

Employment Tribunal proceedings: Libel and Confidentiality issues

Employment tribunal proceedings can be a tense time for employers, and the risk that they might lose the case is not the only worry. As the recent spate of so-called “sex in the City” cases has demonstrated, employment disputes can attract the avid attention of the media and the ensuing publicity can continue to damage employers’ reputations long after the original dispute has been resolved. Perhaps worse still, tribunal proceedings can lead to the private lives of employees being laid bare in public and to the disclosure of commercially sensitive information. This article examines what employers can do to address these risks.

It is not uncommon for a disgruntled ex-employee to try to publicise his grievance against his former employer. Often, where the criticisms are untrue, the law of libel can assist. Interim injunctions are rarely granted in libel claims but the threat of an action for damages will make many think twice about making defamatory allegations. Also, where the ex-employee uses a website to make his attacks, it will usually be easy to persuade the relevant ISP to remove the offending page. ISP’s who ignore such requests risk losing their statutory defences under s.1 of the Defamation Act 1996 and the Electronic Commerce (EC Directive) Regulations 2002.

However, where the ex-employee decides to attack the employer in the course of tribunal proceedings, the position is very different. Statements made in the course of the proceedings will be protected by the defence of absolute privilege, unless the statement has nothing whatsoever to do with the subject matter of the case. As the name suggests, the defence is a complete one - it cannot be defeated even if it is possible to show that the witness has deliberately lied. The rule covers statements made orally at a hearing, but also extends to cover witness statements, documents tendered as evidence and other documents brought into existence for the purpose of the proceedings (in each case where these documents are published in the course of and for the purpose of the proceedings). There is a corresponding advantage to the employer of course: the employer and his other employees are free to defend themselves without fear of vexatious defamation claims which might otherwise be brought against them.

Where defamatory statements are made in the course of a public hearing, the media are free to report them. Fair and accurate reports published contemporaneously with the proceedings are protected by absolute privilege, while later reports will often be protected by qualified privilege (a defence which can be defeated by proof that the words complained of were published maliciously). Moreover, commentary on the case will often be protected too. Usually a libel defendant seeking to rely on the defence of fair comment would have to prove that the facts he was commenting on were true. Exceptionally however, a defendant who sets out a privileged report of a hearing and then comments on it is relieved of the burden of showing that what the witnesses said was in fact true (*Brent Walker Group Plc v Time Out Ltd* [1991] 2 QB 33). Where sensitive information is revealed at a public tribunal hearing, it will usually be regarded as having lost its private or confidential character (although there is some support for the view that subsequent disclosures of personal private information may sometimes still be actionable, notwithstanding the fact that it has previously been aired before the public).

It follows that, once defamatory statements are made, or private or confidential information is revealed, at a public tribunal hearing, there is little an employer can do about it. But there are various steps an employer may take pre-emptively in order to avoid that stage being reached.

Firstly, an employer needs to consider whether there is any basis for resisting disclosure of private or confidential information to the claimant. Tribunals have the same power to order disclosure as a county court¹[1]. The fact that information is confidential or private is not of itself a ground for non-disclosure, but it is something the tribunal will take into account and disclosure will only be ordered if the material is necessary for disposing of the proceedings fairly. A tribunal may permit sensitive

documents to be anonymised or redacted to conceal sensitive details whose disclosure is not necessary (*Science Research Council v Nasse* [1979] 3 All ER 673). Employers can take some comfort from the fact that, generally, a claimant to whom a document is disclosed pursuant to an order of the tribunal may use it only for the purposes of the case, until the document is read or referred to at a public hearing. Even then, the tribunal may order that the claimant should make no further use of it (*Knight v DSS* [2002] IRLR 249).

If it is clear that sensitive information is going to feature in the Tribunal proceedings, the next question for the employer is whether he can avoid a public hearing. Case management discussions are held in private²[2] but other types of hearing must usually be in public. Leaving aside national security cases³[3], the exceptional power to sit in private is governed by Rule 16 of the 2004 Rules, which provides:

(1) A hearing or part of one may be conducted in private for the purpose of hearing evidence from any person evidence or representations which in the opinion of the tribunal or chairman is likely to consist of information-

(a) which he could not disclose without contravening a prohibition imposed by or by virtue of any enactment;

(b) which has been communicated to him in confidence, or which he has otherwise obtained in consequence of the confidence placed in him by another person; or

(c) the disclosure of which would, for reasons other than its effect on negotiations with respect to any of the matters mentioned in section 178(2) of TULR(C)A, cause substantial injury to any undertaking or his or any undertaking in which he works.

Confidential and commercially sensitive information is obviously covered by (b) or (c). More problematic is evidence dealing with personal private information. At common law, a right to privacy has been fashioned out of the equitable action for breach of confidence. Sub-rule (b) deals with information obtained in confidence, but the wording does not seem apt to cover, for example, a witness who needs to speak about his or her own intimate medical history. In *XXX v YYY*⁴[4], the EAT was faced with a situation in which, in their view, the playing of a video tape during the hearing would infringe the privacy rights of a non-party. This was a claim by a nanny who resigned claiming that her male employer had made improper sexual advances to her. The video was alleged to show such an advance taking place in the presence of the child the nanny was employed to care for. The EAT decided, somewhat controversially, that the (identically worded) predecessor to sub-rule (a) applied, because playing the video would infringe the child's article 8 rights and that such an infringement was prohibited by virtue of s 6 of the Human Rights Act 1998.

Where a tribunal sits in private, the reasons for the tribunal's decision may be omitted from the publicly available register⁵[5].

If there is to be a public hearing an employer's options for avoiding publicity are very limited. In cases involving allegations of sexual misconduct either party may apply for a "restricted reporting order" ('RRO'). RROs may prohibit the identification not only of the alleged victim, but also of any person "affected by" the allegation⁶[6]. Unlike the position in a criminal trial the alleged perpetrator of sexual misconduct can benefit from anonymity⁷[7]. In *Associated Newspapers Ltd v London (North) Industrial Tribunal* [1998] IRLR 569, 574 (QB) Keene J said the purpose of RROs is:

'[T]o enable complaints of sexual harassment at work to be brought and witnesses to give evidence about incidents of sexual harassment without being deterred by fear of intimate sexual details about them being publicised'

RROs should therefore go no further than is necessary to achieve that purpose, and the tribunal is required to have regard to the importance of public and contemporaneous reporting of court and tribunal hearings. Recently film star Kevin Costner was a short-lived beneficiary of an RRO. A tribunal heard an allegation that he had performed a sex act in the presence of a hotel masseuse. The case settled before any finding was made on that question and the Daily Mail successfully applied for the anonymity order to be lifted on the grounds that the allegation had already been widely publicised on the Internet and in the foreign press. A company cannot be a “person affected”, but where an RRO is made in respect of an employee of a small company, the practical consequence may be that the company itself cannot safely be named in reports, because it would lead to identification of the employee. RROs are also available in disability discrimination cases involving evidence of a personal nature, but only on the application of the complainant. The principal drawback of RROs is that they last only until the judgment disposing of the claim is sent to the parties. Thereafter the protected person may be identified unless he or she was alleged to have been the victim of a sexual offence⁸[8]. The tribunal must also ensure that, in a case appearing to involve allegations of the commission of a sexual offence, material identifying the person affected by or making the allegation must be omitted from the Register, judgment or any other publicly available document or record of the proceedings.

It is clear therefore that, even for an employer who thinks ahead, the opportunities for limiting publicity surrounding a tribunal case are few. In practice many tribunals are reticent about using the few powers they have. This is in principle right and is only to be expected. Tribunals are, after all, courts, and as in the case of civil and criminal trials, there is a strong presumption in favour of open justice. Inevitably though, there will be cases in which a quick quiet settlement may serve an employer’s interests better than a tribunal win under the prurient gaze of the tabloids.

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1[1] Employment Tribunal Rules of Procedure (SI 2004/1861, Sch 1), Rule 10(d).

2[2] Rule 17(1) as amended.

3[3] To which special rules apply: Rule 54.

4[4] [2004] IRLR 137, (later reversed by CA, but not on this point).

5[5] Rule 32(2)

6[6] ETA 1996, s.12(2)(a); 2004 Rules, rule 50(1)(a).

7[7] See *X v Z Ltd* [1998] ICR 48 and *Associated Newspapers Ltd v London (North) Industrial Tribunal* [1998] IRLR 569.

8[8] In which case they are protected by virtue of the Sexual Offences Amendment Acts 1976 and 1992. Additionally Rule 49 requires material identifying any “person affected” by or making an allegation of a sexual offence to be omitted from the Register, judgment, document or record of the proceedings which is available to the public.

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