order was made not because the court considered it had any duty to protect the client but because it accepted that the naming of the client might impact on the ability of the expert to give his evidence freely and, more generally, might lead others to be less willing to provide assistance to experts in future. As the court observed, either of those matters "*one going to the interests of the parties in this case and the other to wider considerations, might have an adverse impact on the administration of justice*."

75. The answer to this dispute between the parties is, in my judgement, provided by keeping firmly in mind what it is that is sought to be protected in this regard. When considering its powers to make an order under rule 50 **ET Rules** "*in the interests of justice*", the ET is concerned not with the particular interests of those to whom the order might relate but with whether such an order is necessary for the administration of justice, either as relevant to the proceedings before it or more generally. As with any derogation from the open justice

principle, an application in this respect will require clear and cogent evidence demonstrating that it is necessary to make the order sought (see **Fallows v NGN**, at paragraph 48(i)), and where the derogation is sought to protect an individual who is neither a witness nor party, and who has no direct interest in the litigation, it is likely to be all the harder to demonstrate the necessity for the order in that instance. The answer to the point is, however, not provided by the particular label to be attached to the individual in question but by whether there is a proper evidential basis establishing why, in the interests of justice, the derogation is necessary.

Confidentiality

76. The third basis on which the ET may make an order under rule 50 **ET Rules** is where it is of the view that the evidence to be adduced is likely to consist of information communicated in confidence or otherwise obtained as a consequence of another's confidence (see section 10A of the **Employment Tribunals Act 1996**).

77. When considering a possible derogation from the open justice principle on this basis, a relevant factor will be whether the information in question was imparted in circumstances in which an express contractual duty of confidence applied. In such cases, the test to be applied is not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached, there being an important public interest in the observance of duties of confidence, see **HRH the Prince of Wales v Associated Newspapers Ltd** [2008] Ch 57 CA:

> "68. For these reasons, the test to be applied when considering whether it is necessary to restrict freedom of expression in order to prevent disclosure of information received in confidence is not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached. The court will need to consider whether, having regard to the nature of the information and all the relevant circumstances, it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the public interest that the information should be made public."

78. In **HRH the Prince of Wales**, the Court of Appeal further noted:

> "69. In applying the test of proportionality, the nature of the relationship that gives rise to the duty of confidentiality may be important. Different views have been expressed as to whether the fact that there is an express contractual obligation of confidence affects the weight to be attached to the duty of confidentiality. In *Campbell v Frisbee* [2002] EWCA Civ 1374; [2003] ICR 141 at paragraph 22 this court drew attention to this conflict of view, and commented: 'We consider that it is arguable that a duty of confidentiality that has been expressly assumed under contract carries more weight, when balanced against the right of freedom of expression, than a duty of confidence that is not buttressed by express agreement'. We adhere to this view. But the extent to which a contract adds to the weight of duty of confidence arising out of a confidential relationship will depend upon the facts of the individual case."

79. Applying these principles, in **ABC v Telegraph Media Group Ltd** [2019] EMLR 5, an appeal was allowed against a refusal of interim relief in respect of the proposed publication in breach of non-disclosure agreements where (*inter alia*) it was held that the judge had erred by failing to weigh in the balance the public policy considerations relevant to upholding non-disclosure agreements, both generally and in that particular case (see paragraphs 34, 41 and 47).

Discussion and Conclusions

80. Unlike the parties, I have started by considering the scope of the protections relied on by the respondents under the **ECHR** and at common law (grounds 1 and 2 of the appeal). Parking at this stage the question whether the ET erred in its approach to the question of confidential information, the derogations sought in this case were said to be necessary to protect particular employees of the first respondent and/or its subsidiary in the country in question, and/or to be required in the interests of justice given the respondents' concerns.

81. To the extent that the application thus related to those located in a country which is not an **ECHR** signatory state, the ET concluded that it did not have jurisdiction under rule 50(1) **ET**

Rules to make the derogations sought "*to protect the Convention rights of individuals who are outside the jurisdiction of that Convention*" (ET, paragraph 102).

82. Although expressed in a somewhat circular fashion, the ET was correct in its understanding that rights under the **ECHR** are (save in exceptional circumstances, not said to apply here) limited to the territories of the contracting states. The respondents say, however, that the ET thereby erred in failing to comply with the duty imposed on it pursuant to section 6 **HRA**, to act compatibly with the **ECHR**, including the right to fair trial under article 6; an approach allowed, the respondents submit, by rule 50(1) **ET Rules**, which provides that an ET may make an order to protect the **ECHR** rights "*of <u>any</u> person*".

83. The difficulty with this argument, as the claimant has observed, is that section 6 **HRA** imposes a duty upon the ET; it does not afford it additional powers to those provided under rule 50 **ET Rules**. Moreover, the duty under section 6 applies to rights under the **ECHR**: to the extent that the protection is sought in respect of individuals *outside* the territory of the **ECHR**, the duty is simply not engaged. Similarly, to the extent that rule 50(1) provides the ET with the power to make an order for the protection of the **ECHR** rights of any person, it thus provides a power to protect rights conferred under the **ECHR**, it does not serve to extend such rights to those who otherwise fall outside its ambit.

84. The ET was therefore right to conclude that its power to make an order derogating from the principle of open justice to protect rights under the **ECHR** could not extend to those located in the country in issue. The next question that arises, however, is whether the ET nevertheless erred in then failing to consider whether the risks to such persons might be relevant to its power to make such an order under rule 50(1) in the interests of justice. That is a question that requires consideration of the respondents' arguments founded on common law principles and brings back into play the article 6 **ECHR** right to a fair trial.

85. Just as rule 50(1) provided the ET with the power to derogate from the open justice principle so as to protect **ECHR** rights not to be tortured or subjected to inhuman or degrading treatment or punishment (article 3), or to liberty and security (article 5), so too might those considerations be relevant to its power to make such an order in the interests of justice, consistent with the approach taken in this regard at common law (see **In re Officer L; Libyan Investment Authority (No. 1)**; **Libyan Investment Authority (No. 2))**. That would most obviously be the case where such risks would otherwise arise in relation to a witness or a party to proceedings before the ET, but it is possible that the principle might extend more widely to those who are not otherwise participants in the litigation, even if they are otherwise located outside Great Britain and (as here) in a country that is not a signatory to the **ECHR** (see **Libyan Investment Authority (No. 2))**. That is not to say that the ET owes some universal duty to protect any person, wherever located, who might be adversely impacted by the litigation in question; it must be satisfied, on the basis of clear and cogent evidence, that the derogation sought is necessary for the administration of justice (**Khuja v Times Newspapers**). That, however, might be so even in the case of non-participants, if it were established that evidence in the proceedings could not be given freely because of genuine fears of the risk to those located in the country in issue (by analogy with **Brearley v Higgs**), even if those fears are subjective and might objectively be assessed as not well-founded (see **In re Officer L**).

86. Not only is this approach consistent with how the interests of justice are thus protected at common law, it can be seen to be a necessary consequence of the ET's duty under section 6 **HRA** not to act incompatibly with the right to fair trial provided by article 6 **ECHR**. In this respect, the **ECHR** and domestic law "*walk in step"* (to adopt the language of Lord Reed at paragraph 57 **A v BBC**).

87. Against that background, therefore, I turn to the ET's findings in this case and to the respondents' challenges to those findings under grounds 3-5.

88. To the extent that the ET rejected the suggestion that any risk arose outside the country in question, there can be no objection, not least as the second respondent's evidence in this regard was contradicted by that of Mr Stones. The ET was also entitled to have regard to the general level of risk existing in that country, in which the respondents, and other employees of the first respondent and its subsidiary, had operated for many years. As Mr Stones had observed, Millicom had been able to conduct its business in that country for several years and "*does not appear to have run into too much difficulty so far*" (ET paragraph 61). The question for the ET was thus whether proceeding without the protections sought would give rise to a materially increased risk (see **In re Officer L**).

89. In finding that the respondents had failed to demonstrate a real and immediate risk under articles 3 and 5 **ECHR**, the ET explained that this was because there was no "*objective evidence to show that there was any risk based on the disclosure of the specific matters*" (ET paragraph 107):

> "… neither [the second respondent nor Mr Stones] gave any objective evidence as to why the general level of risk present in [the country] would be heightened by the disclosure of the specific matters. They both speculated as to what may happen, but there was no objective evidence to support their views. … [Accepting] that objective evidence was produced of the general risk to foreign businesses trading in [that country], but that is different from evidence which supports the restriction of disclosing the specific matters in the proceedings. …"

90. The respondents contend that the ET thus set a perversely high threshold given that the only evidence available would inevitably be speculative in nature, as – unless and until information regarding the specified matters entered the public domain – the witnesses were necessarily engaged on a predictive exercise. I do not consider, however, that the ET lost sight of the fact that it was being asked to assess a potential future risk; in determining whether the evidence

met the threshold for the purposes of articles 3 or 5 **ECHR**, it was required, nevertheless, to consider whether that risk was objectively verified (see **In re Officer L**, paragraph 20), by evidence that convincingly demonstrated the seriousness of the risk, raising a real possibility of significant harm: "*a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm*" (see **Venables v NGN**, paragraphs 87-89).

91. The respondents further criticise the ET for what is said to have been a failure to adjudicate upon the level of harm required to be established for these purposes. The ET was correct, however, in its focus on the question whether there was objectively verified evidence of a materially increased risk. The assessment of the minimum level of severity of risk will inevitably be relative (**Kudla v Poland**, paragraph 91); here, the ET was required to determine whether there was objective evidence that the existing risk would be materially heightened. In this regard, the only evidence was that contained in the statements of the second respondent and Mr Stones. Although drawing from his past experience of the country in question, the second respondent's evidence provided a view of the increased risk that was inevitably subjective. Even accepting this was a statement of the second respondent's genuine belief, it could not be said to amount to the objectively verified evidence that the ET required. As for Mr Stones' evidence, the ET was entitled to note that the fact that he had never been to the country in question "*does detract to some extent from the weight to be given to his own personal expertise when opining on potential risks in that country*" (ET, paragraph 60).

92. Having regard to the limitations in the evidence thus provided in support of the application, and given the respect that is to be afforded to the first instance tribunal in respect of assessments of this nature (**AAA v Associated Newspapers** paragraphs 8-9; **Fallows v NGN**, paragraph 51), on the question of the potentially increased risk under articles 3 and 5 **ECHR** I do not consider that it can properly be said that the ET reached a conclusion that was outside

the ambit of those open to it on the material available in this case. Accordingly, I would dismiss the appeal on grounds 3-5.

93. Different considerations arose, however, in relation to the ET's assessment of whether the evidence established the necessity of the derogations sought as being in the interests of justice at common law. In that regard, the second respondent's subjective views were potentially highly relevant, not least as he was both a party and a witness in the proceedings and apparently had responsibility for determining whether the first respondent would continue to contest the litigation if the ET refused to make the orders sought. Although the ET used the heading "*Common Law*" when considering the evidence of the risk of inhuman or degrading treatment, or to liberty and security, its reasoning under this head discloses no appreciation of the potential relevance at common law of the second respondent's subjective views when assessing whether the derogations sought might be necessary in the interests of justice. The ET's focus remained firmly on the need for objectively verified evidence to demonstrate a real and immediate risk requiring the protection of **ECHR** rights.

94. For the claimant it is urged that this is not fatal: the ET went on to consider the second respondent's subjective concerns when determining whether the application should be allowed under either article 8 or article 6 **ECHR**.

95. As the claimant thus acknowledges, whilst evidence of a risk might not reach the standard required to engage articles 3 or 5 **ECHR**, it can still meet the threshold for article 8 purposes (see **RXG v Ministry of Justice**, at paragraph 35(viii)) and, consistent with common law concerns to ensure the proper administration of justice, might be a factor relevant to the protection of the right to a fair trial under article 6 **ECHR**. It is therefore necessary at this stage to turn to the ET's reasoning in these respects.

96. In addressing the respondents' case under article 8, the ET's reasoning was succinct:

> "109) Further, I do not accept that the subjective fears raised by [the second respondent] are sufficient to engage Article 8 and therefore, I do not need to go on to consider the balancing test of proportionality under Article 8(2)."

97. It is appropriate, however, to read this alongside the ET's reasoning under article 6:

> "111) I have noted above [the second respondent's] statement to the effect that if an order is not made under rule 50, he will not give evidence in the proceedings and indeed will not allow the R1 to continue to defend the proceedings. Ms Skinner [counsel for the respondents] maintained that this meant that the Tribunal would be depriving the respondents of their rights to a fair trial under Article 6 ECHR. I do not accept this argument. The respondent *[sic]* still have access to a fair hearing but it would be their choice whether to proceed with it. Furthermore, Article 6 specifically provides for the public pronouncement of any judgement but allows for the exclusion of the press and the public where the protection of the private life of the party so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. Again, based on the evidence presented to the Tribunal no such special circumstances or risk to the private life of the parties has been established such as to outweigh the principle of open justice."

98. In thus referring back to its earlier consideration of the second respondent's evidence in this regard ("*I have noted above"),* the ET can be understood to be directing the reader to the discussion at paragraph 96 of its judgment, as follows:

> "… I accept [counsel for the claimant] Mr Callus' submission that I should not take into account as part of my rule 50 deliberations, [the second respondent's] statement that if the rule 50 order is not made he will not allow the respondents to proceed in defending the claim … [the second respondent's] intention may well be a genuine one but it is essentially a matter of choice for him (and the other respondents) and I do not intend to allow his intentions with regard to continuing with the proceedings, to influence me in reaching my decision."

99. In reaching this view, it is apparent that the ET had in mind the warning voiced in **Kaim Todner**, that: "*a party cannot be allowed to achieve anonymity by insisting upon it as a condition for being involved in the proceedings irrespective of whether the demand is reasonable*". The ET had not, however, found that the second respondent had expressed this intention for some ulterior motive, and, although it had rejected his evidence, and that of Mr Stones, as failing to meet the necessary threshold for the purposes of articles 3 and 5 **ECHR**,

it had done so on the basis that this was not objectively verified – a different test to that which the ET had to apply when considering whether the order sought was necessary in the interests of justice.

100. For the claimant it is urged that the answer is provided by the ET's conclusion that the second respondent's "*subjective fears*" were not sufficient to engage article 8 **ECHR**. In particular, it is said, the second respondent's statements failed to demonstrate any concern as to the potential risks to his family or private life.

101. The ET's reasoning in this respect is, however, ambiguous. The reference to the second respondent's "*subjective fears*" as not being sufficient to engage article 8 **ECHR** might suggest that the ET was, wrongly, requiring some objectively verified evidence to establish the potential risk to the second respondent's article 8 rights, when the subjective nature of those fears might be very relevant to any assessment of a risk to his enjoyment of his right to a private and family life. Moreover, the right to a private and family life can extend to workplace relationships (**Niemietz v Germany**, at paragraphs 29-31) and has been held to be wide enough to protect against a person's fears of verbal or physical attack in the workplace, either for themselves or for their colleagues (**Abbasi v Newcastle** [2021] EWHC 1699 Fam, at paragraphs 105-107). It is unclear whether the ET's reasoning allowed for that broader view of the second respondent's article 8 rights; certainly that is not something that can be discerned from paragraph 109 of the judgment.

102. Further, and relatedly, in considering whether it ought to make an order under rule 50 **ET Rules** in the interests of justice, the question for the ET was whether the second respondent's subjective concerns – even if not well-founded (see **In re Officer L)** – were such as would prejudice the administration of justice if the order sought was not made. If the second respondent's concerns were genuinely held, then the fact that they related to other employees,

located in another country and otherwise outside the ambit of the **ECHR**, would not be determinative; the issue for the ET was whether they would adversely impact upon the administration of justice in the proceedings before it or more generally. On this question, whilst it was ultimately open to the ET to decide to discount the second respondent's evidence as to his intended course of action if the application was not granted, this was still a relevant matter to weigh in the balance. There is, however, nothing to demonstrate an application of common law principles in this regard and the ET's reasoning under articles 8 and 6 **ECHR** does not assist given that it expressly did not carry out such a balancing exercise under article 8 and approached its task under article 6 on the basis that this was simply a matter of choice for the respondents.

103. In my judgement the ET's reasoning reveals an error of approach in this regard. In considering whether the derogation sought was necessary in the interests of justice in this case, a fact-specific balancing exercise was required. A potentially relevant factor was the second respondent's stated intention not to give evidence, or to allow the first respondent to continue to contest the proceedings, if the orders sought were not made. That statement was said to be made on the basis of the second respondent's subjective belief as to the potential risk if information as to the specified matters was put into the public domain through the ET proceedings. The ET considered that evidence to be speculative and as not meeting the relevant threshold for the purposes of articles 3 and 5 **ECHR**, but it did not make a finding that this statement had been made in bad faith or that it was implausible (in contrast, for example, to the second respondent's evidence of his need to travel to the country in question in the months after the ET hearing; see the ET at paragraph 105). Although the ET was not bound to grant the application in the light of the second respondent's stated intentions (and was entitled to approach this evidence with some caution, per **Kaim Todner**), where it had allowed that this statement of intent might well be genuine, it was wrong to dismiss that

evidence out of hand when this was a factor that could potentially impact on the administration of justice in the proceedings. Moreover, in assessing the potential impact on the second respondent's ability to freely give his evidence and participate in the proceedings, the ET was required to engage with the possible impact on his article 8 rights, allowing that those might extend to his concerns regarding the safety and security of his work colleagues. In this regard, the ET's reasoning suggests that it adopted an unduly restrictive approach to the second respondent's concerns, apparently considering that his "*subjective fears*" were insufficient.

104. In carrying out the requisite balancing exercise, the ET would have needed to weigh the potential relevance of the information in question against the risk which its disclosure might cause to the judicial process in this instance (**A v BBC**, paragraph 41; **Libyan Investment Authority (No. 1)**, paragraph 34(3)). It would have needed to consider the impact on the article 6 and article 10 **ECHR** rights of others, having regard to the extent of the derogations sought (**Kaim Todner**, p 978B-C). The ET was entitled to take a robust view of the second respondent's evidence as to his intentions if the order was not made, but it needed to demonstrate that it had engaged with the potential relevance of that statement in its consideration of the interests of justice in this matter. As identified by ground 2 of the appeal, the ET erred in failing to apply common law principles in its consideration of the respondents' evidence. This, as the respondents have argued under grounds 7 and 8 of the appeal, led it into error in finding that the second respondent's stated intention - informed by his subjective view of the potentially increased risk to employees of the first respondent and its subsidiary arising from disclosure of the specified matters - could not be relevant to the interests of justice, to the article 6 **ECHR** rights of the respondents, or to the article 8 **ECHR** rights of the second respondent.

105. Finally, I turn to the question of confidentiality. Although the respondents may be criticised for raising this issue late in the day and for only adducing the relevant documentary evidence

towards the end of the hearing, the claimant had not sought an adjournment when asked by the Judge at the start of the hearing and the ET went on to address the application on this basis, finding (whatever the dispute between the parties on the evidence) that the claimant's contract of employment "*did establish a duty of confidentiality as regards matters undertaken in his employment duties*" (ET, paragraph 112).

106. Having thus found that a contractual duty of confidence existed in this case, the ET determined, nevertheless, that this did not necessitate the making of an order under rule 50, reasoning:

> "112) … if the duty of confidentiality of itself justified restrictions on disclosure under rule 50, then surely every whistleblowing claim would potentially be the subject of a rule 50 application, which cannot have been the intention of the statutory power under that rule. I do not find the claimant's obligations of confidentiality outweigh the principle of open justice."

107. Referring to the case of **HRH the Prince of Wales v Associated Newspapers Ltd**, the ET continued:

> "113) … I do not accept that the respondent has shown that, 'it is legitimate for the owner of the information to seek to keep it confidential'. If the respondent maintains that the alleged disclosure was not made by the claimant in the public interest, then it should not be a problem for that information to be withheld."

108. I am not sure I entirely understand the second part of that paragraph, but my primary concern relates to the partial citation from paragraph 68 of the Court of Appeal's judgment in **HRH the Prince of Wales v Associated Newspapers Ltd**. In setting out the test to be applied where information has been obtained pursuant to an express obligation of confidence, it was made clear that the question was "*not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached*". Although a court or tribunal will need to consider whether "*it is legitimate for the owner of the information to seek to keep it confidential or whether it is in*

the public interest that the information should be made public", it is required to do so "*having regard to the nature of the information and all the relevant circumstances*".

109. Here, the relevant circumstance relied on by the respondents was the fact that the information relating to the specified matters had been obtained by the claimant under a contractual duty of confidence. There is, however, no indication that the ET weighed this in the balance. As for its concern that the floodgates might otherwise be opened in whistleblowing claims, I do not see why this should be so. Not all protected disclosures will involve information obtained under a duty of confidence. Even where that is the case, however, it will still be for the ET to determine whether an order under rule 50 should be made. In making that decision, the ET will need to weigh in the balance the public policy considerations relevant to upholding contractual duties of confidence (both generally and in that particular case).

110. By failing to have regard to the contractual duty of confidence it had found in this case, the ET thus omitted to take into account a relevant circumstance. It was required to ask itself not merely whether it was legitimate for the respondents to seek to keep that confidence but whether it was in the public interest for that duty of confidence to be breached. As identified by grounds 9 and 10 of the appeal, these errors vitiate the ET's reasoning in this regard.

Disposal

111. For the reasons provided, I therefore allow this appeal in part. The parties are asked to seek to reach an agreement as to the terms of the order and to provide a draft of that order in advance of the formal handing down of this judgment. If the parties are unable to reach agreement as to the terms of the order, or if there are any consequential applications that they seek to make, they should set out their respective positions in writing (on no more than two-sides of paper), again in advance of the formal handing down of the judgment.

