Appeal No. UKEAT/0540/12/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
On 15 November 2012
Judgment handed down on 12 February 2013

Before

THE HONOURABLE MRS JUSTICE COX

MR A HARRIS

MR S YEBOAH

MRS S SINGH — APPELLANT

READING BOROUGH COUNCIL &
GOVERNING BODY OF MOORLANDS PRIMARY SCHOOL — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS HEATHER WILLIAMS (One of Her Majesty's Counsel) & MS ALTHEA BROWN (of Counsel) Instructed by: Messrs Bindmans LLP 275 Grays Inn Road London WC1X 8QB
For the Respondents	MR ROBIN ALLEN (One of Her Majesty's Counsel) & MS AKUA REINDORF (of Counsel) Instructed by: Reading Borough Council Legal & Democratic Services Civic Centre Reading Berkshire RG1 7AE

SUMMARY

UNFAIR DISMISSAL - Constructive unfair and discriminatory dismissal

RACE DISCRIMINATION

PRACTICE AND PROCEDURE - Judicial proceedings immunity

The Claimant headteacher is alleging in proceedings currently adjourned part-heard that she was the victim of a concerted campaign of racial discrimination, harassment and victimisation, pursued by parents, staff and governors at the school, and encouraged by senior employees of the council, in order to remove her from her post.

Before the hearing began the Respondents served a witness statement from the School Business Manager, who is to be called as a witness on their behalf. The Claimant alleges that the statement contains lies as a result of improper pressure being put upon the witness by the Respondents to make a statement unhelpful to the Claimant. The Claimant resigned from her employment and her ET1 was amended to include claims of constructive dismissal.

The ET held on a PHR that the contents of this witness statement and the conduct connected with its preparation attracted absolute judicial proceedings immunity; that the Claimant could not rely upon this allegation in support of her complaints of constructive dismissal; and that the offending paragraphs of her amended claim should be struck out, on the basis that there was no jurisdiction to determine them.

On the Claimant's appeal, on the basis that the ET erred in holding that the immunity applied in these circumstances, the law relating to judicial proceedings immunity and its rationale was considered in detail. On analysis the Tribunal's reasoning and conclusions were held to be correct. The appeal was therefore dismissed.

THE HONOURABLE MRS JUSTICE COX

Introduction

1. This appeal concerns the scope and application of judicial proceedings immunity.

2. The issue has arisen in the course of proceedings before the Reading Employment Tribunal, currently adjourned part-heard. The Claimant, formerly the Headteacher at Moorlands Primary School, alleges that she was the victim of a concerted campaign of racial discrimination, harassment and victimisation, pursued by parents, staff and governors at the school and encouraged by senior employees of Reading Borough Council, in order to remove her from her post.

3. Before the Tribunal hearing began, and while the Claimant was still employed as Headteacher, the Respondents served a witness statement from the School Business Manager and Clerk to the Governing Body, Sue Heath, who is to be called as a witness on their behalf. The Claimant believes that the statement contains lies, and that this is the result of improper pressure being put upon Ms Heath to make a statement unhelpful to the Claimant.

4. Following service of this witness statement the Claimant resigned from her employment, claiming that this was the 'final straw' in terms of her treatment by the Respondents. Her extant Tribunal claim was subsequently amended to include claims of constructive dismissal.

5. In their reasoned judgment, received by the parties on 19 October 2012 after a Pre-Hearing Review, the Employment Tribunal held that the contents of this witness statement and the conduct connected with its preparation attracted absolute judicial proceedings immunity; that Ms Heath could not be required to give any evidence relating to the allegation of improper

pressure; and that the Claimant could not rely upon this allegation in support of her complaint of constructive dismissal. The Tribunal struck out various paragraphs of her amended claim which, in accordance with their ruling, they considered they had no jurisdiction to determine.

6. In contending that this decision is wrong Heather Williams QC, appearing for the Claimant, submits that the immunity principle does not apply in the particular circumstances of this case, given the nature of the wrongdoing alleged and the fact that the amended claim reflects a continuing course of conduct by the Respondents, which has ultimately destroyed the employment relationship. On behalf of the Respondents, Robin Allen QC submits that the immunity is absolute; that the Claimant cannot get around it; and that the judgment of the Tribunal is plainly correct.

7. There was extensive citation of authority by both counsel in this appeal, in support of their submissions on the rationale for the immunity and its reach. Helpfully, their detailed written submissions and succinct oral submissions enabled us to conclude the hearing in the one day allocated, and reserve judgment to consider the competing arguments.

The relevant background

8. The Claimant, who describes herself as a non-white British citizen of Indian origin, was appointed Headteacher of Moorlands Primary School, a community school maintained by Reading Borough Council (the Council), with effect from 1 September 2009. This was her first appointment as Headteacher. She was employed by the Council, but the Governing Body of the school had statutory responsibility for the Claimant's appointment and for the management of her performance and the implementation of policies regulating the employment relationship, including grievance, capability and disciplinary procedures.

9. One of the members of the Senior Leadership Team at the school is Sue Heath, the School Business Manager and Clerk to the Governing Body. In that capacity Ms Heath worked closely with the Claimant, and it is common ground that they enjoyed a good working relationship.

10. During the Claimant's first year as Headteacher serious difficulties arose in her relationships with parents, members of staff and governors, including the Chair of the Governing Body. The Claimant alleges in her ET1 that, right from the start, she was met with hostility and aggression in response to her attempts to take forward the strategic management of the school. Specifically, she alleges that the governors "*deliberately endorsed a targeted campaign of discrimination, bullying, harassment and victimisation*" against her as an Asian head teacher; and that her employers, through the Head of School Improvement and the School Leadership Development Manager at the Council, "*deliberately and unlawfully endorsed a targeted campaign of discrimination, bullying and harassment and victimisation against her to remove her as head of Moorlands Primary School.*"

11. The Respondents deny all the allegations. They contend, essentially, that the serious breakdown in relationships was due to the Claimant's autocratic style of leadership and her poor communication skills.

12. For the purposes of this appeal it is unnecessary to refer to the factual allegations and responses in any detail. The Claimant's ET1 runs to almost 30 pages. There is extensive factual dispute between the parties and the claim is currently adjourned part-heard.

13. However, to understand the context for the appeal it is necessary to refer to events leading up to the Claimant's decision to issue her ET1 on 14 September 2010, and to

summarise the procedural history thereafter, which is not in dispute. These events are based on the pleaded cases, the skeleton arguments, the agreed chronology and the reasoned decisions of the Employment Tribunal following the various Case Management Discussions (CMDs) held since the proceedings began.

14. On 14 June 2010, towards the end of the Claimant's first year as Headteacher, and after various problems which form the subject of her allegations, the Respondents received a petition signed by approximately 170 parents, expressed to constitute a vote of no confidence in the Claimant. On 16 June the Council decided to appoint an independent investigator, Ms Barnes-Vachell, to conduct a review of the school.

15. In her interim report, sent by email on 2 July, Ms Barnes-Vachell expressed serious concerns about the school, referring to it as "a school at risk" and describing an air of chaos. In her opinion, neither the Claimant nor the Assistant Headteacher was capable of making clear and coherent decisions. She recommended that the Claimant be removed from her post pending the outcome of the review.

16. The Council, as the Claimant's employers, asked the Claimant to take a period of voluntary paid leave pending the outcome of the review. The Claimant sought advice from her union representative and agreed to take leave. She remained on leave for the rest of the summer term.

17. Ms Barnes-Vachell presented her final, draft report to the Claimant and the Respondents on 18 July. In that report she referred to the number of members of staff who had left since the Claimant joined the school, and she identified a number of serious problems relating to the

Claimant's management style and interpersonal skills, her strategic management and performance, and her behaviour management.

18. The Claimant alleges that this report was neither informed nor impartial, and that the integrity of the investigation was undermined by the investigator's failure to act fairly, in circumstances where the Claimant was on leave and was unable to refute the findings until the evidence gathered was provided to her.

19. On 21 July, understanding that capability proceedings were to be started against her, the Claimant lodged a formal grievance complaining of race discrimination and victimisation, including allegations against the Council relating to the conduct of the investigator's review.

20. Work on the review was halted, pending resolution of the Claimant's grievance and, on 3 September, an external consultant, Minna Nathoo, was appointed to investigate the grievance. Interviews with thirty people, including the Claimant and Sue Heath, were tape recorded and transcribed during this investigation, which continued until December 2010.

21. Meanwhile, after the Claimant returned to school at the start of the autumn term, the problems persisted and escalated. The Claimant alleges that she faced continuing harassment, from parents and others who wanted to remove her from her post. On 6 September, approximately thirty to forty parents contacted the Governing Body to inform them that they were going to withdraw their children from the school. On 13 September the Council's Education Department issued a Formal Warning Notice to the school under section 60(2) of the **Education and Inspections Act 2006**, on the basis that there had been a serious breakdown in the way that the school was managed or governed.

22. On 14 September 2010 the Claimant issued her ET1, complaining of race discrimination, harassment and victimisation against her by both Respondents. The allegations reflected those already made in her grievance. On 15 October the Respondents filed a detailed ET3 denying all the allegations.

Events leading up to the Claimant's resignation

23. On 1 November 2010 the Claimant commenced a period of sick leave, which continued until 31 August 2011. In December 2010 Ms Nathoo concluded her investigation and produced her report. No aspect of the Claimant's grievance was upheld. The Claimant did not pursue an appeal against the outcome of her grievance.

24. At a CMD before the Tribunal, on 27 April 2011, the Claimant's claim was fixed for hearing with a time estimate of five weeks, commencing on 27 February 2012.

25. On 1 September 2011 the Claimant commenced a period of maternity leave, which was due to expire on 17 July 2012.

26. The Claimant states that she telephoned Sue Heath on 22 and 26 November 2011, to ask if she would be a witness for her at the hearing. She received a text message from Ms Heath on 26 November, which read as follows: "*Dear Sudhana, I have been instructed to have no contact with you and to refer you to Sonal Khimji at rbc, regards Sue*".

27. On 31 January 2012 witness statements were exchanged in readiness for the forthcoming hearing. The statements served by the Respondents included a witness statement from Sue Heath.

28. By letter to the Chair of the Governing Body, dated 17 February 2012, the Claimant resigned from her employment by notice expiring on 17 July 2012. She referred to having suffered psychiatric injury, as a result of her treatment by the Respondents. In addition she stated, materially, as follows:

> **"By reference to all the complaints of discrimination I have raised previously I have effectively been dismissed from my post and I have no alternative but to resign. We recently exchanged witness statements for the Tribunal and the statement from Mrs Susan Heath is ridden with blatant lies, and I believe that she has been forced to provide such a statement of 'untruths' deliberately and directly to undermine me for the purposes of the tribunal claim. I believe this conduct to be unacceptable and demonstrative of bad faith on the part of my employer and in breach of the duty of trust and confidence and fidelity. When I read Mrs Sue Heath's statement I was shocked and deeply upset and my health very quickly deteriorated. I regard this as the latest in a series of acts whereby I have been discriminated against and victimised for having raised my complaints of discrimination …**
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> **…I am deeply devastated that the Governing Body that you Chair and Reading Borough Council has failed to exercise its duty of care for me throughout my tenure and which makes my position now untenable due to a very clear breakdown in the trust and confidence between us."**

Subsequent procedural history

29. On 17 February 2012 the Claimant applied to the Tribunal to amend her ET1, to add a complaint of constructive discriminatory dismissal and to allege that she had suffered psychiatric injury as a result of her treatment. At that time her proposed, amended particulars of claim made no reference to Sue Heath's witness statement, or to the allegation concerning that statement made in her resignation letter of the same date. In fact, in relation to the claim of constructive discriminatory dismissal, the Claimant did not rely on any acts post-dating the lodging of her ET1, some 17 months earlier.

30. The Respondents' solicitors objected to the proposed amendment and queried whether, in relation to constructive dismissal, the Claimant was intending to rely on any events since September 2010.

31. The Claimant's solicitors replied, so far as is relevant,

> **"…For the avoidance of doubt, in accordance with the judicial direction set out in *Parmar v East Leicester Medical Practice* (2011) it is not alleged that the witness statement of SH provides the basis for a cause of action. That however does not preclude the fact that the Claimant has suffered psychiatric harm because of the discrimination alleged and is vulnerable to that condition being triggered and exacerbated. The Claimant does not rely on any acts of discrimination in these proceedings which post date 14 September 2010."**

32. However, the Claimant's solicitors then served Re-Amended Particulars of Claim by letter dated 23 February, in which the Claimant stated that she was also claiming constructive unfair dismissal under section 95(2) of the **Employment Rights Act 1996**. She relied in this respect on all the allegations pleaded in her original ET1 and added the following further paragraph:

> **"86. The Claimant further relies on the Respondent's conduct in placing undue pressure on Mrs Sue Heath to produce a witness statement containing false or otherwise inaccurate evidence for the purpose of these proceedings."**

33. The application to amend was opposed. The first day of the hearing was converted into a CMD, with the substantive hearing directed to be held from 8 to 30 March 2012. The Claimant's application to amend was rejected on various grounds, including the fact that her claim for constructive discriminatory dismissal was premature, having been brought before the expiry of the Claimant's notice on 27 July.

34. The Employment Judge observed at paragraph 25 of his reasons,

> **"I am further persuaded that as it appears that the 'final straw' relied on by the Claimant in resigning is her perception of the circumstances in which she believes Mrs Sue Heath's witness statement was obtained, she is seeking to rely on a cause of action which attracts absolute judicial proceedings immunity in accordance with the case of *Parmar*. Indeed the Claimant's solicitors themselves appear to accept this point on 20 February 2012 although they subsequently resiled from that position. The Claimant's case on this appears to be simply a perception and there is no detail given of any particulars of any substantiating evidence … "**

35. On 7 March 2012 the Claimant lodged an appeal to the EAT, challenging the refusal to allow the amendment of her claim. On 8 March her appeal was rejected on the sift, pursuant to

rule 3(7) of the EAT Rules. On 8 March the Employment Tribunal refused the Claimant's application for a postponement of the re-listed hearing, pending her application for a rule 3(10) hearing, but in the event, no such application was made.

36. The substantive hearing of the Claimant's original ET1 therefore began on 9 March 2012. The Claimant and her witness and two of the Respondents' witnesses gave evidence to the Tribunal. The hearing was then adjourned part-heard on 30 March. It was listed to continue over a further 14 days fixed in October and November 2012.

37. At the Tribunal on 30 March the Claimant indicated that she would seek to renew her application to amend her ET1 to add her constructive dismissal claims. A further CMD was fixed for 30 July, on the basis that, by then, the Claimant's notice period would have expired, and time would have started to run for her constructive discriminatory dismissal claim.

38. Curiously, on 15 May 2012, the Claimant lodged two further ET1s complaining of constructive unfair dismissal and constructive discriminatory dismissal, at which point the constructive discriminatory dismissal claim was still premature. Only one of these claims referred to the 'final straw' allegation. The Respondents lodged ET3s in response, contending that the fresh ET1s amounted to an abuse of process. They repeated their contention that the Tribunal had no jurisdiction to determine the 'final straw' allegation because of absolute judicial proceedings immunity.

39. It is common ground that the Claimant's employment terminated on 17 July 2012.

40. At the CMD on 30 July the Claimant withdrew both fresh ET1s and applied for permission to amend her original ET1 to add both constructive dismissal claims, including the

'final straw' allegation. That application was granted. Referring to that allegation, the Tribunal said this at paragraph 15:

> **"… in the Tribunal's view, whilst the Claimant is entitled to make that allegation, the Tribunal will be bound to apply the provisions of Parmar v East Leicester Medical Practice at the trial of these issues and to act in accordance with that case when hearing the evidence. There appears to the Tribunal to be a slight distinction in the facts of this case as opposed to the facts of Parmar in that the Claimant in this case is not pursing a claim against Mrs Heath personally, although the Claimant is clearly making allegations in relation to what is in Mrs Heath's statement, and that will cause the provisions of Parmar to come into play when the Tribunal hears the evidence in this case."**

41. The Claimant was also ordered to set out

> **"…fully in the amended pleading what specific facts and matters the Claimant relies on in coming to the conclusion that it was the Respondent's conduct that placed undue pressure on Mrs Sue Heath to produce a witness statement containing false or otherwise inaccurate evidence for the purposes of these proceedings."**

42. The relevant allegation now pleaded in the Claimant's re-amended particulars is as follows:

> **"9. The Claimant further relies on the Respondent's conduct in placing undue pressure on Mrs Sue Heath to produce a witness statement containing false or otherwise inaccurate evidence for the purpose of these proceedings. Mrs Heath is employed by the First Respondent as Business Manager and Clerk to the Governors. Mrs Heath is in a subordinate post to Ms Kate Rex, Lynda Miller, Kim Bergamasco, Anna Wright. Mrs Heath is directly supervised by and works with Ms Kate Rex and the First Respondent but her role means that she would have regular working relationship with all those referred to. Each of these individuals is identified by the Claimant as bearing responsibility for the discrimination she has suffered.**
>
> **10. The Claimant refers to the transcript of Mrs Heath's interview** [by Minna Nathoo] **… and the various contemporaneous emails and letters produced by Mrs Heath which reveal material inconsistencies with the witness statement produced for the purpose of these proceedings.**
>
> **11. From September 2009 the Claimant looked upon Sue Heath as a trusted confidant in the workplace. They enjoyed a professional relationship and the Claimant trusted her implicitly …"**

After setting out, at paragraphs 12 to 20, detailed particulars of incidents in which Sue Heath is said to have shown support for the Claimant, or to have expressed concern about the way the Claimant was being treated, the Claimant pleads as follows at paragraphs 21 to 23:

> **"21. The Claimant refers to her resignation letter and further pleads that she has formed the view that the Respondents have placed undue pressure on Sue Heath because the Claimant had asked Sue Heath if she would give evidence in support of the Claimant witness in this tribunal. Mrs Heath agreed and said that she would give evidence as a witness in support.**
>
> **22. Mrs Heath sent the Claimant a text message on Saturday 26 November 2011 at 9:32 and read 'Dear Sudhana, I have been instructed to have no contact with you and to refer you to Sonal Khimji at rbc, regards Sue' such an instruction was unreasonable and placed Sue Heath under undue influence. Mrs Heath was ordered not to communicate with the Claimant and she felt compelled to comply. It follows that Mrs Heath was not free to express herself in her witness statement.**
>
> **23. The Claimant had always regarded Sue Heath as a person of integrity and she was distressed and frankly broken to realise that a person of Sue's integrity could be coerced under threat of her job to lie for Reading. The Claimant does not believe that Mrs Heath would have made such a statement but for pressure from her employers. The Claimant believes that the concern Sue Heath had expressed for the Claimant's health and wellbeing was entirely genuine as was her indignation at the Claimant's treatment by the Respondents throughout her headship …"**

43. In their written response, the Respondents contend that absolute judicial proceedings immunity attaches to the witness statement of Sue Heath; that the Claimant is not entitled to found a cause of action upon it; and that the complaint is not justiciable.

44. Although they deny the allegations of impropriety, the Respondents criticise the amended claim for containing no particulars of her allegations and for pleading no positive case in support of the charge that the Respondents, or either of them, placed Sue Heath under pressure or coercion in relation to her witness statement. Nor does the Claimant identify the person or persons who are said to be responsible for applying such pressure. No positive facts are pleaded in support of the serious allegation that Sue Heath made this statement "*under threat of her job*". In our view, there is some merit in these criticisms, a point to which we shall return later on in this judgment.

45. Mr Allen makes a further, general submission as to the difficulties faced by the Claimant in respect of the claims added by way of amendment in July 2012. Without the 'final straw' allegation now being advanced, the course of conduct she relies upon as amounting to a repudiatory breach of contract ended in September 2010. Mr Allen submits that it had therefore lost its potency as a course of conduct which could be accepted by her resignation 17 months

later, in February 2012. The period in which the Claimant could decide whether to affirm her contract or resign was long past.

46. In any event, he submits that the Claimant has clearly affirmed her contract during this period by drawing her salary, claiming sick pay and availing herself of the contractual provisions for maternity leave. In seeking to rely on the witness statement as a recent 'final straw', in order to pursue constructive dismissal claims, Mr Allen submits that the Claimant has had to try and persuade the Employment Tribunal that the judicial proceedings immunity rule did not apply to her new allegation, when it plainly did.

47. The Claimant denies that her reliance on Sue Heath's statement is any form of tactical device. She contends that what has happened here demonstrates that improper pressure was applied to Ms Heath, in order to persuade her to make a false statement adverse to the Claimant; that this was part of a continuing course of conduct by the Respondents against her, in breach of the implied term of trust and confidence and arising from the same facts as relied on in the original claim; and that in these circumstances the immunity rule does not apply.

48. At a CMD held on the first day of the resumed hearing, on 8 October, it was agreed that the Tribunal would reconsider the immunity point with the benefit of full argument at a Pre-Hearing Review (PHR) on 10 October. The present appeal is against the Tribunal's judgment following that hearing. Given that we heard full argument on the immunity, and that the case is currently adjourned part-heard, we shall say nothing further in respect of Mr Allen's general submission as to the Claimant's reasons for advancing the final straw allegation in pursuing her constructive dismissal claims. We shall determine this appeal on its merits.

The Tribunal's Decision

49. The Tribunal's judgment was formally recorded in the following terms:

> **"1. The contents of the witness statement of Mrs Sue Heath and the conduct connected with the preparation of the witness statement of Mrs Sue Heath, attract absolute judicial proceedings immunity.**
>
> **2. Accordingly, the Respondents' witness, Mrs Sue Heath, cannot be required to give any evidence in relation to the allegation that undue pressure was placed on her to produce a witness statement containing false or otherwise inaccurate evidence for the purposes of these proceedings.**
>
> **3. The Claimant cannot rely on the last straw allegation made in her claims of constructive unfair dismissal and the Tribunal must strike out those parts of the amended claim, which it has no jurisdiction to consider because of the application of absolute judicial proceedings immunity. Accordingly the Tribunal strike out paragraphs 9, 10, 21, 22 and 23 of the amended claim."**

50. The Tribunal accepted the Respondents' submissions. In summary, they concluded that the pleaded allegation related to conduct in the course of the existing proceedings, in that the constructive dismissal claims arose because of words contained in a witness statement prepared and served in the course of those proceedings; that the rule of absolute judicial proceedings immunity was therefore engaged; and that the Claimant was seeking to found a cause of action as a result of the manner in which she alleged evidence in a witness statement had been obtained for trial, and her reaction to it. That evidence, and the Claimant's pleaded allegations concerning it, had to be excluded in accordance with the immunity rule, and they had no discretion to come to any other conclusion.

51. The Tribunal held that the fact that Sue Heath was not herself a party to the proceedings was irrelevant. Further, the Claimant was wrong to categorise this allegation as a fresh claim arising out of the same facts. The pleaded allegation concerned conduct by the Respondents which was subsequent to the matters pleaded in the original proceedings. The Claimant's allegation, if true, could arise only as part of the Respondents' participation in the judicial process. Her complaint was not about what witnesses were doing prior to the beginning of the judicial process, but related directly to conduct in the course of that process. There was no need

for the Tribunal to hear all the evidence before determining the point, because it was clear on the authorities that the immunity rule applied.

52. The Tribunal also held that the allegation was in any event inadequately particularised and that, where undue influence was pleaded, the alleged wrongdoers should be identified.

53. At paragraph 71 of their reasons the Tribunal said this in respect of their decision:

> **"Whilst that may on the facts of this case appear to result in a harsh outcome it is clear from both the Parmar and Dathi cases that that does not mean that a person who has been discriminated against during the course of legal proceedings is without remedy. The conduct of a party in an Employment Tribunal is relevant to the issue of costs which may be awarded for unreasonable conduct in the proceedings, see rule 40(3) an award for injury to feelings can be made and it can be increased by an award of aggravated damages. A claim or a response can be struck out on the grounds that the manner in which the proceedings have been conducted has been scandalous, vexatious or unreasonable under the provisions of rule 18(7). A witness, and more particularly a party, are not protected by the policy behind the judicial proceedings immunity rule from all adverse consequences of their conduct. They can be prosecuted for perjury or sued for malicious prosecution."**

54. Acknowledging that application of the principle may in some circumstances appear to produce harsh results, the Tribunal described it as the price to be paid for what was clearly a long-standing principle of public policy.

55. Having pronounced their judgment orally, the Tribunal then sought the parties' views on the practical impact of their decision and on the striking out of those paragraphs in which the relevant allegation was pleaded. In striking out the paragraphs identified at paragraph 3 of their judgment the Tribunal stated their reasons for doing so at paragraphs 73 to 74, in the following terms:

> **"73. …The Tribunal sought the parties' views on its proposals to strike out those paragraphs. The Tribunal considered that was necessary because having determined that judicial proceedings immunity applied it could not allow to remain pleaded those parts of any claim which it did not have jurisdiction to consider. The Tribunal gave the parties' representatives time to consider the points. For the Claimant Ms Brown understandably said that in the circumstances she was unable to make any meaningful submissions on the strike out of pleadings in the absence of the reserved reasons. Ms Reindorf was content with the Tribunal striking out the paragraphs identified. The Tribunal's rationale for deleting the pleaded**

paragraphs is as follows. Paragraph 9 relies on the Respondents' conduct in placing undue pressure on Mrs Sue Heath to produce a witness statement containing false or otherwise inaccurate evidence for the purpose of these proceedings. Because the contents of the witness statement of Mrs Sue Heath and the conduct connected with the preparation of that witness statement attract absolute judicial proceedings immunity that paragraph must be struck out. Paragraph 10 is also struck out. That is because it follows on from paragraph 9 and specifically refers to the witness statement. Paragraphs 21, 22 and 23 are struck out because they all refer to the allegation that the Respondent has placed undue pressure on Sue Heath in relation to the witness statement.

74. That does not prevent the Claimant's counsel from cross-examining Mrs Sue Heath and other witnesses for the Respondent as to their credibility and this can be done with reference to documents in the agreed bundle … However, what must not be put to Mrs Sue Heath or any of the Respondents' witnesses in cross-examination are any questions that engage the circumstances in which that statement came to be prepared."

The Tribunal emphasised that they were not striking out the claims of constructive dismissal, pointing out that the Claimant was entitled to rely on all those matters already pleaded in her Particulars in support of those claims.

56. The Claimant then lodged this appeal. In a telephone CMD on 23 October the Employment Tribunal refused the Claimant's application for the resumed hearing, then due to restart on 5 November, to be adjourned pending the outcome of this appeal. The Tribunal further ordered that the constructive dismissal claims were to be stayed, pending determination of the appeal. This resulted in a further appeal by the Claimant against that order (Appeal no. UKEAT/1762/12/RN), to which we shall refer again briefly at the end of this judgment.

57. The Claimant's substantive appeal on the immunity point was initially rejected on the sift but, following oral submissions at a rule 3(10) hearing, permission was given for her grounds of appeal to proceed to a full hearing. In the event, the Claimant's substantive appeal has regrettably, but inevitably resulted in the further dates fixed for the resumed Tribunal hearing in November being ineffective.

The appeal

58. For the reasons advanced at paragraphs 18.1 to 18.10 of the grounds of appeal, which are said to be both cumulative and free-standing, Ms Williams submits that the Tribunal erred in striking out the relevant paragraphs from the amended claim on the basis that pursuit of these allegations would infringe the principle of judicial proceedings immunity.

59. Her core proposition is that the Tribunal erroneously extended the ambit of the immunity beyond the proposed evidence of Sue Heath, as contained in her witness statement, to encompass the actions of those said to have improperly pressurised her into giving a false account. Ms Williams submits that the Tribunal failed to identify any rationale, let alone any necessity for such an extension, in circumstances where the immunity runs counter to another important principle of public policy, that those who suffer a wrong should have a right to a remedy. While not disputing the origins and early development of the immunity rule, Ms Williams submits that the more recent authorities establish that the application of an immunity which denies a remedy to the victim of a wrong is an exceptional course requiring strict and cogent justification, and that no justification was, or could be advanced in the circumstances of this case.

60. Mr Allen's submission is that the Tribunal were correct to hold that absolute judicial proceedings immunity applied; that the rule cannot be outflanked by an allegation of the kind being made in this case, or by the pleading devices the Claimant has sought to deploy in order to avoid its effect; and that none of the authorities relied on by the Claimant supports her submission that the immunity rule does not apply, or that the Tribunal erroneously extended its ambit.

61. In support of their submissions counsel for both sides cited extensive authority, often relying on different passages in the same cases. We consider that we should determine the central dispute as to the current nature and scope of the immunity and its application in this case, before finally addressing the individual grounds of appeal, because resolving that dispute will largely determine the validity of the Claimant's challenge. We stress that, although we do not refer in this judgment to all the authorities relied upon in argument, we have had regard to all of them in determining the dispute and the issues raised in this appeal.

Judicial proceedings immunity

62. Recently, this common law rule has featured in two judgments of the EAT, to which the Employment Tribunal referred, namely **South London Maudsley NHS Trust v Dathi** [2008] IRLR 350 and **Parmar v East Leicester Medical Practice** [2011] IRLR 641. However, judicial proceedings immunity has a long pedigree. In what may well be a first for the EAT we were taken to a line of authority beginning in the 16th century with **Cutler v Dixon** (1585) 4 Co Rep 14b.

63. We agree with Ms Williams that the classic description of the rule in modern case law is that given by Lord Hope in **Darker and others v Chief Constable of the West Midlands Police** [2001] 1 AC 435 at 445H:

> **"This immunity, which is regarded as necessary in the interests of the administration of justice … is shared by all witnesses in regard to the evidence which they give when they are in the witness box. It extends to anything said or done by them in the ordinary course of any proceeding in a court of justice. The same immunity is given to the parties, their advocates, jurors and the judge. They are all immune from any action that may be brought against them on the ground that things said or done by them in the ordinary course of the proceedings were said or done falsely and maliciously and without reasonable and probable cause: *Dawkins v Lord Rokeby* (1873) LR 8 QB 255, 264, per Kelly CB. The immunity extends also to claims made against witnesses for things said or done by them in the ordinary course of such proceedings on the ground of negligence."**

64. The public policy grounds underlying this immunity are essentially twofold. First, per Fry LJ in **Munster v Lamb** (1883) 11 QBD 588, explaining why it was that no action lay against judges, counsel, parties or witnesses for things said and done falsely or maliciously in the course of any proceeding in a court of justice,

> **"The rule of law exists, not because the conduct of those persons ought not of itself to be actionable, but because if their conduct was actionable, actions would be brought against judges and witnesses in cases in which they had not spoken with malice, in which they had not spoken with falsehood. It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law; but it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty. It must always be borne in mind that it is not intended to protect malicious and untruthful persons, but that it is intended to protect persons acting bona fide, who under a different rule would be liable, not perhaps to verdicts and judgments against them, but to the vexation of defending actions."**

65. Second, per Lord Wilberforce in **Roy v Prior** [1971] AC 470 at 480,

> **"The reasons why immunity is traditionally…conferred upon witnesses in respect of evidence given in court, are in order that they may give their evidence fearlessly and to avoid a multiplicity of actions in which the value or the truth of their evidence would be tried over again."**

66. Further, since the immunity would be worthless if it were confined to the actual giving of evidence in court, (per Lord Clyde in **Darker** at 458D), the House of Lords decided, in **Watson v M'Ewan** [1905] AC 480, that the immunity also protected a witness against the consequences of statements he has made to a party, or to the legal representatives, in preparing his proof of evidence for trial. The Earl of Halsbury LC explained why this was an important element of the immunity (at 487),

> **"It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must as a necessary consequence involve that which is a step towards and is part of the administration of justice - namely, the preliminary examination of witnesses to find out what they can prove. It may be that to some extent it seems to impose a hardship, but after all the hardship is not to be compared with that which would arise if it were impossible to administer justice, because people would be afraid to give their testimony.**
>
> **My Lords, the hardship to which I refer is this: that although when a witness does give evidence which is wilfully false you can indict him for perjury, on the other hand, if he makes the same statement not upon oath to a person taking down the evidence he is prepared to give, it seems to be very difficult to devise anything that would bring him to justice for that false statement. The answer, of course, dealing with it as a matter of convenience and indeed of necessity for the administration of justice, I suppose, is this:**

> **unless he does give evidence in a Court of justice, in which case he can be indicted for perjury if his evidence is wilfully false, nobody knows anything about it - it slumbers, I suppose, in the office of the solicitor, and nobody hears or cares anything about it. Practically, I think that would be the answer. But whether that be a good answer or not, what seems to me to be an overwhelming consideration in the determination of this case is that a witness must be protected for his preliminary statement or he has no protection at all, and that there is that protection established is, as I have already said, beyond all possibility of doubt."**

The immunity therefore gives protection even if, eventually, the trial does not take place.

67. In **Taylor v Serious Fraud Office** [1999] 2 AC 177 the House of Lords held that the immunity extended also to statements made out of court by persons not called as witnesses (in that case fraud investigators), if they could fairly be said to be part of the process of investigating a crime or a possible crime with a view to a prosecution, even where those being investigated were never charged with any offence.

68. The potential hardship, if this were not the rule, has been acknowledged in many of the authorities. Notwithstanding the public interest in the finality of litigation, the observation is often made that malicious and untruthful persons are liable to prosecution for perjury, to an action for malicious prosecution, or to proceedings for contempt of court, which will provide some deterrent against abuse of the litigation process. However, the recognised risk that dishonest and malicious people may, on occasion, benefit from the immunity, has long been held to be outweighed by the paramount public interest in protecting the integrity of the judicial process,

> **"The law protects witnesses and others, not for their benefit, but for a higher interest, namely, the advancement of public justice"** (per Starke J in **Cabassi v Vila** (1940) 64 CLR 130, a decision of the High Court of Australia, cited with approval by the Court of Appeal in **Marrinan v Vibert** [1963] 1 QB 528 at 536.)

69. Much of the case law has concerned the rule as it applies to witnesses, not infrequently police witnesses. However, there has never been any doubt that the immunity does not operate solely to protect witnesses in relation to their evidence given at, or prepared for trial. It has

been held to apply to all the "essential ingredients of the judicial process" (per Lord Pearce in **Rondel v Worsley** [1969] 1 AC 470), namely the parties, witnesses, advocates, judges and jurors. The reference (in **Munster**) to the need to protect "persons" from being sued and having to defend themselves appears in numerous passages in the cases cited to us. Lord Hope referred expressly to parties in his description of the rule in **Darker**, (set out above), emphasising that the 'same immunity', giving protection from any action which may be brought against them, applies just as much to parties as to others involved in judicial proceedings.

70. It is the application of the rule to the Respondents, as parties to this litigation, in deciding to obtain and serve a witness statement from Sue Heath in support of their defence to the claim, that arises in this case. In this respect, in relation to the first element of the rationale underpinning the immunity explained by Fry LJ in **Munster**, Mr Allen also relies on the observations of Brett MR in the same case, when referring to the reason for the rule given by Pigott CB in **Kennedy v Hilliard** (1859) 10 ICLR 195 at 209,

> **"I take this to be a rule of law, not founded (as is the protection in other cases of privileged statements) on the absence of malice in the party sued, but founded on public policy, which requires that a judge, in dealing with the matter before him, a party in preferring or resisting a legal proceeding, and a witness in giving evidence, oral or written, in a court of justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel."**

71. Further, in **Marrinan v Vibert** [1963] 1 QB 528, Sellers LJ drew attention to the width of the language used by Kelly CB in **Dawkins v Lord Rokeby** (1873) LR 8 QB 255 (to which Lord Hope referred in **Darker**), in referring to the immunity as a rule that "no action lies against parties or witnesses for anything said or done, although falsely and maliciously and without any reasonable and probable cause, in the ordinary course of any proceedings in a court of justice."

72. As **Watson** and **Taylor** established, the immunity is not restricted to statements made in court or to statements made by witnesses in a case. It includes within its scope things said or done in the course of preparing evidence for trial. In our judgment, it necessarily includes the words or deeds of parties to litigation, in connection with the preparation of a case for hearing in a court or tribunal. Since a complaint in respect of a witness's account to a solicitor constitutes an attack on that witness's participation in the judicial process, a complaint in respect of the discussions between a party and one of their witnesses, about the evidence to be adduced from her for trial, constitutes an attack on the participation of that party in judicial proceedings. As such it subjects that party to 'the vexation of defending an action' and offends the first element of the rationale underpinning the immunity.

73. As we shall see, in focussing on the immunity as it applies to witnesses the Claimant has, in our view, failed to engage with the protection afforded by the immunity to the parties to litigation in addition. Contrary to Ms Williams' submission, the Employment Tribunal did not decide this case as one of witness immunity. It is clear to us from their reasoned judgment, read as a whole, that the Tribunal found the immunity to attach to the Respondents in relation to the testimony adduced by them, as parties, for use at the hearing.

74. Nor did the Respondents suggest below that the case was one of witness immunity, as is clear from their written submissions for the PHR. The Claimant's allegation is that the Respondents, as parties, acted improperly in their conduct of the judicial proceedings and in presenting false evidence to the Tribunal. That was the allegation being addressed by the Respondents and the Tribunal and we agree with Mr Allen that those are the acts upon which the immunity bites.

75. Recently, in **Baxendale-Walker v Law Society and others** [2011] EWHC 998 QB, absolute immunity was held to apply in civil proceedings brought against the Law Society, to protect the statements and conduct of the Law Society Defendants in the course of an investigation in anticipation of disciplinary proceedings.

76. Upholding the Defendants' submissions on this point, Supperstone J held (so far as material, at paragraphs 90-95) that

> **"90. The immunity is not limited to things which are actually said or done in court or (in the present case) to proceedings before the SDT. It extends also to statements or conduct connected with the preparation of the case to be presented in court or before the SDT. *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177 was concerned with criminal investigations in criminal proceedings however I accept Mr Smith's submission that the immunity extends and applies with equal force to disciplinary investigations and disciplinary proceedings (and indeed to other civil proceedings). (See *Mahon v Rahn and others (No.2)* [2000] 1 WLR 2150, per Brooke LJ at para 194).**
>
> **…**
>
> **92. In *Darker v Chief Constable of West Midlands Police* Lord Clyde at 456 said that the principles governing the immunity of witnesses in connection with judicial proceedings 'should be of general application regardless of the particular form of the action'. The only exception to this principle of absolute immunity for participants in investigations or proceedings is the tort of malicious prosecution or malicious arrest. However the Claimant does not allege that the Defendants have committed this tort.**
>
> **…**
>
> **93. Mr Susman referred during the course of the hearing to the pending appeal to the Supreme Court in *Jones v Kaney* (on appeal from the decision of Blake J [2010] EWHC 61) and submitted that I should not strike out the claims on this ground when the Supreme Court may take a different view to earlier decisions on absolute privilege and immunity. I agreed to receive written submissions from Counsel when the outcome of that appeal was known….**
>
> **94.** [On 30 March 2011] **The Supreme Court in *Jones v Kaney* overruled the decision in *Stanton v Callaghan* [2000] QB 75 and held by a majority of 5-2 (Lord Hope and Lady Hale dissenting) that an expert witness has no immunity from suit in an action brought by his own client for breach of a contractual or tortious duty of care. I accept the submission of Mr Smith that the decision in *Jones v Kaney* does not touch on the immunity of a witness (whether they be a witness of fact or expert opinion) or a party to proceedings in respect of things said or done in the ordinary course of proceedings, in respect of claims brought against him by an opposing party; nor does the decision affect the law on judicial immunity …**
>
> **95. In my judgment the actions of the Law Society Defendants are protected by absolute privilege and immunity and I would strike out the claims against them on this ground."**

77. We do not accept Ms Williams' submission that these findings were obiter. While Supperstone J also held that the claims should be struck out on other grounds, it is clear from

these passages that he upheld the Defendants' submissions on immunity and ruled that the claims should be struck out on that ground in addition.

78. It is also clear, as Supperstone J observed in that case, that the principles regarding the immunity of witnesses, parties and others are of general application, regardless of the particular form of the action being brought.

79. In **Marrinan** the action was brought in conspiracy. Police officers were alleged to have conspired together to make false statements about the plaintiff, a disbarred barrister, in their reports to the DPP, in their evidence at trial, and in their evidence at an inquiry before the Benchers of Lincolns Inn. The Court of Appeal upheld the decision of Salmon J that the plaintiff's action in conspiracy was barred by the immunity rule.

80. Holding that "those who take part in the administration of justice…must be free from the fear of civil proceedings", Sellers LJ rejected as "misconceived" the attempt to distinguish between actions in defamation and actions in conspiracy, stating:

> **"Whatever form of action is sought to be derived from what was said or done in the course of judicial proceedings must suffer the same fate of being barred by the rule which protects witnesses in their evidence before the court and in the preparation of the evidence which is to be so given."**

81. Citing this passage with approval in **Darker**, Lord Clyde said this at 456F,

> **"Thus, for example, whether the action is one of defamation or of negligence or, as in the present case, of conspiracy to injure and misfeasance in a public office, the same principles should apply."**

82. The immunity cannot therefore be circumvented by pleading a conspiracy to procure false evidence. In both **Munster** and **Marrinan** the courts unhesitatingly rejected attempts to avoid the immunity by founding a cause of action upon an alleged conspiracy to procure false

evidence, rather than upon the contents of that evidence itself. Further, the statements of principle in **Marrinan** are expressed in broad terms. The application of the immunity does not appear to us to be limited to cases in which the action brought, in relation to things said or done in the course of judicial proceedings, is an action in conspiracy.

83. Nor is it limited to allegations made against witnesses, rather than against parties to litigation. We can identify no logical reason, whether by reference to the rationale for the immunity or otherwise, why the police officers in **Marrinan**, in their capacity as witnesses, should be protected from such an attempt to circumvent the immunity, but the Respondents as parties in the present case should not be. The central allegation against both Respondents here, as defending parties, is of undue influence exerted upon a witness to provide a false statement for their use at the hearing. Such an allegation clearly relates to the participation of the Respondents in the judicial process; and in any event it seems to us to be sufficiently analogous to an allegation of conspiracy to fall within the immunity, as explained in **Marrinan**.

Discrimination cases

84. Further, it is common ground that cases involving allegations of unlawful discrimination are not regarded as requiring special treatment, or as being exempt from the immunity rule.

85. In **Heath v Commissioner of Police of the Metropolis** [2005] ICR 329, where the point was fully argued, the Court of Appeal held that judicial proceedings immunity applied not only to common law claims, such as defamation or negligence, but also to statutory claims of discrimination, because the public interest justifying the immunity was exactly the same. In particular, the Court ruled that the immunity was not contrary to either the underlying EU Equality Directives (in that case the Equal Treatment Directive) or Article 6 of the European Convention on Human Rights.

86. Auld LJ described the absolute immunity from suit (at paragraph 52) as

> **"… a core immunity in our system, critical to the integrity and effectiveness of our judicial system, which, save for a few well defined exceptions … applies to all forms of collateral action however worthy the claim and however much it may be in the public interest to ventilate it. Claims of unlawful discrimination are clearly of that importance, but no more than many others, such as the citizen's right to protect his own good name or good character or to claim for conspiracy to injure or for misfeasance in public office, say, in giving evidence in a criminal trial resulting in the claimant's loss of liberty."**

87. In relation to the exceptions, he said (at paragraph 17) that the immunity rule

> **"… attaches to anything said or done by anybody in the course of judicial proceedings whatever the nature of the claim made in respect of such behaviour or statement, except for suits for malicious prosecution and prosecution for perjury and proceedings for contempt of court. That is because the rule is there, not to protect the person whose conduct in court might prompt such a claim, but to protect the integrity of the judicial process and hence the public interest. Given that rationale for the rule, there can be no logical basis for differentiating between different types of claim in its application."**

88. The EAT has subsequently adopted the same approach. In **Dathi** HH Judge McMullen QC held that the immunity applied to claims for race discrimination and victimisation arising from two letters written by the Respondent's then legal representatives in earlier discrimination proceedings. These letters, one relating to disclosure and the other to costs, were relied on as the central acts in the subsequent proceedings, but were both held to be protected by absolute immunity, as documents brought into existence for the purpose of the proceedings.

89. In **Parmar** the Claimant brought a victimisation claim against his employers on the basis of witness statements served by them in earlier race discrimination proceedings. The Claimant alleged that six of the statements served contained untruths, and that the untrue statements had been made by those witnesses because he had brought the previous proceedings. The Employment Tribunal held that the statements were protected by judicial proceedings immunity. Dismissing the Claimant's appeal, Underhill J held that the principles governing the immunity rule applied also to claims of discrimination by victimisation (a point not argued in **Heath**).

90. Ms Williams submits that, in **Parmar**, Underhill J was not concerned with, and therefore did not consider the parameters of judicial proceedings immunity because, if the rule applied to victimisation claims, it was clear that the allegations in that case fell within its scope. It was the contents of each witness's statement that were alleged to constitute the acts of victimisation. She seeks to distinguish **Parmar** on the basis that the EAT was not dealing in that case with an allegation that the Respondents had improperly pressurised the witnesses into making false statements adverse to the Claimant's claim.

91. Ms Williams submits that the impropriety alleged in this case falls outside the parameters of the immunity because Mrs Singh's constructive dismissal claims were not constituted by the contents of Sue Heath's witness statement, but by the acts of senior employees of the Respondents in putting undue pressure upon her. Far from safeguarding Ms Heath's ability as a witness to express herself freely, in accordance with the rationale for the rule, the immunity was deployed to preclude investigation into her alleged subornation.

92. However, in suggesting that in this way the Tribunal lost sight of the rationale behind the immunity and its parameters, Ms Williams has in our view described the rationale too narrowly (for example at paragraph 10 of her main skeleton argument), namely that it was (i) to enable witnesses to "feel free to testify and to express themselves without fear of the consequences, specifically that of having their evidence challenged in another process; and (ii) to avoid a multiplicity of actions in which the value or truth of their evidence would be re-tried".

93. Since the immunity also applies to parties, the rationale for the rule envisages that parties may also rely upon it, so as to be protected from defending actions brought against them for things said or done when they are taking part in the administration of justice; and so as to avoid a multiplicity of actions in which the truth of a witness's evidence adduced by them would be

tried over again.

94. The obtaining and serving of witness statements, from witnesses they intend to call at trial in support of their case, is an important and necessary aspect of a party's participation in the administration of justice. The rules of procedure governing hearings before Employment Tribunals make specific provision for service of such statements, with appropriate sanctions for non-compliance.

95. We agree with Mr Allen that, if parties were unable to rely on the immunity, in relation both to the witness evidence they have adduced for trial and the discussions they have had with their witnesses about that evidence, there would be an inexplicable gap in the protection afforded to parties by the immunity. The immunity would be deprived of its necessary effect and the evidence of those witnesses would be directly vulnerable to attack. Further, we consider that the prospect of a challenge to those discussions, and of exposure of their contents, would be more likely to discourage parties from assisting in the administration of justice and, thus, would be wholly contrary to the public interest.

96. On the face of it therefore, and subject to the Claimant's further submissions as to the effect of **Darker** and other recent authorities, the acts complained of by the Claimant in this case seem to us to fall well within the current parameters of the immunity. We regard her complaint as relating to both the contents and the preparation of Sue Heath's witness statement, obtained by the Respondents for the purpose of defending the claims brought against them. In particular, the Claimant seeks to rely upon the discussions that took place between the Respondents and Ms Heath, in drafting the contents of that witness statement and preparing for her to give evidence on their behalf at the hearing.

97. For these reasons we cannot accept Ms Williams' submission that the constructive dismissal claims are not constituted by the contents of the statement; and that what was done to procure the statement is a free-standing act divisible from its contents. The 'final straw' allegation, that the statement is false and has been procured improperly, depends in large part on the alleged inconsistencies between the statement and the transcript of Ms Heath's grievance interview by Ms Nathoo. The allegation therefore depends both on the veracity of the statement and on the improper pressure said to have been put upon her. Indeed, the presence of alleged lies in the statement is what has led the Claimant to infer that pressure must have been applied to her.

98. Similarly, in **Marrinan**, the overt acts complained of in advancing the unsuccessful claim of conspiracy were the witness statements, which were relied upon both as giving rise to the inference that there was a conspiracy and as causing the damage (see Diplock LJ at 537).

99. It does not matter, in our view, that Sue Heath is not herself a party to the litigation, or that no allegations of improper conduct are made against her personally. In our judgment the case law to which we have referred establishes that, whatever the form of action, the immunity will apply to protect a party to litigation where the allegation is that the party has improperly procured false witness testimony for trial. Where such an allegation is made, the overt act alleged to have caused damage, and from which the impropriety is to be inferred, is the witness evidence itself. The Claimant's allegations in this case mount an attack upon both the truthfulness of a witness statement adduced by the Respondents for trial, and the manner in which the Respondents have participated in the judicial process. Both elements of the public policy rationale underpinning judicial proceedings immunity are therefore engaged in this case. And it does not matter how the action is framed. The immunity is absolute. A party to litigation may not be sued for the witness evidence it has adduced for trial.

100. Further, we consider that there is no merit in the argument that the immunity does not apply to the Claimant's constructive dismissal claims because they were introduced by way of amendment of her existing claim, and are not therefore subsequent claims based on witness evidence in earlier proceedings. The Tribunal were right to reject this argument and to conclude that these were new claims reliant on events that post-dated the facts relied on in the existing claim; and that the immunity applied.

101. As Mr Allen points out, if the immunity did not apply in such circumstances, then in every piece of litigation in which one litigant sought a remedy on a free-standing basis for the way in which her opponent had conducted the litigation, that litigant could seek to avoid the immunity by applying to amend to add the new claim. We agree that the immunity is not to be avoided by such a pleading device. It is the substance of the allegation that is important.

*The effect of **Darker** and other recent authorities*

102. However, it is in relation to the substance of the allegation in this case that Ms Williams relies on the judgment of the House of Lords in **Darker** and other recent authorities, in submitting that the immunity does not apply and that the Tribunal erroneously extended its ambit.

103. That there are limits to the immunity is not in dispute. Mr Allen accepts that the rule will not apply if the giving of evidence is merely an incidental or tangential aspect of the conduct complained of, even if it is a significant part of the factual matrix. The question for us is whether the effect of **Darker (**and other recent authorities) is that the particular impropriety alleged in this case now falls outside the parameters of the immunity; and that no justification or necessity for extending the circumstances in which it applies can be shown.

104. Ms Williams contends that, while the immunity applies to claims that false evidence has been given at trial, the effect of **Darker** is that it does not extend to the procurement of false evidence, as alleged by this Claimant. Mr Allen submits that the distinction she seeks to draw between procuring and giving false evidence is entirely artificial; that in any event **Marrinan** makes it clear that no action will lie in respect of evidence procured; that the Claimant's 'final straw' allegation falls well within the current parameters of the rule; and that her reliance on **Darker** is misconceived.

105. The facts of **Darker** were that a police undercover operation led to serious criminal charges against the plaintiffs. During their trial on indictment the judge ruled that there had been serious failings in relation to pre-trial disclosure, for which the police were at fault. The charges were permanently stayed on the ground of abuse of process. The plaintiffs subsequently brought civil proceedings against the Chief Constable claiming damages for conspiracy to injure and misfeasance in public office, alleging amongst other things that police officers had fabricated evidence against them during the investigation. The statement of claim was struck out on the basis that the allegations were covered by absolute immunity.

106. The Court of Appeal dismissed the plaintiffs' appeal, but the House of Lords allowed it. They did so on the basis that, while the immunity given to a party or witness in respect of what he said or did in court extended to statements made for the purpose of court proceedings, and to prevent him being sued for conspiracy to give false evidence, it did not extend to police conduct during the earlier investigative process. Such conduct, involving for example the deliberate planting of incriminating material, could not be said to form part of their participation in the judicial process as witnesses, and the immunity did not extend to cover the fabrication of false evidence during the investigation. Public policy required in principle that those who had suffered a wrong should have a right to a remedy. Accordingly the case should proceed to trial.

107. Ms Williams' submission is therefore that the immunity does not extend to the fabrication of false evidence by the Respondents, as alleged in this case. If the Claimant's allegations are correct, there has been serious misconduct by senior employees of the Respondents in furtherance of the campaign of racial discrimination and harassment of which the Claimant complains.

108. In support of this submission Ms Williams relies in particular on those passages in the speeches in **Darker**, and in other recent authorities, referring to the countervailing public policy requirement that a remedy should be afforded to those who are the victims of wrongdoing. At 456H of **Darker** Lord Clyde said this:

> **"It is temptingly easy to talk of the application of immunities from civil liability in general terms. But since the immunity may cut across the rights of others to a legal remedy and so runs counter to the policy that no wrong should be without a remedy, it should only be allowed with reluctance, and should not readily be extended. It should only be allowed where it is necessary to do so. As McCarthy P observed in *Rees v Sinclair* [1974] 1 NZLR 180, 187:**
>
> > **'The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice …'**
>
> **Furthermore the idea of a universal immunity attaching to a person in the performance of some particular function requires to be entertained with some caution."**

Lord Cooke and Lord Hutton made similar observations (at 453E and 468H respectively).

109. Further, Ms Williams points out that in **Taylor** Lord Hoffman had also emphasised that any extension of the immunity must be justified by the strict test of necessity. At 214D, after referring to **Mann v O'Neill** (1997) 71 A.J.L.R.903, he said this:

> **"… the test is a strict one; necessity must be shown, but the decision on whether immunity is necessary for the administration of justice must have regard to the cases in which immunity has been held necessary in the past, so as to form part of a coherent principle."**

110. In **Jones v Kaney** [2011] 2 AC 398 the Supreme Court, by a majority of 5-2, overruled earlier decisions establishing that absolute immunity applied in proceedings brought by the

former claimant against an expert witness, in respect of their evidence given in court, or views expressed in anticipation of court proceedings. Referring to Lord Clyde's remarks in **Darker** Lord Phillips PSC said at 419E,

> **"It would not be right to start with a presumption that because the immunity exists it should be maintained unless it is shown to be unjustified. The onus lies fairly and squarely on the defendant to justify the immunity behind which she seeks to shelter."**

111. Lord Dyson, observing that the long-established immunity cannot survive if the policy grounds on which it is based no longer justify it, said at 432H-433F:

> **"The mere fact that the immunity is long established is not a sufficient reason for blessing it with eternal life. Circumstances change as do attitudes to the policy reasons which underpin the immunity. The common law develops in response to these changes. The history of the rise and fall of the immunity of advocates provides a vivid illustration of the point. As Lord Reid observed in *Rondel v Worsley* [1969] 1 AC 191, 227C, public policy is not immutable and any rule of immunity requires to be considered in the light of present day conditions.**
>
> **113. The general rule that where there is a wrong there should be a remedy is a cornerstone of any system of justice. To deny a remedy to the victim of a wrong should always be regarded as exceptional. As has been frequently stated, any justification must be necessary and requires strict and cogent justification: see, for example, per Lord Hoffmann in *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177, 214D; *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435, per Lord Hope of Craighead at p 446D, per Lord Clyde at p 456H and per Lord Hutton at p 468F. If the position were otherwise, the law would be irrational and unfair and public confidence in it would be undermined.**
>
> **114. Furthermore, the justification for any exception to this general rule should be kept under review. That is what happened in relation to the immunity of barristers. Their immunity for all that they did was recognised by the House of Lords in *Rondel v Worsley.* It was based on the public policy grounds that the administration of justice required that a barrister should be able to carry out his duty to the court fearlessly and independently, and that actions for negligence against barristers would make the retrying of the original actions inevitable and so prolong litigation contrary to the public interest. In *Saif Ali v Sydney Mitchell & Co* the immunity was limited (again on grounds of public policy) to what barristers did in court and to work that could fairly be said to affect the way that the case would be conducted if it came to a hearing. Finally, the immunity was swept away altogether in the *Arthur Hall* case, when it was decided that the public policy grounds previously relied on were no longer sufficient to justify a departure from the general rule that where there was a wrong there should be a remedy.**
>
> **115. It follows that the issue that arises on this appeal is whether there is a compelling need to continue the immunity enjoyed by expert witnesses from liability to their clients."**

112. Ms Williams also draws attention to passages in **Darker** referring to the limits of the immunity, which per Lord Hope "…is not to be used to shield the police from action for things done while they are acting as law enforcers or investigators." He went on to say (at 448E),

> **"The rule of law requires that the police must act within the law when they are enforcing the law or are investigating allegations of criminal conduct. It also requires that those who complain that the police have acted outside the law in the performance of those functions, as in cases alleging unlawful arrest or trespass, should have access to a court for a remedy."**

113. Lord Hope drew a distinction between acts by police officers to procure false evidence, such as planting a drug or fabricating a record of interview, and the evidence that may be given about the act or its consequences. At 449B he explained the distinction in the following terms:

> **"This distinction rests upon the fact that acts which are calculated to create or procure false evidence or to destroy evidence have an independent existence from, and are extraneous to, the evidence that may be given as to the consequences of those acts. It is unlikely that those who have fabricated or destroyed evidence would wish to enter the witness box for the purpose of admitting to their acts of fabrication or destruction. Their acts were done with a view to the giving of evidence not about the acts themselves but about their consequences. The position is different where the allegation relates to the content of the evidence or the content of the statements made with a view to giving evidence, and not to the doing of an act such as the creation or the fabrication of evidence. The police officer who is alleged to have given false evidence that he found a brick or drug in the possession of the accused or that he heard an accused made a statement or a remark which was incriminating is protected because the allegation relates to the content of his evidence. He is entitled to the immunity because he was speaking as a witness, if he made the statement when he was giving evidence, or was speaking as a potential witness, if he made it during his preliminary examination with a view to his giving evidence."**

114. Lord Clyde expressed it in this way, at 460B-E and 461C,

> **"But that is not to say that everything said or done by anyone in the investigation or preparation for a judicial process is covered by the immunity. In drawing the line in any particular case it may be necessary to study precisely what was being done and how closely it was linked with the proceedings in court. No immunity should attach to things said or done which would not form part of the evidence to be given in the judicial process.**
>
> **…**
>
> **The protection is granted to a witness in the interest of establishing the truth and to secure that justice may be done. But the witness is not immune from a charge of perjury and that possibility remains as a deterrent against an abuse of his position. Immunity from that would not serve the interests of justice in the case. So also before matters have reached the stage of trial the immunity should not be available to give protection for matter which is designed to defeat the ends of justice rather than to serve them.**
>
> **…**
>
> **What is alleged here is not the telling of lies about facts which had occurred but a deliberate fabrication of facts which had not occurred. What is under attack is not the investigation of possible realities but the preparation of a fiction. In so far as the immunity granted to a witness relates to the substance of the evidence which he or she gives or is to give, the matters of which the plaintiffs complain will almost certainly not be the intended substance of the evidence of those who were engaged in the conspiracy. It cannot be that everything which is said or done in the preparation for judicial proceedings is necessarily immune. Where evidence is fabricated or statements concocted, protection from attack should not be gained by a subsequent presentation of false testimony in court."**

115. We have set out these passages at length because Ms Williams relies upon them, amongst others, in submitting that the distinction identified by Lord Hope is directly relevant to the present case. She argues that, on a correct analysis, the Claimant's allegations of constructive dismissal are constituted by the improper conduct of her employers that generated the witness statement. If her allegations are true, then just as the police officers in **Darker** would seek to conceal their misconduct rather than given evidence about it, those senior employees who put pressure on Ms Heath to give a false account would seek to conceal, rather than testify as to their misconduct. Such misconduct, she submits, falls outside the parameters of absolute immunity and an extension to the rule cannot be justified in such circumstances.

116. More generally, she argues that, since the arrival of the **Human Rights Act 1998**, recent cases demonstrate that the trend has been to review and limit previously established immunities rather than to extend them. In addition to the authorities we have referred to above she cites, as a further example of this trend, the decision of the House of Lords in **Arthur JS Hall v Simons** [2002] 1 AC 615, overturning the previous line of authorities concerning the immunity of barristers in respect of actions in negligence for work intimately connected with litigation.

117. We have considered these submissions and the authorities carefully, but in our judgment the speeches in **Darker** and the passages in the other cases relied upon by Ms Williams do not assist the Claimant's arguments in the present appeal.

118. The relevant allegation in **Darker** was that police officers had fabricated primary evidence against the plaintiffs at the stage when their crimes were being investigated. The fact that those officers subsequently gave evidence at trial did not operate retrospectively to immunise their earlier misconduct.

119. Lord Clyde emphasised that it is the function to which the immunity attaches, and the fact that police may mount prosecutions should not obscure the critical consideration of the function which is being performed. An absolute immunity is however appropriate to the conduct of prosecutors which is intimately associated with the judicial phase of the criminal process. He cited with approval (at 459D) the helpful distinction drawn in the American jurisprudence between matters of advocacy and matters of detection. Per Justice Stevens in **Buckley v Fitzsimmons** 113 SCt 2606,

> **"There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand."**

120. The facts of **Roy v Prior** [1971] AC 470 provide a further example of the distinction being drawn. The Defendant, a solicitor acting for a client on trial for larceny, applied ex parte for a bench warrant, to compel the Plaintiff, a doctor, to give evidence at the trial. He gave evidence in support of that application, which the Plaintiff had no opportunity to challenge, and the Plaintiff was duly arrested and compelled to give evidence.

121. The Plaintiff brought proceedings against the solicitor, which included an allegation of malicious arrest. On the Plaintiff's appeal from the decision of the Court of Appeal to strike out the claim, the House of Lords held that the action should not be dismissed as disclosing no cause of action. Although the immunity rule meant that no action lay against a witness for words spoken in giving evidence, an action in respect of an alleged abuse of the process of the court was not to be defeated, even though one step in the abuse involved the giving of evidence. The essence of the claim was that process was instituted, as a result of which the court was induced to order the Plaintiff's arrest. The solicitor's wrongdoing was not the evidence he gave

in court, which was merely a step taken to bring about the alleged abuse, but the actual abuse of the court's process in unlawfully and maliciously securing the plaintiff's arrest.

122. In **Darker** Lord Mackay of Clashfern, referring to the nature of the Claimants' allegations, stated at 451B,

> **"In my view there are materials in these allegations which do not depend as a cause of action on alleged statements relating to the preparation of evidence for proceedings and go beyond matters of freedom of speech either at, or in the course of preparation for, a criminal trial. It follows that in my opinion the immunity claimed cannot apply to these allegations…"**

123. This passage, in our judgment, demonstrates succinctly why it is that the Claimant's reliance upon **Darker** cannot assist her. The alleged misconduct of the police officers in that case related to the way in which they carried out their functions as investigators of crime, not as participators in the judicial process. Their alleged creation of false primary evidence, upon which witness evidence may subsequently have been based, was not part of their participation in the justice process. The overt act from which the damage flowed was not the witness evidence but the false primary evidence which they had improperly created. The immunity rule was therefore not engaged.

124. In contrast, in the present case, the Claimant's constructive dismissal claims depend entirely on the alleged discussions between the Respondents and Sue Heath, as their witness, about her evidence for trial and upon the allegedly false evidence contained in her witness statement. In contrast with the case of **Roy**, the essence of the Respondents' alleged wrongdoing in the present case relates directly to their function as parties to litigation preparing evidence for trial. The allegation is that they improperly procured false witness evidence, not that they coerced Ms Heath into producing false primary evidence. There is no suggestion that

they were involved in any investigative or other activity, separate from their preparation of witness testimony for the hearing, when the alleged impropriety occurred.

125. That, in our view, is the material difference. In our judgment **Darker** and the other authorities relied upon by the Claimant do not affect the established position that judicial proceedings immunity attaches to a party's preparation for trial, whether or not it is actuated by malice or amounts to impropriety. An allegation that a party procured false evidence by improper means is therefore within the current scope of the immunity.

126. The observations in the case law upon which Ms Williams relies must be read in the context in which they were made. We see nothing in **Darker**, or in the other authorities relied on, to cast doubt on what remains a clear and long-standing principle of public policy, protecting parties and others from having to defend themselves against allegations of the kind made by the Claimant in this case.

127. In **Jones v Kaney** the Supreme Court were focussing on the immunity as it applies to expert witnesses, on the particular duties that such witnesses owe to the court and the availability of protection against actions brought against them, for example by way of professional indemnity insurance. The issue to be determined was that identified by Lord Dyson at paragraph 115, namely whether there is a compelling need to continue the immunity enjoyed by expert witnesses from liability to their clients.

128. We agree with Supperstone J in **Baxendale-Walker** that this decision does not touch on the immunity of a witness or a party to proceedings in respect of things said or done in the ordinary course of proceedings. Nor does the decision affect the law on judicial immunity.

129. We also considered **L (A Child) v Reading Borough Council** [2001] 1 WLR 1575 CA, to which Ms Williams referred us, but in our view it does not assist her. While, on the particular facts, the Court of Appeal considered it arguable that the immunity did not apply, the particular allegations related to the conduct of the police as investigators, rather than as witnesses or parties. The case therefore goes no further than **Darker**.

130. Nor does **Autofocus Ltd v Accident Exchange Ltd** [2010] EWCA Civ 788 take the Claimant's case any further. The Court of Appeal considered it arguable that the immunity did not apply to the preparation of material contained in spreadsheets exhibited to witness statements prepared by rates surveyors, which the Claimant alleged were fraudulently prepared. However, the principal objective of the alleged fraud in that case was to secure a business advantage and not to present false evidence in court. The Court noted the distinction in **Darker** between the fabrication of evidence at the investigative stage and fabrication of evidence for trial. The question whether the immunity applied on the facts was left to be determined at trial. In any event, it does not appear to have been argued by anyone in that case that a party is not protected by the immunity in respect of evidence procured for trial. None of these cases seems to us to advance the Claimant's submissions in this appeal.

131. We wish to add these general observations. Like the Employment Tribunal, we too are cognizant of the potential hardship that application of the immunity may cause in some cases. Ms Williams submits that, for the purposes of argument on this issue, given that the relevant parts of the claim were struck out, we should assume that the Claimant's allegations are true. She therefore draws attention to the hardship which would be caused in this case if the Tribunal's ruling stands. She submits that it would be wholly unacceptable if employers could suborn witnesses in this way, and yet not be answerable for such a serious breach of the implied term of trust and confidence.

132. We accept that, in considering the arguments, we should take the Claimant's case at its highest. However, there are other, relevant considerations in this case. It is, first, an interesting but by no means straightforward argument that, by defending themselves against allegations of discrimination and serving a witness statement which the Claimant believes to contain lies, the Respondents have acted in repudiatory breach of the Claimant's contract of employment. We heard no argument on the point and say no more about it here, but the extent of an employer's duty to defend litigation brought by an employee in such a way as not to breach the implied term of trust and confidence in the contract of employment raises some interesting legal issues.

133. Secondly, Ms Williams' submission as to the hardship that would result in this case effectively amounts to an argument that the Claimant is entitled to a remedy for the wrong she has in fact suffered. It is, thus, an argument advanced from a conclusion. The immunity should also be considered from the point of view that, notwithstanding her strong belief to the contrary, the Claimant has not in fact suffered any such wrong.

134. In order to set the context for her submissions on appeal and explain the reasons for the Claimant's belief, Ms Williams took us to some passages in the transcript of Ms Nathoo's lengthy interview with Sue Heath and some paragraphs of Ms Heath's witness statement, served by the Respondents. She did this in order to demonstrate what she submitted were clear inconsistencies and contrary statements in the two documents, such as to provide support for the Claimant's allegations.

135. Having read both documents with some care, however, we consider that read as a whole, the contrasts are not as stark as suggested. The considerable experience of all the members of this EAT teaches that cases involving allegations of discrimination, where working relationships, behavioural styles, attitudes and perceptions are under the microscope, not

infrequently involve allegations on both sides that witness statements contain lies, or that witnesses have conspired together to re-write each side's view of history.

136. An important element of the rationale for witness immunity is to ensure that witnesses are able to give their evidence freely and fearlessly, without being deterred by the threat of subsequent litigation concerning their evidence. The immunity exists to protect truthful witnesses, not those who give false evidence.

137. The central dispute between the parties in this case concerns the reasons for the breakdown in the working relationships that the Claimant had with parents, staff and governors at the school. It will inevitably involve a close examination, amongst other things, of her style of leadership and her management and communication skills, through the evidence given by those who worked with her, as well as by the Claimant herself.

138. Such cases, as Mr Allen rightly observed, call for a high degree of insight by the Tribunal. The witnesses called must be able to express themselves frankly, without fear of subsequent litigation as to the evidence they give, or the circumstances in which their witness statements were made. For the same reasons, both parties must be able to adduce witness evidence without fear that they may have to defend themselves against a subsequent challenge to the circumstances in which that evidence was adduced.

139. While Ms Williams understandably draws attention to the hardship which will be caused in this case, if the Claimant's allegations are correct and the Tribunal's judgment is upheld, Mr Allen draws attention in turn to the deeply unattractive consequences, if the Claimant's allegations are unfounded, of the Respondents being subjected to further litigation as a result of

witness evidence they have adduced in defending the claim, and to exposure of the circumstances in which that evidence was prepared.

140. For all these reasons, we conclude that the submissions of Mr Allen as to the scope of the immunity, and the protection it affords to parties to litigation as well as to witnesses, are correct. In our judgment the Employment Tribunal's analysis as to the extent and application of the immunity was not in error and their conclusion was correct.

141. We therefore turn, finally, to address the individual grounds of appeal advanced at paragraphs 18.1 – 18.10 of the Claimant's Notice. For the reasons we have already given, and which we expand upon as necessary below, the Claimant's grounds of appeal must fail.

142. The first ground, that the Employment Tribunal erroneously distinguished **Darker** and held that the immunity applied to the Respondents' alleged conduct in pressurising a witness to make a false statement, we reject for the reasons we have given above, in our analysis of the immunity and its scope.

143. The Tribunal's conclusions, at paragraphs 58 and 68 of their reasons, are in our view consistent with long-standing authority, in particular **Marrinan**, and are entirely correct. The rule as to judicial proceedings immunity cannot be circumvented by an attempt to complain of antecedent impropriety by the Respondents, as parties to this litigation, committed in order to cause false evidence to be given at the hearing.

144. The contention in ground 2 that the Tribunal erred, at paragraph 65 of their reasons, because no authority establishes that immunity "extends to the improper conduct of third parties" in applying pressure to a witness to give a false account, is similarly misconceived.

145. The Tribunal's reasoning at paragraphs 60, 62 and 65 seems to us to be correct. The Claimant's description of the rule as one of "witness immunity" ignores the established application of the immunity to parties to litigation. The Respondents are not "third parties", but are participating in the judicial process, as Respondents to the claims brought against them, by preparing and serving statements from the witnesses they propose to call at the hearing. The Claimant may not bring an action against them in respect of the evidence they have procured, or the discussions they have had with their witnesses in preparing for that hearing.

146. In ground 3 it is contended that it is perfectly normal and proper in civil litigation for a witness to be cross-examined as to pressure put upon her to change her account; that the immunity rule is not infringed by an investigation into the circumstances in which that witness' evidence came to be given; and that the Tribunal were in error in ruling, at paragraph 74, that no such questions could be asked.

147. However, whether such cross-examination is normal, which the Respondents dispute, is not to the point. It is normal that witnesses are cross-examined as to the truthfulness of their evidence. However, any attempt to bring a claim on the basis of the preparation of a witness statement for trial, or to question a witness as to discussions concerning the preparation of that statement will be prohibited by judicial proceedings immunity.

148. There are, as we observed earlier in this judgment, no particulars and no positive case pleaded by the Claimant as to the alleged subornation of Ms Heath; and she does not identify the alleged wrongdoers. Any attempt to put a generalised allegation of wrongdoing to the Respondents' witnesses, going purely to credit, would not fall within the normal parameters of legitimate cross-examination. In our view the Tribunal were correct to rule at paragraph 74 that

there could be no cross-examination of Ms Heath as to the circumstances in which her statement was prepared.

149. In ground 4 the Claimant seeks to distinguish her case from that of **Parmar** in the EAT, and criticises as erroneous the Tribunal's rejection of her submission (see paragraphs 59-60) that her claims are not subsequent claims based on witness evidence within earlier proceedings. In our view, however, the Tribunal's reasoning is entirely correct. For the reasons we have given earlier, application of the immunity does not depend on whether the Claimant is able, by way of amendment, to combine the two claims. The Tribunal were right to conclude that these were new claims reliant, in part, on events that post-dated the factual matrix relied on in the existing proceedings.

150. Ground 5, alleging that the Tribunal erred in holding (at paragraphs 56-58 and 61-62) that Ms Heath's witness statement was the "trigger" for the claims they struck out, must fail. The Tribunal's conclusion was entirely consistent with the case law; and we reject the submission that "actions taken to procure false evidence fall outside of the immunity" for the reasons we have already set out above.

151. Ground 6, alleging that the Tribunal erred (paragraph 65) in holding that this case was analogous to that of **Dathi**, also fails. We do not understand the Tribunal to be drawing a precise analogy between this case and **Dathi**, which we accept was not dealing with "witness immunity". In paragraph 65 the Tribunal are addressing the course of conduct being relied on by the Claimant and explaining why the Claimant cannot rely upon a witness statement obtained in the course of proceedings. Their reasoning is not in error for the reasons we have already explained.

152. We have already addressed the contention, in ground 7, that the immunity represents a derogation from the Claimant's normal right of access to a court; that it should only be applied when strictly necessary; and that the Tribunal failed to identify any compelling rationale for applying it. For the reasons given we find that the Tribunal were correct in deciding that the Claimant's allegations were within the current parameters of judicial proceedings immunity. It was therefore unnecessary for them to identify any necessity for extending the rule.

153. While acknowledging that application of the rule may well produce harsh results in some circumstances, the Tribunal recognised that this may be the price to be paid for a long established rule of public policy and, further, that as the case law makes clear, a party will not necessarily be protected from all adverse consequences of their misconduct. In this they were entirely correct.

154. In ground 8 the Claimant contends that the Tribunal erred in reasoning (at paragraph 71) that the apparent harshness of the rule could be offset by the potential for an increased award for injury to feelings, an award of aggravated damages or an order for costs. Ms Williams submits that in this case, since the Tribunal struck out the relevant paragraphs of the amended claim and ruled against any questioning of the Respondents' witnesses concerning the preparation of Ms Heath's statement, the Claimant is simply unable to ventilate these allegations at all. There is therefore no prospect of this misconduct being reflected in either an award of aggravated damages or costs.

155. We do not accept this submission. The Tribunal found that no proper evidential basis had been identified by the Claimant so as to permit cross-examination of any witness as to pressure having been put upon Ms Heath at any stage, and there is in our view no error in their reasoning on this issue.

156. In ground 9 the Claimant criticises the Tribunal's decision to strike out paragraphs 21 and 22 of the Re-Amended Claim. Even on the Tribunal's interpretation of the law, it is submitted that these paragraphs do not relate to Ms Heath's witness statement but to a separate allegation, not caught by the immunity rule, that she was put under pressure not to act as a witness for the Claimant and to have no contact with her.

157. In ground 10 it is said further that the Tribunal erred in failing to allow the parties' representatives an opportunity to consider the Tribunal's Extended Reasons and then to make submissions upon their effect, before deciding which aspects of the Re-Amended Claim should be struck out.

158. In relation to ground 9, we consider that the Tribunal were entitled to strike out these paragraphs, given their conclusions as to the application of the immunity. The allegation made in those paragraphs, that Ms Heath was put under pressure not to act as a witness for the Claimant, is not separate from the allegation of undue influence. The Claimant makes no separate complaint to that effect, and was not granted permission to amend her claim to make such a complaint.

159. It is important to recall how these paragraphs came about. Paragraphs 9 to 23 of the Re-Amended Claim were pleaded as a result of the Tribunal's order of 23 August 2012, that the Claimant set out fully the facts and matters relied upon in coming to the conclusion that it was the Respondents' conduct that placed undue pressure on Sue Heath to produce a false or otherwise inaccurate statement. The Claimant therefore supplied these particulars in support of that complaint and in our view the Tribunal were entitled to strike the paragraphs out for the reasons they gave.

160. As to ground 10, after their oral judgment the Tribunal informed the parties as to those paragraphs of the Re-Amended Claim they were proposing to strike out. The parties were given an opportunity to make submissions on that proposal and, as we understand it, the Claimant's counsel made a number of submissions at that stage and then reserved her position generally. It is not usual practice, as Mr Allen submits, for Tribunals to allow parties to comment further on receipt of the Extended Reasons for a judgment and prior to their promulgation. The Claimant did not apply for a review of the Extended Reasons upon receiving them. In our view the Tribunal did not err in proceeding to strike the relevant paragraphs out in the circumstances.

161. For all these reasons therefore the Claimant's appeal must be dismissed.

162. So far as the Claimant's other appeal (Appeal Number 1762/12) is concerned, it was agreed at the conclusion of the hearing before us on the main appeal that, following judgment, we should do no more than invite submissions from both sides as to the appropriate directions to be given in respect of that appeal, which is against the Tribunal's decision that the constructive dismissal claims should be stayed. We therefore direct that submissions from both sides should be filed with the EAT within 28 days of the date on which this judgment is handed down.