Tribunal decision

Appeal Number EAT/661/99

EMPLOYMENT APPEAL TRIBUNAL

Before
THE HONOURABLE MR JUSTICE LINDSAY (PRESIDENT)
(AS IN CHAMBERS)

CHIEF CONSTABLE OF THE WEST YORKSHIRE POLICE	APPELANTS
"A"	RESPONDENT

Transcipt of Proceedings

JUDGMENT

Revised

For the Appellants	NO APPEARANCE OR REPRESENTATION ON BEHALF OF THE APPELLANTS
	MISS M CARSS-FRISK Amicus Curiae
For the Respondents	MS S HARRISON (of Counsel) Instructed By: Mr D C Burgess Winstanley-Burgess Solicitors 378 City Road London EC1V 2TQ

Mr Justice Lindsay (PRESIDENT): Today has been a Meeting for Directions in the matter of "A" against the Chief Constable of West Yorkshire Police, whom I shall refer to as "the Police".

1. The Police have an appeal against the decision of the Employment Tribunal sent to the parties on 18 March 1999. There was an earlier Meeting for Directions as to that appeal and this is a second. But, strange to say, the hearing today has been little

concerned with the substantive appeal. Nor, either, is there any application by any party which, in terms of a piece of paper indicating relief claimed, is laid before me. Moreover, as will appear, there is little dispute between those who do appear today and I am sitting alone.

2. Today, one might therefore think, has hardly provided a suitable forum for any decision on any point of wide application or involving the grander principles and yet that is what is expected of me. I am invited by Ms Harrison, in the course of her thoughtful argument on behalf of "A", to comment upon the jurisdiction of Employment Tribunals, and to rule upon the jurisdiction of the Employment Appeal Tribunal, to make Restrictive Reporting provisions in relation to cases in certain circumstances, jurisdictions arguably arising under both domestic and Community law, as well as my also being expected then to turn to the exercise, in this particular case, of such discretion, if any, as such jurisdictions may have conferred on the Employment Appeal Tribunal. All that without there being any appeal as to reporting restrictions and without any application lodged to indicate precisely what relief is sought. I shall need to explain this rather unattractive state of things in more detail.

3. I shall in the course of this judgment use the abbreviation "RRO" to stand for "Restricted Reporting Order", but I shall use the expression to cover not only Orders so described in our domestic statutes but also any Orders to substantially the like effect, whether conferred by domestic statutory or inherent jurisdictions or conferred directly or impliedly by Community law or, indeed, arising in any other way.

4. The factual background is as follows. The party "A", Respondent to the Police's appeal but the Applicant below, was born male and grew up as a man. In 1996 "A" underwent "gender reassignment surgery". I shall speak of "A" hereafter as if "A" is female.

5. In 1997 "A" applied to join the West Yorkshire Police Force. "A" claimed to have encountered sex discrimination in relation to that application. An IT1 was lodged by "A" against the Police. It was at first thought to be resisted by the Police on the broad ground that whilst there had been discrimination against "A" on the grounds of her transsexuality, that discrimination was not unlawful but justified. But the nature of the Police's response was later put in different ways. From the outset "A" sought anonymity in relation to her proceedings.

6. On 20 June 1998, albeit untraceable amongst my papers, an RRO was made by the Employment Tribunal limited until promulgation of its decision. That, so far as concerned "A", did not go far enough. "A" sought protection beyond that which had been then granted. The Police did not oppose relief going further. They were neutral on the point. Evidence was then adduced to the Employment Tribunal of the extreme reluctance of transsexuals to litigate in discrimination cases if their identity was thereby likely to be revealed. Evidence, too, was given of the abuse and the difficulties often consequent upon their identification as transsexuals and evidence of the coarseness or offensiveness on the subject of transsexuals alleged to be frequently adopted by the British tabloid press, extracts from which were produced in the evidence.

7. On 21 September 1998 the Employment Tribunal sitting in a full panel of three, made an RRO. The first paragraph of the decision reads as follows:

   "The unanimous decision of the tribunal is that pursuant to Rule 13(1) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 1993 nothing shall be done by way of publication in any newspaper, periodical or other publication or in any media broadcast or transmission to identify the applicant or which is likely to lead members of the public to identify her as the person affected by the subject matter of these proceedings. Furthermore the tribunal or the Secretary shall omit from the Register or any decision, document or record of the proceedings, which is available to the public, any identifying matter which is likely to lead to identification as aforesaid. This order shall remain in force unless and until it is revoked by an Employment Tribunal or the application of any party. Any breach of this order is likely to lead to proceedings being taken in the High Court of Justice for contempt of court."

8. There has been no appeal against that although, no doubt, some of those who have looked at it have had doubts about the appropriateness of Rule 13(1) and have had doubts about the meaning of "these proceedings". Is that intended to relate only to proceedings at the Employment Tribunal or to go beyond that? There may be doubts also about what the position might be as to a separate Remedies Decision after a Liability Decision. The appropriateness of the limitation "until it is revoked by an Employment Tribunal on the application of any party" also may give rise to doubt given the ability, for example, of the Employment Appeal Tribunal or the Court of Appeal or the House of Lords, let alone the European Court of Justice or the European Court of Human Rights, to cause an Order made by the Employment Tribunal to cease to have effect without necessarily remitting the matter to the Employment Tribunal. For all those doubts, there has been no appeal. Moreover, correspondence was embarked upon between "A's" Solicitors and others seeking to establish whether there were interested sections of the press who might wish to oppose the continued effect of the Order. Correspondence was deliberately directed to those who were thought, in the press, most likely to wish to object but no objection was received on behalf of the press.

9. In February and March 1999 the substantive hearing of "A's" complaint took place over some four days. The hearing was in public. There is, though, no suggestion that the RRO was breached or that "A's" identity was in any way harmfully disclosed. The RRO worked well. The unanimous decision of the Employment Tribunal, under the chairmanship of Mr D R Sneath, was as follows:

   "The unanimous decision of the tribunal is that the respondent has discriminated against the applicant contrary to Part II of the Sex Discrimination Act 1975 by refusing to offer her employment in the office of constable. Determination of remedy is adjourned to a date to be fixed."

10. The decision was cast in anonymous terms. One cannot find "A's" identity however much one searches through it. It must not be thought that the Tribunal found this to have been some crude and simple case of sex discrimination. The Police's case, by the time it was heard at the substantive hearing, had become that "A", particularly in relation to searches of suspects, of accused persons and of prisoners, was not able to

do the full range of the duties nowadays expected of a constable. The Tribunal held, in their paragraph 30:

"30. … Further, we find that it would objectively be unreasonable to require the respondent [the Police] to employ the applicant as a police constable if in law and fact she could not carry out the full range of a police constable's duties. …"

But they continued, in their paragraph 37:

> "37. … In our judgment, the risks to the respondent in permitting the applicant as a transsexual to carry out the full range of duties including the searching of women are so small that to give effect to them by denying the applicant access to the office of constable would be wholly disproportionate to the denial of the applicant's fundamental right to equal treatment."

And of the Police, the Tribunal said:

> "38. … We would also repeat a view expressed earlier that the respondent and his subordinates have behaved honourably in this case. Its outcome must not be taken as an adverse reflection on any of them."

11. In April 1999 the Police lodged a Notice of Appeal appealing to the Employment Appeal Tribunal and it is, of course, that that will be ruled upon by the Employment Appeal Tribunal. It is the Notice of Appeal which is therefore determinative of the nature of the hearing at the Employment Appeal Tribunal. It is not, I think, necessary to read out the Notice of Appeal to indicate the nature of the issues of law that will be ventilated but they are issues of law and it is, of course, only issues of law with which this Tribunal can deal. The facts are already found anonymously in the Employment Tribunal's decision.

12. The identity of "A" is extremely improbable to be revealed from anything said at the Employment Appeal Tribunal. The Employment Appeal Tribunal has no need to know who she is, what she looks like, where she lives, where she comes from or what her plans for the future might be.

13. However, although it is unclear (to me, at any rate) how the point first emerged, there has emerged doubt as to the position of the existing RRO in relation to the Employment Tribunal proceedings and doubts also as to whether it should be considered that a fresh RRO should be made. Those doubts came before Mr Justice Morison or may have been generated at the hearing before Mr Justice Morison in this Tribunal on 25 June 1999. An Order was then made as follows:

"IT IS ORDERED that the Restricted Reporting Order contained in the Decision of the Employment Tribunal promulgated on the 21st day of September 1998 will remain in force until the matter is determined by the Employment Appeal Tribunal on a date to be fixed.

IT IS FURTHER ORDERED that the hearing of the full Appeal be stayed until the Employment Tribunal Remedies Decision is promulgated."

That Order, it seems to me, is ambiguous. Is "the matter" there referred to the substantive appeal to the Employment Appeal Tribunal (which is consistent with the heading of the Order, which says "In the matter of an Appeal under Section 22(1) of the Industrial Tribunals Act 1996 from the decision of an Employment Tribunal sitting at Leeds and entered in the Register on the 18th day of March 1999") or is "the matter" a full hearing of some application for an RRO to be made to cover restrictions during Employment Appeal Tribunal proceedings?

14. The Order is, itself, unclear but it seems that the parties plainly understood the latter to be the correct interpretation. No transcript of the hearing of 25 June is before me. After that hearing a letter was written to the Press Complaints Commission to see if they felt any need to appear at a fuller hearing in relation to an RRO but no opposition has appeared. The Police have remained neutral, as, as mentioned earlier, they had been below. But, very helpfully, the Treasury Solicitor has provided me with a amicus curiae and I am especially grateful to Miss Carss-Frisk for her admirable Skeleton Argument prepared by her, she being instructed as amicus on the instruction of the Treasury Solicitor.

15. I suspect that Mr Justice Morison saw this hearing as a prospective test case on RROs both at the Employment Tribunal level and at the Employment Appeal Tribunal level. In the event, as the Police have remained neutral, as the press has been indifferent and as the amicus and Ms Harrison have both argued in favour of an RRO continuing, (although slightly differing in their routes to that conclusion) the case has transpired not to be a good vehicle for the general guidance that can usefully emerge from a test case because there has been no real opposition available to test the emerging arguments and conclusions.

16. It is thus tempting to deal with matters in a few words. That, though, would be an ungrateful response to the much fuller argument that has been addressed to me. Thus, although given the absence of adversarial opposition, I am loath to be regarded as laying down any general guidelines, I shall go beyond a mere granting or refusal of relief. The matter, as it appears to me, is as follows.

17. The Employment Tribunal has no powers beyond those conferred on it by domestic Statutory provision or required in consequence of European or Human Rights legislation. Neither Section 11 of the Employment Tribunal Act, nor Employment Tribunal Rule 13(6), nor Employment Tribunal Rule 14 in my view empowered the Employment Tribunal here to make an RRO. So far as concerns Rule 13(6) no "sexual offence" appears to be alleged - see also Section 11(6) giving a definition of that phrase.

18. So far as concerns Rule 14, whilst I recognise the immense breadth of the language of the definition of "sexual misconduct" in Section 11(6) and hence in Rule 14, its very breadth, in my view, proves too much. Every case of sexual discrimination would be a case of "sexual misconduct" within Section 11(6). If all that was required for "sexual misconduct" was that it was conduct which was "adverse" and was "related to sex" by way of having reference to the sex or sexual orientation of the person to

whom it was directed. Ms Harrison accepts that, literally read, that the consequence would be that there would be "sexual misconduct" in every case of sexual discrimination. That seems to me so improbable a conclusion to have been intended that it makes one step back and recollect that what one is talking about here is "sexual misconduct".

19. The Employment Tribunal, by adopting a reference of Advocate General Tesauro in **"<u>P v S</u>" infra** held this, in their paragraph 21:

"21. … In the light of the decision of the European Court and particularly the words of the Advocate General in that case, it is impossible to characterise the applicants conduct as misconduct. The expression 'adverse conduct' in section 11(6) again connotes some form of moral obloquy."

I do not see that to be an error of law. If the Order at the Employment Tribunal had been made and made only, under Rule 14, it would necessarily have ceased to have effect on the promulgation of the decision of the Employment Tribunal - see Rule 14(3)(b) and Rule 14(5).

20. However, in a case where the RRO itself has not made any express contradistinction as between an Order running until the Liability Decision or an Order running until a Remedies Decision and where the case is that liability has been held to exist, I do not see the promulgation of a "Liability only" Decision as being "promulgation of <u>the</u> Decision" of the Employment Tribunal. It would, as it seems to me, negate the whole purpose of RROs if their protection ended on the Liability Decision being sent to the parties in a case where a Remedies Hearing was necessary and awaited.

21. In **<u>A v B Ex-parte News Group Newspapers Ltd</u>** [1998] ICR 55 at 70H, Morison J held that "one originating application can lead to more than one determination". I do not doubt that, but where, as is the case in Rule 14(5), one sees reference to "<u>the</u> determination" and that it is to be "of <u>the</u> originating application", that to me suggests a reference to the conclusion which is determinative of the whole proceeding which is the Originating Application. One cannot say at the point at which it has been held that liability does exist that "<u>the</u> Originating Application" has been determined, as Rule 14(5) requires, as, if that was so, the Remedies Hearing would then be impossible as the Originating Application would already be spent.

22. Employment Tribunal Rule 13(1) does not itself empower the Tribunal to make any RROs. If it did, Rule 14 would have been totally unnecessary. If I am right, domestic legislation did not empower the Tribunal to make an RRO on the facts of this case. Even were I to be wrong and if "sexual misconduct" is in fact a broader expression than I have agreed it may be held to be, it is still unsatisfactory that there should be any unclarity in this area. To avoid unclarity it would be very welcome if the rule-making authority could reflect upon the appropriateness of some broader provision than Rule 14(1) being available to the Tribunals so as to be exercised not only where "sexual offence" or "sexual misconduct" is alleged, but to be exercisable as a matter of discretion in cases akin to those involving "evidence of a personal nature", such as is provided for expressly in the Employment Tribunal Act 1996, Section 12(7) in relation to the restriction of publicity in disability cases. Clarity apart, a practical reason for that matter being considered is that there may very well be cases in which

sexual discrimination is alleged where, although nothing ordinarily is to be regarded as a sexual offence or sexual misconduct is alleged, there is evidence no less likely to cause significant embarrassment to the claimant than would be the evidence in some comparable disability discrimination case. It is hard to see why, if the Tribunals are properly to be entrusted with the broad discretion under Rule 14(1)(a) as to Disability Discrimination cases, they should not have some similar wider power than Rule 14(1) confers. I shall mention later a further reason why fresh consideration by the rule-making authority in this area would be desirable.

23. However, domestic legislation is not an end of the matter. The Equal Treatment Directive extends to prohibit discrimination as to transsexuals and transsexuality, **P v S and Another** [1996] ICR 795 ECJ; **Chessington World of Adventures v Reed** [1998] ICR 97. Here, as the Respondent, the Police, is an emanation of the State, "A" can rely directly upon that Directive: see **Johnson v RUC** [1987] ICR 83. Article 6 of the Equal Treatment Directive requires an effective remedy to be conferred upon those able to rely upon it. Thus, in **Johnson v RUC supra**, one finds at paragraph 17, at page 101:

"… it must be borne in mind first of all that Article 6 of the Directive requires Member States to introduce into their internal legal systems such measures as are needed to enable all persons who consider themselves wronged by discrimination 'to pursue their claims by judicial process'. It follows from that provision that the Member States must take measures which are sufficiently effective to achieve the aim of the Directive and that they must ensure that the rights thus conferred may be effectively relied upon before the national courts by the persons concerned."

See also **Coote v Grenada** [1999] ICR 100 ECJ; **Levez v T H Jennings (Harlow Pools) Ltd** [1999] ICR 521 ECJ, paragraph 18 and **Marshall v Southampton and South-West Hampshire Area Health Authority (No.2)** [1993] ICR 893. It was such a route that the Employment Tribunal here relied upon to conclude as they did. They held in their paragraph 23:

> "23. Our second route might be described as the European route. It brings together the European notion of 'the effective remedy' and the domestic notion of access to justice. We find that, on all the evidence before us, not to grant the order, would deter the applicant from seeking a remedy for sex discrimination. The respondent is an emanation of the State. The applicant has a direct right under the Equal Treatment Directive not to suffer discrimination in access to employment. Article 6 obliges the United Kingdom to ensure that she has effective remedies. The only way in these circumstances in which this applicant can have an effective remedy is for us to grant the order sought.

There has been no appeal against that and I am not in a position to rule the Tribunal to have there been wrong in law.

24. On the basis, as I mentioned above, that the Remedies Hearing at the Employment Tribunal has not yet been determined and hence that the Originating Application has not yet been determined, I take the view that the Employment Tribunal's RRO is still in force.

25. As for the Employment Appeal Tribunal's powers to make an RRO, the width of Section 31(1) of the Employment Tribunals Act 1996 is greatly limited by Section 31(2) which has been held to deny the ability in the Employment Appeal Tribunal to make an RRO on a substantive appeal against Liability - see **A v B Ex-parte News Group supra**. It is unnecessary to debate whether, as was touched upon in **A v B supra**, the Employment Appeal Tribunal has, as a superior Court of Record, an inherent power of domestic origin to do so, although I would not wish to say anything that cast doubt upon that proposition - consider also Section 30(3) of the Employment Tribunal Act 1996. But to look further into that is unnecessary, in my view, because Community law is here relevant and, as I shall explain, in my judgment confers a relevant jurisdiction on the Employment Appeal Tribunal. Again, Article 6 of the Equal Treatment Directive and the **Johnston** and **Coote** cases come into play. As Miss Carss-Frisk argues in her Skeleton Argument:

"If the Applicant is deterred from pursuing her clalm (or from defending an appeal) because she does not have the protection of an Anonymity Order, she does not have an effective remedy."

I agree. Miss Carss-Frisk also argues, as I accept, that:

> "… the Community law principle of effectiveness requires that the Applicant should not be subject to procedural rules which render virtually impossible or excessively difficult the exercise of rights conferred by Community law."

See **Levez supra** [1999] ICR 521 ECJ paragraph 18. I do not see it as necessary to go further and to enquire whether the equivalence principle provides a yet further ground for supposing there to be some implied or inherent jurisdiction of Community origin here available.

26. I would readily accept that it is not every slightest degree of deterrence, every facet of difficulty, which entitles a party so to invoke Article 6 and its consequences. Here, though, the evidence was very clear and all one way. The Tribunal held in their paragraph 3 as follows:

"3. Since being diagnosed transsexual, the applicant has had to change her identity, move to a different location and make new friends who are unaware of her medical history and status. This has been an essential step in her ability to socialise and become accepted within her community. Her ability to do these things is of paramount importance if her treatment is to have a successful outcome. The community within which she had previously lived was hostile and members of it had subjected her to personal abuse, taunts and damage to her property and home. Her ability to find employment, make relationships and integrate with the wider community so that she can live a fulfilling life, depends very much on her personal medical details remaining confidential. The social and personal relationships formed since moving to her new community have allowed her to live a normal life as a woman, without fear of assault, abuse or damage to her home and possessions. It has taken her a number of years to get to know people, form friendships, become accepted and valued within the community and to have the confidence to participate in local functions and charity events. …"

A little later, in their paragraph 5, the Tribunal said:

> "5. If the applicant was identified as a result of these proceedings, she would be alienated from her community. She would be prevented from forming relationships, finding employment and functioning as a woman in the community. Many of her friends would disassociate themselves from her and she would lose the support of her family. Her general practitioner recognises that disclosure of her personal details and the subsequent attention that this would bring could lead to a decline in her health. …"

27. In their paragraph 7 they continue, by reference to the evidence of a senior lecturer in law at Manchester Metropolitan University who is himself a female-to-male transsexual and appears to have made some study of the subject, that:

"7. …For about five years he has provided legal assistance to transsexuals including frequent advice and support to individuals considering presenting claims to Employment Tribunals. His experience is that many such cases never reach the Employment Tribunal because the individuals feels unable to face the social stigma that press reporting can result in and even the harassment and violence which can follow publicity. It is also his experience that to be known publicly, even locally, as a transsexual can make it very difficult to secure alternative employment."

Finally of these quotations from the findings of the Tribunal, in paragraph 9 they say:

> "9. …The issue of anonymity is vital for transsexuals. Not only is there the fear of direct harassment including assault but also the fact that individuals become unable to shake off their old identities which can be a permanently debilitating experience."

28. On that evidence and in these circumstances I see Employment Appeal Tribunal Rule 23 as being defective or inadequate in that it is a procedural rule which, on the facts of the case, leaves as virtually impossible, or extremely difficult, the exercise of rights conferred by Community law. It is important, too, that I bear in mind that the Equal Treatment Directive is, on the facts of this case, directly enforceable as the Police are an emanation of the State. It is that same State that has failed to provide an adequate remedy in Rule 23 and it is that same State which also provides the judge who is required to remedy that defect. I am sitting in a superior Court of Record - Employment Tribunal Act, Section 20(3). Were I concerned only with some domestic area, wholly untouched by statutory rules, no one, I apprehend, would doubt that the Employment Appeal Tribunal would have the ability in such a case to exercise an inherent jurisdiction to protect or preserve due access to and the administration of justice - see, for example, **R v Somerset Health Authority** [1996] COD 244, citing from **R v Westminster City Council Ex-parte Castelli**, which was reported in 1995 TLR 14 August 1995 and [1995] COD 375. See also **Attorney-General v Leveller Magazine** [1979] AC 441, **H v Ministry of Defence** [1991] 2 QB 103 and also **Scott v Scott** [1913] AC 417 at 437 to 439 and 446.

29. The Employment Appeal Tribunal has, by statute, in relation to matters incidental to its jurisdiction, the same rights, powers, privileges and authority as the High Court - section 29(2) of the Employment Tribunals Act 1996. It does, as the ordinary incidental right of the High Court, have an inherent jurisdiction to protect due access to and the due administration of justice in the domestic field. But here the area I am in is not untouched by domestic rules. The Employment Appeal Tribunal is expressly empowered as to RROs but in a very limited way in Rule 23, a way which, on the facts of this case, would not permit an RRO to be made by the Employment Appeal Tribunal. Does the non-availability of relief under Rule 23 exclude any inherent jurisdiction otherwise available? Is it inevitably the case that *expressio unius est exclusio alterius?* In **A v B supra** Mr Justice Morison at page 69 E held there to be a good argument for saying that the EAT did have an inherent jurisdiction beyond that conferred by Rule 23 to make what he called "gagging orders" where such were required for the due administration of justice according to law. He continued, at page 69 F:

"Without exploring the constitutional origins of the inherent powers which such judges from time to time assert, it seems to me that there is a residual inherent jurisdiction. However, even if I had a residual power to make a restricted reporting order, I would not do so on the facts of this case. In general terms I would be chary of asserting a right to make an order which conflicted with what Parliament had expressly laid down. If, as I believe, Parliament has weighed the circumstances in which it would be appropriate to make a gagging order, it would be difficult to justify resorting to an inherent jurisdiction to extend those circumstances. I bear very much in mind the passage in the judgment of Hoffman LT in *Reg v Central Independent Television Plc* [1994] Fam. 192 to which Ms Phillips referred. Press freedom means freedom to publish even when a judge, for good motives, thinks otherwise. Simply because I cannot at the moment rule out the possibility that there might be some special case which might call for the application of the court's inherent jurisdiction, I am not prepared to hold that it would never be appropriate for the court to make a gagging order beyond those circumstances defined in section 31(2) of the Industrial Tribunals Act 1996. But the present case raises no particular or peculiar matters beyond those contemplated by Parliament. I am not persuaded that this case is a case for creative law-making by a judge in the exercise of an inherent jurisdiction. I should make it clear that there can be no question of the industrial tribunals having an inherent jurisdiction: as this appeal tribunal said in *Secretary of State for Employment v Mann* [1996] ICR 197, 204F their jurisdiction is defined by statute and there is no inherent, general or residual jurisdiction'."

30. By contrast, in the case before me there is unrefuted evidence that without an RRO the Applicant, upon reasonable grounds, would be deterred from seeking against an emanation of the State a remedy to which Community law requires the State to provide fair access for her. There is thus a proven objective foundation for the claim for an RRO - compare **R v Legal Aid Board** [1998] 3 WLR 925 at 935 G. If there were no domestic provision at all as to the availability of an RRO an inherent jurisdiction would, as it seems to me, unquestionably here be available. I cannot see that it is excluded by some inadequate domestic provision, inadequate in the sense that the domestic provision fails to ensure access to a Community right, access to which Community law itself requires to be available.

31. Moreover, there is no literal inconsistency between a broader inherent jurisdiction and Rule 23 as Employment Appeal Tribunal Rule 23 does not go to the lengths of saying that an RRO or something like it can be made only where Rule 23 provides. That, as it seems to me, is itself a distinction between the case before me and **Middleton v Middleton** [1994] 3 All ER 236, CA, where there was an inconsistency between the alleged inherent jurisdiction in that case and the express statutory provision. Whether or not there is an inherent jurisdiction of domestic origin, and although it is proper for me to be chary (to use Mr Justice Morison's word), or, given that no opposition has appeared before me, even to be vigilant against the making of an RRO, I see myself as having an inherent jurisdiction of Community origin and, subject to the matters to which I shall next turn, on the undisputed and unusual facts of this case to be able to exercise it.

32. In relation to any possible exercise, of course, I must and do recognise the force of domestic and Community and Human Rights provisions and authorities as to public hearings, freedom of expression and freedom of the press. Such matters have, of course, been brought to my attention. Miss Carss-Frisk has taken me an on quick canter through authorities on the Human Rights aspects, in relation, in particular, to Articles 6, 8, 10 and 14. I do not think it is necessary for me to take up time by referring to them expressly. But it has to be recognised that such matters as freedom of expression, freedom of the press and the right to a public hearing have, in some circumstances, such as those before me, countervailing factors operating, such as freedom from discrimination and respect for privacy and, perhaps most of all, most important in the case before me, the need for access to an effective remedy and the due administration of justice.

33. With some unease, because of the absence of argument to the contrary, in the circumstances found as fact by the Employment Tribunal, I hold the Employment Appeal Tribunal to have a jurisdiction derivable from the Equal Treatment Directive to make an RRO, notwithstanding the existence of a more restricted domestic provision under which an RRO would not be able to be made and that no principle precludes the exercise of that jurisdiction on the facts of this case.

34. The nature of any RRO now to be made by the Employment Appeal Tribunal must be limited so as to do no more than is necessary to enable "A" fairly to assert her Community rights in the Employment Appeal Tribunal. The hearing at the Employment Appeal Tribunal will be in public and reporting will be restricted only so far as it might jeopardise the secrecy so far obtaining in relation to her identity. Such legal principles, if any, as emerge at the substantive hearing at the Employment Appeal Tribunal will, of course, be freely able to be reported. But is an RRO here necessary, given that it is only points of law that will fall for discussion in the Employment Appeal Tribunal, that the decision below is anonymously framed, that disclosure of anything that even hints at a clue to her identity or her whereabouts during the course of the hearing at the Employment Appeal Tribunal is improbable in the extreme, and that the Employment Tribunal's own RRO is in broad terms and (if I am right) still subsists?

35. In my judgment the granting or not of an RRO by the Employment Appeal Tribunal comes down to whether "A" might wish to attend the hearing at the Employment Appeal Tribunal. It would not be right, in my view, to require her to submit herself to the undignified antics of arriving by taxi, covered by a shawl. It is the gap between arrival by taxi or car and entrance within the building that, puts her at risk of being photographed and thus identified after publication of the photograph. If she were to be determined that she would not wish to attend, I would see no need for an RRO to protect her in relation to the Employment Appeal Tribunal's proceedings.

36. However, I raised the question with Ms Harrison and my understanding is that "A" may wish to attend. Indeed, my impression is that it is more likely than not that she will. She attended, of course, at the substantive hearing at the Employment Tribunal because evidence was needed to be given by her but I am told that she also attended at an earlier Directions Hearing at the Employment Appeal Tribunal. She plainly took an interest in the matter and she is entitled, as it seems to me, if she wishes to attend at the Employment Appeal Tribunal, to do so to listen to and respond to and understand the case put for and against her position. I therefore proceed on the basis that she will or may wish to attend. If that is the case, as I take it to be, I see no alternative to an RRO now being made in the Employment Appeal Tribunal. I do not see the continuing present existence of the Employment Tribunal's RRO, which I have held still to be in existence, as necessarily sufficient to protect her. The relative dates of decision of the police's substantive appeal to the Employment Appeal Tribunal and of the Remedies Hearing at the Employment Tribunal are unknown, although, if the Order of 25 June 1999 remains in force, a Remedies Hearing will come first. The Employment Tribunal's role will then be spent. That is not to say that its Order will then be of no further effect but the Originating Application might very well be thought then to have been completely determined: "These proceedings" within the Employment Tribunal's present judgment might then be thought to be over. Even if, as "A" asserts, the Employment Tribunal's Order properly construed still continues thereafter, a newspaper might, given the frame of Section 11(1)(b), take the view that it must have ceased to be effective. The safer course in such circumstances, in my judgment, is for there to be an Employment Appeal Tribunal Order as a bolster, so that the efficacy of "A's" continuing protection should depend on the clear letter of the Employment Appeal Tribunal's Order rather than some fine construction and argument as to jurisdiction in relation to the Employment Tribunal's Extended Reasons. As Monsieur Talleyrand not infrequently remarked, even that which goes without saying may go even better said. So long as the two Orders do not conflict there is no harm in their overlapping.

37. The hearing itself at the Employment Appeal Tribunal will, of course, be in public, as I mentioned. I shall make an RRO and will discuss with Counsel the appropriate form of words to be used which, I again emphasise, must do no more than enable a situation in which "A" is not deterred from defending the Police's appeal or from advancing any cross appeal by the risk of publicity such as might identify her. I do not see it to be right that the form of Order should not give protection beyond the conclusion of the hearing at the Employment Appeal Tribunal and I therefore contemplate that the form of Order to be prepared by Counsel to be such as will be in perpetual terms, protecting "A" from identification as the individual who is or has been concerned in the appeal, namely the Police's Notice of Appeal or any amendment thereof and any cross appeal in relation thereto.

38. Finally, as I was invited to indicate by Ms Harrison, I see this case as sufficiently clear as not to require reference to the European Court of Justice. I shall now ask Counsel to consider (not necessarily here and now but possibly overnight) the appropriate language of the RRO which I have indicated I am willing in principle to make.