



Neutral Citation: [2024] UKFTT 00401 (TC)

Case Number: TC09168

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video

Appeal reference: PRIVATE

*APPLICATION FOR ANONYMITY – test to be applied – sever financial loss – not made out
– risk to health – established – application allowed*

Heard on: 23 April 2024

Judgment date: 17 May 2024

Before

TRIBUNAL JUDGE AMANDA BROWN KC

Between

L

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Michael Firth KC on direct instruction

For the Respondents: Joshua Carey and Sam Way of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was a video hearing using the Tribunal video hearing system. A face-to-face hearing was not held because it was expedient not to do so. The documents to which I was referred were a witness statement prepared by the taxpayer (**Appellant**) together with the documents referred to therein and the skeleton arguments for each side.
2. The hearing was in private, and this judgment is anonymised pursuant to the directions of Judge Cannan.
3. This was an application by the Appellant that:
 - (1) the hearing of their substantive appeal should be in private; and
 - (2) the substantive decision be anonymised so as not to refer to anything that would, or might, enable the identification of the Appellant.
4. As set out in further detail below the Appellant contends that anonymity is justified in the present case on two grounds:
 - (1) that there is a risk of serious financial harm; and
 - (2) a serious risk to health, in particular mental health.
5. HM Revenue & Customs' (**HMRC**) position in the application is neutral.

PRIVATE HEARINGS AND THE PRINCIPLE OF OPEN JUSTICE

6. The starting point in tax cases is to be found in Rule 32 Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (**Tribunal Rules**) which provides that all hearings must be in public subject to the Tribunal's power to give a direction that all or part of the hearing shall be in private where it considers that restricting access to the hearing is justified on the following grounds:
 - “(a) in the interests of public order or national security;
 - (b) in order to protect a person's right to respect for their private and family life;
 - (c) in order to maintain the confidentiality of sensitive information;
 - (d) in order to avoid serious harm to the public interest; or
 - (e) because not to do so would prejudice the interests of justice.”
7. Rule 32 also provides that where a hearing is in private any decision resulting from the hearing must not, so far as practical, disclose information which would undermine the purpose of holding the hearing in private.
8. This rule reflects Articles 6 and 8 of the Human Rights Convention.
9. The principle of open justice is an important one even where holding a public hearing will necessarily involve making private information public. As was said in *Scott v Scott* [1913] AC 417:
 - “The hearing of a case in public may be, and often is, no doubt, painful, humiliating or deterrent both to the parties and witnesses, and in many cases, ... the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in a public trial is to be found, on the whole, the best security for the pure, impartial, and efficient

administration of justice, the best means for winning for it public confidence and respect.”

10. As summarised in *XXX v Camden London Borough Council* [2020] EWCA Civ 1468 (**XXX**) (paragraphs 17 – 21) there are statutory exceptions to open justice (i.e. those which provide for the protection of victims of sexual offences etc) but the court/tribunal’s discretion to direct a private hearing does not represent “a power to create by a process of analogy ... further exceptions to the general principle” “except in the most compelling circumstances” (see paragraph 20 *In re S (A Child) (Identification: Restrictions on Publications* [2004] UKHL 47 (**S**)). Creating exceptions is said to erode the principle which “deters inappropriate behaviour on the part of the court ... maintains the public’s confidence in the administration of justice and enables the public to know that justice is being administered impartially” (*R v Legal Aid Board Ex p Kaim Todner* [1999] QB 966).

11. However, where convention rights are said to be impinged principle of open justice (enshrined in Article 6 and 10) must be balanced against the duty of fairness towards parties and witnesses. Where there is a real and immediate risk of death (Article 2), serious injury or inhumane treatment (Article 3) of a party or witness proceedings must be organised in a way that ensures those rights are not “unjustifiably imperilled” (see paragraph 45 *A v. BBC* [2014] UKSC 25) whilst, so far as practical also ensuring the principle of open justice is respected. .

12. As also confirmed in *XXX* (paragraphs 23 and 24) there is no threshold test to be applied prior to undertaking the balancing exercise.

13. In the context of the present application a particular factor to be weighed when considering the question of fairness is the potential adverse impact on health from a public hearing.

14. In *Michael Adebolajo v Ministry of Justice* [2017] EWHC 3568 (**Adebolajo**) the High Court considered an application for witness anonymity. The Court reviewed the jurisprudence guiding when it is appropriate for a direction for anonymity to be made in the context of serious risk of injury. The Court noted:

(1) by reference to *Re Officer L (Northern Ireland)* [2007] UKHL 36 a positive obligation in respect of an Article 3 right arose only “when the risk is ‘real and immediate’” i.e., one which is “objectively verified’ and is ‘present and continuing’ (see paragraph 21 – 22).

(2) The risk of serious harm to health may arise because of the applicant’s fear or belief in their identity being revealed. That fear or belief must be real and must manifest itself in evidence of harm to health (or conceivably in the context of mental health) to family life (see paragraphs 26 – 30).

15. Further, in *A v British Broadcasting Corporation* [2014] UKSC 25 (**BBC**) it was apparent that the Supreme Court recognised that anonymity would be appropriate to protect the health, including the mental health of a vulnerable person (paragraph 39).

16. A second basis for an application which has been recognised by the courts and tribunals was articulated in *BBC* as where the party seeking anonymity may suffer “commercial ruin” (see paragraph 41).

17. In the context of tax appeals the courts and tribunals have tended to adopt a reasonably hard line on the question of anonymity. In *Banerjee (No 2) v HMRC* [2009] EWHC 1229 (Ch) Henderson J (as he then was) stated:

‘[34] ... In my opinion any taxpayer has a reasonable expectation of privacy in relation to his or her financial and fiscal affairs, and it is important that

this basic principle should not be whittled away. However, the principle of public justice is a very potent one, for reasons which are too obvious to need recitation, and in my judgment it will only be in truly exceptional circumstances that a taxpayer's rights to privacy and confidentiality could properly prevail in the balancing exercise that the court has to perform.

[35] ... taxation always has been, and probably always will be, a subject of particular sensitivity both for the citizen and for the executive arm of government. It is an area where public and private interests intersect, if not collide; and for that reason there is nearly always a wider public interest potentially involved in even the most mundane seeming tax dispute. ... in tax cases the public interest generally requires the precise facts relevant to the decision to be a matter of public record, and not to be more or less heavily veiled by a process of redaction or anonymisation. The inevitable degree of intrusion into the taxpayer's privacy which this involves is, in all normal circumstances, the price which has to be paid for the resolution of tax disputes through a system of open justice rather than by administrative fiat.'

18. This has led to the refusal of anonymity in a plethora of cases.

19. Those cases include *JK v HMRC* [2019] UKFTT 411 (TC) where the taxpayer sought anonymity on the grounds that he had ADHD and various addictions which, if publicly known, would damage the reputation of his business and/or that criminals would target him, blackmailing him or pulling him in to criminal activity because of his addiction, was not sufficient to justify anonymity in an application to bring an appeal late. The Tribunal considered that the balance weighed against anonymity, the taxpayer in that case was not at risk of serious harm to health and his case was predicated on having sufficient capacity to have managed and run his business with reasonable care.

20. One of the factors that the Tribunal has appeared to consider particularly relevant when considering applications for anonymity is the relevance of identity to the tax dispute in question. Thus where HMRC have challenged the deductibility of expenditure on the grounds that it was not incurred wholly and exclusively in connection with the trade carried on by a sole trader, it has been considered that identity is relevant (see *Martin Chunes v HMRC* [2017] UKFTT 204 (TC) which considered costs of cosmetic surgery) and where the issue before the Tribunal concerned tax avoidance (see *Mr A (Moyles) v HMRC* [2012] UKFTT 541 (TC)). Whereas, where the issue to be determined is essentially one of law and the facts are agreed with no need for witness evidence to be called at all, the Tribunal and its predecessors have been more sanguine on the issue (see *Businessman v HMRC* [2003] STC 403).

21. In this latter context, and as demonstrated in the cases of *AB v HMRC* [2011] UKFTT 685 (TC), *Mr A v HMRC* [2015] UKFTT 0189 (TC) and *Mrs A v HMRC* [2022] UKFTT 000421 (TC) the Tribunal has been prepared to grant anonymity in cases where the taxpayer has been party to discrimination cases against their employer in particular in cases where the tax issue has concerned payments made in consequence of such discrimination. Similarly in *A Partnership v HMRC* [2015] UKFTT 161 (TC), concerning VAT recovery in respect of legal costs incurred in connection with a dispute between members of a partnership who wanted to ensure that the nature of the dispute remained private.

22. Finally, it is important to note that HMRC's neutral stance in this application is not sufficient for it to be granted as "unopposed". This is confirmed in *Zeronmska-Smith v United Lincolnshire Hospitals* [2019] EWHC 552 (QB) at paragraph 21. The Tribunal must consider the wider public interest of open justice on behalf of known and unknowable parties who might have objected to anonymity had they been aware of the application which is

necessarily held in private to avoid rendering the application nugatory (see *HMRC v The Taxpayer* [2024] UKUT 12 (TCC)).

RELEVANT FACTS IN THIS APPLICATION

23. I find the following facts from the evidence given by the Appellant in their witness statement and orally together, with three letters from the Appellant's psychiatrist. The Appellant was not cross examined by HMRC.

- (1) The Appellant was previously employed in the financial services sector. Their employment in that sector ended pursuant to a settlement agreement reached following a claim for discrimination.
- (2) The Appellant entered the settlement agreement, thereby agreeing to what they believe was a sum which they considered to be less than that which might have been awarded by an employment tribunal, because the Appellant wanted to avoid a public hearing.
- (3) The Appellant's first psychotic episode was in 2010. That episode was followed by a prolonged period of depression and anxiety lasting in excess of 12 months.
- (4) At that time there was no diagnosis for the symptoms experienced. The episode was triggered by workplace stress and represented what the Appellant considers to have been the foundation for the discriminatory treatment she experienced.
- (5) Following this episode, the Appellant left their employment and sought an alternative career path outside the financial services sector but capitalising on her knowledge and experience in that field.
- (6) A formal diagnosis of bipolar disorder was given some years later following a second psychotic and manic episode induced by a number of stress factors.
- (7) During periods when the Appellant is unwell the risk of suicide is high.
- (8) Following a prolonged period of treatment for the second episode the Appellant was released back into the care of her GP.
- (9) The prospect of a public hearing of her tax appeal has caused increased anxiety, insomnia and irritable mood resulting in reengagement with their psychiatrist. The psychiatrist has adjusted (in the main increased) the Appellant's medication and is of the opinion that "the risk of relapse under stress is high" if required to face the stress of a public hearing.
- (10) On the basis of these findings, I accept that the Appellant is at serious risk of harm to health and possibly even life if the Tribunal were to refuse an application for a private hearing and anonymity.
- (11) Subjectively the Appellant believes that any public hearing of this appeal will have an impact on the prospects of retaining their current employment under a temporary contract and career prospects within the alternative sector in which they now work.
- (12) There is some direct but circumstantial evidence that those who have brought discrimination challenges against their employers in the financial services sector (but not the new sector in which the Appellant now works) find it more difficult to gain employment and, certainly equivalent employment, but not sufficient to satisfy me that the risk that the Appellant unquestionably fears would materialise.

DISCUSSION

24. The starting point is that the substantive hearing of this appeal “must be in public” subject to the exceptions listed in Rule 32 of the Tribunal Rules. Of those (b) protection of private/family life, (c) maintaining confidentiality of sensitive information and (e) not holding a private hearing would prejudice the interests of justice, are all potentially relevant.

25. I must balance the underlying principle which holds the tax tribunals and thereby HMRC to account, ensuring that the correct amount of tax is collected against the factors identified. I have in mind in particular, that the test in Rule 32(e) Tribunal Rules requires there to be an injustice in not granting application.

26. As set out in paragraph 23.(10) I have accepted that the Appellant is at serious risk of harm to health. I consider that this is a factual conclusion not simply based on the Appellant’s subjective fear that harm would be caused, but one based on an objective assessment of likelihood given the nature of the Appellant’s condition and the circumstances that induce it. In accordance with the jurisprudence considered, and in particular *Adebolajo* I would have been entitled to reach the same conclusion simply having accepted the evidence that the Appellant’s fear was a real one to them.

27. In light of the approach to the balancing exercise I consider that this risk is a factor which weighs heavily both in the context of Rule 32(b) and (e). That is particularly so given that even if anonymised the judgment written by Tribunal hearing the substantive case will not be inhibited in exploring the relevant legal issues to be determined for the benefit of the wider public’s use and relevance of the judgment.

28. I therefore allow the application on this ground.

29. I consider that conclusion is also supported by reference to Rule 32(c). Whilst I was not shown a copy of the settlement agreement it is reasonable to expect that it includes a confidentiality clause and a clause in which the former employer made the settlement payment without admission of liability. At least in part because the former employer will not be party to the tax appeal, I am conscious that critical details of the agreement will need to remain confidential and one of the most convenient means of doing so is to anonymise the hearing and the judgment. Terms of the agreement which are relevant to the tax issue may then more conveniently be referred to for the benefit of those persons other than the parties when reading and understanding the taxing outcome determined by the Tribunal.

30. I am less convinced of the case for anonymity based on the perceived commercial impact of a public hearing. It is plain from *Adebolajo* that a subjective fear of serious physical harm may be sufficient to justify anonymity. However, I take the view that, in the context of tax cases where frequently the sums in dispute are significant (either in absolute or relative terms), to allow anonymity on the basis of a fear of commercial consequences based on circumstantial assertion is significantly more challenging.

31. I do not need to determine this issue because I have decided to grant anonymity on the basis of serious risk to health. However, were I have needed to do so, and in order to have considered the commercial aspects of this case to have weighed sufficiently strongly against the principle of open justice, I would have wanted more evidence as to the objective reasonableness of the unquestionable subjective fear of the commercial risk before deciding the case on that basis. I accept that there are challenges in obtaining direct evidence that prospective employers are less likely to employ or that career paths will be thwarted by prejudice but would certainly have wanted to consider the issues and possible available evidence more deeply.

32. I do not consider the limited and historic evidence that previous Tribunals have granted anonymity for commercial reasons (distinct from commercial sensitivity) to be sufficient to have determined this case on the basis of a commercial risk.

DISPOSITION

33. For the reasons given I allow the application.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

34. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**AMANDA BROWN KC
TRIBUNAL JUDGE**

Release date: 17th MAY 2024