

Legal Q & A - Libel and Confidentiality

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Employment disputes that attract media attention can cause immense damage to an employer's reputation, and can also lead to the disclosure of commercially sensitive information and distressing publicity about employees' private lives.

Can witnesses in employment tribunal proceedings be sued for libel or slander?

Almost never. Statements made during tribunal proceedings benefit from the defence of absolute privilege, unless the statement has nothing whatsoever to do with the subject matter of the case. The rule extends to witness statements, documents supplied as evidence and other documents published in the course of, and for the purpose of, the proceedings. An employer is, therefore, at the mercy of a disgruntled ex-employee who wishes to court publicity by making outlandish allegations. However, the employer is also protected against vexatious defamation claims that might be brought in respect of statements it makes or its employees make in defence of the claim.

What can an employer do when a tribunal hearing attracts adverse media coverage?

Usually very little. A contemporaneous, fair and accurate report of a public hearing is protected by absolute privilege. Later reports will often be protected by qualified privilege. Commentary on a privileged report will usually be protected as fair comment. So employers must act pre-emptively, such as by resisting disclosure of the information in the first place, or invoking the tribunal's limited powers to sit in private or restrict reporting.

Can an employer resist disclosure of confidential or private information in the course of tribunal proceedings?

The fact that information is confidential or private is not a ground for non-disclosure, but the tribunal will take it into account and will only order its disclosure to ensure a fair hearing.

Can the tribunal sit in private?

Yes. Case management discussions are held in private. The tribunal can sit in private for national security reasons and if it is likely to hear:

- information whose disclosure is prevented by other legislation
- confidential information
- information whose disclosure would cause substantial injury (other than by affecting collective bargaining with employees) to the business in which the witness works.

The Employment Appeal Tribunal has held that playing a video containing personal information about a non-party would infringe their right to privacy, and contravene section 6 of the Human Rights Act 1998. So the tribunal was entitled to sit in private when the video was played (XXX v YYY [2004] IRLR 137).

Can the tribunal restrict the reporting of a public hearing?

Only in cases involving allegations of sexual misconduct and in disability discrimination cases. In sexual misconduct cases, a restricted reporting order (RRO) may be made, prohibiting the identification not only of the alleged victim, but also of any person 'affected by' the allegation. The rule only applies to people, not companies, but it has been generously interpreted to cover the

alleged perpetrators of sexual misconduct. Employers can apply for an RRO to protect employees who are accused of sexual harassment.

In disability cases, a complainant may apply for an RRO to prevent them (or others) being identified where medical or other intimate evidence is given, and it is reasonable to assume that it would cause them significant embarrassment if reported.

RROs are only effective until the judgment disposing of the claim is sent to the parties. However, if the allegations of sexual misconduct amount to allegations of sexual offences, then the alleged victim is entitled to lifetime anonymity and the tribunal is required to omit identifying material from the Register and any other publicly available document.

What documents can the public obtain from the tribunal?

Employment tribunals hold a Register, which is open to public inspection and which must contain copies of all judgments and written reasons for decisions. However, written reasons may be omitted where the tribunal has sat in private and material identifying the victim of an alleged sexual offence must also be omitted.

Unlike the Civil Procedure Rules, the Employment Tribunal Rules do not expressly provide for public access to witness statements, statements of case or other documents.

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