Case Numbers: 2200411/2016
2206052/2017
2208124/2017

EMPLOYMENT TRIBUNALS

Case No 2200411/16 ("Claim 1")

Claimant: Mr D P Herbert OBE

Respondent: Secretary of State for Justice

Case No 2206052/17 ("Claim 2")
Claimant: Mr D P Herbert OBE
Respondents: 1. Secretary of State for Justice
2. The Honourable Mrs Justice Elisabeth Laing
3. Lord Thomas (former Lord Chief Justice)
4. Liz Truss MP (former Lord Chancellor)

Case No 2208124/17 ("Claim 3")
Claimant: Mr D P Herbert OBE
Respondents: 1. Secretary of State for Justice
2. The Right Honourable Lady Justice Gloster
3. Mr S Parsons

PRELMINARY HEARING IN PUBLIC

Heard at: Leeds On: 12, 13 September 2019
Before: Employment Judge Davies

Representation
Claimant: In person
Respondents: Mr B Cooper QC with Mr R Moretto (counsel)

RESERVED JUDGMENT

Claim 1

1. The complaint in Claim 1 about declining to respond to an invitation for early conciliation is dismissed on withdrawal by the Claimant.
2. By consent, the Lord Chief Justice is substituted as the correct Respondent to the claims relating to allegations 2 to 4 in the agreed list of issues in Claim 1 and the Claimant withdraws his application to join other named Respondents to those claims.
3. The application to join the Nominated Judge in judicial complaint 22092/2015 and the Judicial Conduct Investigations Office ("JCIO") as Respondents to the claims relating to allegations 1 and 5 in Claim 1 is refused.

4. The claims against the Secretary of State for Justice in allegations 1 and 5 in Claim 1 have no reasonable prospect of success because the Secretary of State for Justice is not the correct Respondent under the Equality Act 2010. Those claims are therefore struck out.
5. The application to amend Claim 1 to substitute the Lord Chancellor as Respondent to the claims relating to allegation 7 is allowed. The application to amend Claim 1 to join the Lord Chief Justice as a Respondent to those claims is refused. The application to strike out the claims relating to allegation 7 is refused.
6. Claim 1 will therefore proceed as a claim against the Lord Chief Justice in respect of the claims relating to allegations 2 to 4 and a claim against the Lord Chancellor in respect of the claims relating to allegation 7. Claim 2
7. The Lord Chief Justice is substituted for the Third Respondent and the Lord Chancellor is substituted for the Fourth Respondent to Claim 2.
8. The application to amend Claim 2 to join the Disciplinary Panel in judicial complaints 22092/2015 and 22178/2015 ("the Disciplinary Panel") as a Respondent to the claims relating to allegations i, ii, and vi is allowed. The application to amend Claim 2 to join the Disciplinary Panel as a Respondent to the claims relating to allegations v and vii is refused.
9. The claims against the Secretary of State for Justice and the Hon Mrs Justice Laing in allegations i, ii, v, vi and vii in Claim 2 have no reasonable prospect of success because they are not the correct Respondents under the Equality Act 2010. Those claims are therefore struck out.
10. The application to join the Lord Chief Justice as a Respondent to the claims relating to allegation viii in Claim 2 is allowed.
11. The application to strike out the claims relating to allegations i, ii, vi and viii in Claim 2 on the basis that they have no reasonable prospect of success is refused.
12. Claim 2 will therefore proceed as:

    12.1 Claims against the Disciplinary Panel, the Lord Chancellor and the Lord Chief Justice in respect of allegations i, ii and vi;

    12.2 Claims against the Lord Chancellor, the Lord Chief Justice and the Secretary of State for Justice in respect of allegation iv;

    12.3 Claims against the Lord Chancellor and the Lord Chief Justice in respect of allegation viii. Claim 3

13. The claims against Mr S Parsons in Claim 3 are dismissed on withdrawal by the Claimant.
14. By consent, the JCIO is joined as a Respondent to the claims relating to allegation (1) in the agreed list of issues in Claim 3.
15. By consent, the Nominated Judge in judicial complaint 25979/2016 is substituted for the Rt Hon Lady Justice Gloster as Respondent to the claims relating to allegation (2) in the agreed list of issues in Claim 3.
16. The claims against the Secretary of State for Justice and the Rt Hon Lady Justice Gloster in respect of Claim 3 allegation (1) and against the Secretary of State for

Justice in respect of Claim 3 allegation (2) have no reasonable prospect of success because they are not the correct Respondents to these claims under the Equality Act 2010 and those claims are therefore struck out.

REASONS

Introduction

1.1 This was a preliminary hearing in public to decide the issues set out in the Order made by REJ Robertson dated 1 March 2019. Those issues fell into two categories, which can be summarised in broad terms as follows:

1.1.1 Issues relating to the identity of the Respondents: are the correct Respondents named? If not, should the claims against those Respondents be struck out on the basis that they have no reasonable prospect of success? Alternatively, should the Claimant be allowed to amend the claim to name a different Respondent or Respondents?

1.1.2 Issues relating to prospects of success: should particular complaints be struck out on the basis that they have no reasonable prospect of success? Alternatively, should the Claimant be ordered to pay a deposit as a condition of continuing with them, on the basis that they have little reasonable prospect of success?

1.2 I make clear at the outset that these issues do not raise questions about whether judges, or any group of judges, are above the law. Nor do they raise questions about whether, if someone in the Claimant's position has been a victim of race discrimination, he or she should have recourse to the law. That is not to deny or undervalue the personal and historic context that the Claimant articulated in his submissions. But it is no part of the Respondents' case that the Equality Act 2010 does not permit complaints of discrimination such as these to be brought. Rather, the issues before me concern the question whether the Claimant has brought his claims against those who, under the Equality Act 2010, are legally responsible for the acts he complains of and, if not, whether he should be allowed to amend his claims to name those who are legally responsible.

1.3 At the hearing, the Claimant represented himself. The Respondent was represented by Mr B Cooper QC with Mr R Moretto.

1.4 The Claimant has experienced ill-health. I indicated that I would take a break every hour and reminded the Claimant to ask if he needed a break at any other time. He did not identify any other adjustment that would assist him.

1.5 I was provided with an agreed file of documents for today's hearing. In addition, the Claimant attended with a further file of documents. He referred to some of those documents during the preliminary hearing and the Respondents did not object to his doing so. I was also provided with written skeleton arguments and authorities by both parties.

1.6 At the start of the preliminary hearing the Claimant made an application for disclosure of documents and emails naming him that emanated from Gloster LJ between April and October 2017. He requested that such documentation be provided by the following day. He suggested that Gloster LJ and the judges the subject of his claims were "social and judicial buddies" and that such correspondence was likely to be significantly damaging. That was relevant to whether the claims should be struck out. I refused the application. It was made for the first time at the preliminary hearing. The Claimant did not identify any particular document or basis for contending that the material he was seeking would support his complaints of discrimination, beyond speculating that it was likely to be damaging because the judges were friends socially and judicially. The nature of a strike-out application was frequently that it took place before full disclosure had taken place. Tribunals are regularly reminded of the need for utmost caution before striking out discrimination claims, in part for that very reason. The fact that full disclosure had not yet taken place would be one of the factors on which the Claimant would no doubt rely in resisting the strike-out application. It would not be consistent with the overriding objective to order disclosure at this stage.

1.7 On the first day of the preliminary hearing, Mr Cooper QC raised an issue about disclosing the identity of comparators named by the Claimant in his discrimination complaints. He indicated that disclosure of their identities might be precluded by provisions of the Constitutional Reform Act 2005. The Claimant said that he did need to refer to those comparators by name. I therefore invited the parties to present full argument about this point on the following day. However, Mr Cooper QC did not pursue the matter. In the event, I did not find it necessary to refer to the comparators by name.

1.8 The file of documents for the preliminary hearing included agreed lists of issues in Claims 1, 2 and 3. Those lists identify seven broad factual allegations in Claim 1, seven broad factual allegations in Claim 2 (numbered i, ii and iv to viii) and two broad factual allegations in Claim 3. Those are the allegations I considered at the preliminary hearing. Different (and multiple) complaints under the Equality Act 2010 are said to arise from each allegation, e.g. direct race discrimination and victimisation.

Outline chronology

2.1 In order to set the issues to be decided at the preliminary hearing in context I need to set out an outline of the chronology giving rise to these claims. I have not heard evidence and these are not findings of fact. Rather, they are intended to summarise relevant parts of the chronology.

2.2 The Claimant is a barrister specialising in human rights and employment law. He is a fee-paid Employment Judge, a fee-paid Judge of the First Tier Tribunal and a Recorder.

2.3 In April 2015 an Election Commissioner in the High Court made findings of corrupt and illegal practices in respect of the election of the former Mayor of Tower Hamlets, Mr L Rahman. The election result was set aside. A public meeting took place on 30 April 2015 in support of Mr Rahman. The Claimant attended and spoke from the podium. His speech was recorded and appeared on YouTube. His speech included the following:

> I am a judge, albeit part-time. … I can say this because I sit: these are sometimes my colleagues. Racism is alive and well and living in Tower Hamlets, in Westminster and sometimes yes in the judiciary.… We had, we had before the murder of Stephen Lawrence, race training for judges because they came out with racism, when they didn't even know what it meant. So don't let anyone fool you that just because you have a judgment in a court it is somehow sacrosanct. It is not. But do not put your faith in a system that is not designed for you. You are not regarded as British. You are not regarded as part of here and now, otherwise this decision would not be made. …

2.4 A Presiding Judge on the South-Eastern Circuit referred the speech to the Judicial Conduct Investigations Office ("the JCIO") on 17 June 2015. On 18 June 2015, a Nominated Judge, Underhill LJ, was asked whether the complaint should be referred for investigation to the JCIO. He decided that it should. It proceeded as complaint 22092/2015. The Claimant was asked for his comments. Separately, a member of the public complained to the JCIO about the speech on 17 July 2015. He complained that the Claimant should not have introduced himself as a judge when speaking, should not have cast aspersions on a recent judgment and the integrity of another judge, and should not have spoken publicly on a matter of political controversy. That complaint, 22178/2015, was also referred by the JCIO to Underhill LJ, the Nominated Judge.

2.5 On 6 November 2015, the Lead Presiding Judge on the South-Eastern Circuit (Sweeney J) wrote to the Claimant asking him to refrain from sitting, on a voluntary basis, until the complaints had been resolved. He said that otherwise he would have to take steps formally to seek the Claimant's suspension. The letter was said to be written with the agreement of the Presidents of the Immigration and Employment Tribunals. Conversations and meetings followed. There is no dispute that the formal procedure for interim suspension of office holders required by the Judicial Discipline (Prescribed Procedures) Regulations 2014 was not followed. By 9 November 2015 it had been agreed that the Claimant could resume sitting. I understand that the events surrounding this attempt to stop him from sitting caused the Claimant real distress.

2.6 The Claimant provided his written response to the complaints on 11 September 2015. That set out his explanation of what he said and meant on 30 April 2015. Among other things, he said that he only mentioned that he was a judge because previous speakers had complained about the

lack of diversity in the judiciary. He said that his remark was meant lightheartedly in that context and was taken as such.

2.7 Underhill LJ sent written advice to the JCIO on 13 January 2016. He set out his view that the Claimant had committed misconduct because first, regardless of the reason, he should not have introduced himself as a judge; and, secondly, he had by his words alleged that the Election Commissioner's judgment was tainted by discrimination. Underhill LJ expressed the view that this misconduct was towards the less serious end of the spectrum but merited disciplinary sanction. He advised that a formal warning was appropriate.

2.8 The Claimant was given the opportunity to respond to Underhill LJ's advice and he did so in detail in writing on 3 February 2016. He argued that informal advice would be a more appropriate and proportionate sanction. In his representations the Claimant suggested that he had been treated less favourably than a white judge would have been.

2.9 On 16 March 2016 solicitors representing the Claimant lodged Claim 1 in the Employment Tribunal. It made complaints of discrimination[1] in respect of events up to and including January 2016. It named the Ministry of Justice as sole Respondent.

2.10 The Lord Chief Justice wrote to the Claimant on 23 March 2016 telling him that because the Claimant had raised new matters that had not been considered by the Nominated Judge, he and the Lord Chancellor had decided to refer the matter to be investigated by a Disciplinary Panel. A Disciplinary Panel of 4 members, chaired by Laing J, was convened. The Disciplinary Panel decided that it was necessary to hear evidence from the Claimant. A hearing was eventually arranged for 3 November 2016. The Claimant had submitted witness statements and a skeleton argument in advance. The Disciplinary Panel heard from the Claimant but decided not to hear oral evidence from any of his other witnesses. The Disciplinary Panel produced a draft report and received further written representations from the Claimant in January 2017. Its final report was produced on 19 January 2017. It was more than 30 pages long. For present purposes, it included the following relevant matters:

2.10.1 The Disciplinary Panel recommended that a suitably senior person should formally apologise to the Claimant for the way the purported "suspension" was handled.

2.10.2 The Disciplinary Panel took the view that it was not able to make findings or express any view about the Claimant's argument that a white judicial colleague would not have been disciplined or threatened with suspension, that the investigation was politically or racially motivated, or

[1] And "whistleblowing" which was withdrawn, but is now the subject of an amendment application.

that the Claimant was being victimised for supporting another judge who was bringing discrimination complaints.

2.10.3 The Disciplinary Panel noted that the Claimant had not read the Election Commissioner's judgment when he spoke at the public meeting.

2.10.4 The Disciplinary Panel recorded their finding that an objective person listening to the Claimant's speech would have concluded that a part-time judge had said that the Election Commissioner's decision was based on the race of the litigants. They concluded that the Claimant had committed misconduct. The Panel's reasoning included the following:

> 80. … We consider that all right-thinking members of our society would view an accusation of racism as serious and damaging. To say that another judge has been guilty of unconscious racism is to make a grave attack on that judge. We consider that for [the Claimant] to have identified himself as a judge, to have made that accusation to listeners who were predominantly BME people, and to say that they should not put their faith in a justice system which is not designed for them, are statements which are likely to bring the judiciary into disrepute and to undermine its authority. That effect is exacerbated by the fact that the accusation is made by a predominant BME human rights lawyer, to whom that audience might well look for informed comment and guidance. …
> …
> 106 We accept that the circumstances in which the speech was made provide [the Claimant] with some mitigation, as does the evidence of his character witnesses. It seems to us that he did not plan to say, in public, that he was a judge, and that the decision of the Commissioner would not have been made if the litigants had been regarded as British. It also seems to us that he might have meant to say, "these decisions", rather than "this decision". But this mitigation is two-edged. It also seems to us that as a prominent BME lawyer and part-time judge, the [Claimant] should have taken particular care not to say things which objectively convey a meaning which he did not plan to convey.…

2.10.5 The Disciplinary Panel concluded that the appropriate penalty was not a formal warning, but the lesser sanction of formal advice and recommended that such advice be given.

2.11 On 3 April 2017 the Lord Chief Justice wrote a letter of formal advice to the Claimant. He wrote that he and the Lord Chancellor accepted the findings of the Disciplinary Panel and agreed with the Panel's recommendation that formal advice was the appropriate disciplinary sanction. The letter advised the Claimant that if he intended to speak publicly on a potentially controversial subject such as one that concerned a judicial decision, he should think carefully about what he intended to say and avoid making comments that could put the reputation of the judiciary at risk of damage. In particular, he should avoid making comments which an objective observer would infer to mean that he was accusing a judicial colleague of making a decision on grounds of race.

2.12 On 5 April 2017 the Claimant wrote to the Lord Chief Justice expressing his fundamental disagreement with the formal advice letter. He said that he regarded the recommendation of the Disciplinary Panel and the decision of the Lord Chief Justice and Lord Chancellor as forming a pattern of differential treatment based on his race as well as victimisation. He referred to the events relating to his "suspension" in November 2015. He contended that the judges involved, assisted by the JCIO, had deliberately sought to orchestrate his removal from office despite knowing they had no intention of seeking his suspension by filing a report with the Lord Chief Justice as required by the Judicial Conduct (Judicial and other office holders) Rules 2014. The Claimant complained of the failure to take action against those judges, which he said gave the clear message that white High Court judges were above the law.

2.13 On 6 April 2017 The Guardian newspaper published an article quoting from the Claimant's letter. The Claimant had provided the letter to them. On the same day, he tweeted a link to the newspaper article and commented, "High Court Judges unlawful activity condoned by Truss and Chief Justice. Racism still "alive"?"

2.14 On 10 April 2017, the same member of the public made a further complaint to the JCIO about these matters. That complaint, 25979/2016, was referred by the JCIO to a Nominated Judge, this time Gloster LJ. The Claimant was asked for his comments and provided them on 1 May 2017.

2.15 On 16 June 2017 solicitors representing the Claimant lodged Claim 2 in the Employment Tribunal. It made complaints of race discrimination and victimisation in respect of conduct of the Disciplinary Panel, the failure to offer the Claimant an apology in respect of the events of November 2015, and the failure to refer the judges involved in those events for investigation. Claim 2 named the Ministry of Justice, "Ms Justice Elisabeth Laing", "Lord Thomas (Lord Chief Justice)" and "Liz Truss MP (Former Lord Chancellor)" as Respondents.

2.16 Gloster LJ provided written advice about the second complaint on 2 October 2017. She considered whether the complaint was vexatious and found that it was not. She expressed the view that the Claimant had committed misconduct by providing The Guardian with a copy of his letter to the Lord Chief Justice; by tweeting as he did; and by writing to the Lord Chief Justice in the terms that he did. She took the view that the Claimant's letter to the Lord Chief Justice contained direct allegations that the Disciplinary Panel had been motivated by direct racial discrimination and an intention to victimise the Claimant; that the Lord Chief Justice and the "Lord Chancellor/Minister of Justice" had likewise been motivated by direct racial discrimination and an intention to victimise the Claimant; and that the Lord Chief Justice and the "Lord Chancellor/Minister of Justice" had

deliberately allowed a racially discriminatory judicial conduct investigation system to remain in place, whereby BME judges were to be referred for disciplinary misconduct proceedings on spurious grounds whilst white High Court judges were above the law. Gloster LJ expressed the view that the Claimant had provided no evidence to justify such allegations. She described them as "no more than bare assertions." She found that the Claimant had provided his letter to The Guardian and drawn attention to the article by means of his tweet. She concluded that this amounted to judicial misconduct. She expressed her reasoning briefly and in strong terms. She expressed the view that the Claimant was unfit for judicial office and advised the Lord Chief Justice and Lord Chancellor to remove him from office.

2.17 Solicitors representing the Claimant lodged Claim 3 in the Employment Tribunal on his behalf on 15 December 2017. It made complaints of race discrimination, victimisation and harassment in respect of the referral of the second complaint to a Nominated Judge and the conduct of Gloster LJ. It named the Ministry of Justice, "Dame Gloster LJ" and Mr S Parsons [who works for the JCIO] as Respondents.

2.18 I do not need to set out the full procedural history of these claims at this stage. I note that there was a lengthy stay of proceedings, pending the decision of the Supreme Court in the case of P (see below). I also note that at a preliminary hearing on 26 February 2019, at which all parties were represented by counsel, REJ Robertson made an order substituting the Secretary of State for Justice for the Ministry of Justice as Respondent in each of the claims, and amending the names of the two named judicial Respondents to The Hon Mrs Justice Elisabeth Laing and The Right Hon Lady Justice Gloster .

Procedural background to the amendment issues

3.1 In their responses to the claims, the Respondents had asserted that the Claimant had named as Respondents people or entities that did not have legal responsibility for the matters complained of. At the preliminary hearing on 26 February 2019 REJ Robertson ordered the Claimant to lodge any application to amend the claims so as to name different Respondents by 29 March 2019. His legal representatives lodged a detailed amendment application on his behalf as ordered. That application sought to remove the Secretary of State for Justice as a party to Claim 1 and to substitute seven different parties as Respondents to various of the allegations. In Claim 2 the application sought to remove the Honourable Mrs Justice Laing and the Ministry of Justice; to name the Lord Chief Justice and Lord Chancellor by reference to their offices; and to join the relevant Disciplinary Panel and the JCIO. In Claim 3 the application sought to remove each of the three named Respondents and to substitute the Nominated Judge and the JCIO. Detailed amended grounds of claim, drafted by counsel, were lodged with the amendment application.

3.2 As ordered by REJ Robertson, the Respondents provided a written response to the amendment application on 17 April 2019. At that stage the preliminary hearing was intended to take place on 20 and 21 May 2019. The Respondents lodged their written skeleton argument and authorities on 7 May 2019. In the event, the hearing did not go ahead in May. On 18 June 2019 the parties were informed that it had been relisted for 12 and 13 September 2019.

3.3 On 8 August 2019 I noted that the Claimant had not yet provided his skeleton argument (because it had not yet fallen due when the preliminary hearing was postponed). I ordered him to lodge it by 23 August 2019. He was unable to do so and requested an extension to 30 August 2019. The Claimant provided a skeleton argument on 30 August 2019. In his covering email he indicated that he withdrew the earlier amendment application (although he confirmed that he was still withdrawing the claim against Mr Parsons in Claim 3). He argued instead that the Ministry of Justice was the correct Respondent to all the claims. In the alternative he argued that the Lord Chancellor and Lord Chief Justice were the appropriate Respondents, on the basis of the vicarious liability for the conduct of relevant bodies and individuals. In the further alternative, he contended that named bodies and individuals should be joined as Respondents. On 11 September 2019 the Claimant sent a letter said to clarify the proposed amendments to the names of parties as highlighted in the skeleton argument, although the position was still not entirely clear.

The parties' positions as to the correct Respondents

4.1 I clarified whom the parties said were the appropriate Respondents to each claim at the start of preliminary hearing. Following certain concessions by the Respondents during the hearing, the Claimant altered his position in some respects. In particular, Mr Cooper QC indicated during his submissions that the Respondents did not object to the application to substitute the Lord Chief Justice as the correct Respondent to allegations 2 to 4 in Claim 1. The Claimant indicated in those circumstances that he no longer sought to join Sweeney J or other individuals/office holders as Respondents to those allegations. By the conclusion of the preliminary hearing, the parties' positions in respect of the disputed allegations (allegations being denoted §), were as follows:

	Allegation	Respondent currently named	Claimant's position	Respondents' position
Claim 1				

§ 1	The decision of Underhill LJ and/or the JCIO to refer the conduct of the Claimant	Secretary of State for Justice	Ministry of Justice or Secretary of State for Justice If not, the Nominated Judge	1. Nominated Judge 2. JCIO

§ 5	The recommendation of Underhill LJ	Secretary of State for Justice	Ministry of Justice or Secretary of State for Justice If not, the Nominated Judge	Nominated Judge
§ 7	The JCIO referring the Claimant's matter to a disciplinary hearing	Secretary of State for Justice	Ministry of Justice or Secretary of State for Justice If not, the former Lord Chief Justice and the former Lord Chancellor	JCIO
Claim 2				
§ i	"Conduct exacerbated because of C's race" relating to decision of Disciplinary Panel	1. Secretary of State for Justice 2. Hon Mrs Justice Laing 3. Lord Thomas former LCJ 4. Liz Truss MP former Lord Chancellor	1. Ministry of Justice or Secretary of State for Justice 2. Mrs Justice Laing as Chair of Disciplinary Panel 3. If not, the Disciplinary Panel, the JCIO, the LCJ and the Lord Chancellor	Disciplinary Panel

§ ii	Refusal to consider the Claimant's allegations of discrimination, victimisation and harassment	1. Secretary of State for Justice 2. Hon Mrs Justice Laing 3. Lord Thomas LCJ 4. Liz Truss MP former Lord Chancellor	1. Ministry of Justice or Secretary of State for Justice 2. Mrs Justice Laing as Chair of the Disciplinary Panel 3. If not, the Disciplinary Panel, the JCIO, the LCJ and the Lord Chancellor	Disciplinary Panel
§ iv	Refusal to offer the Claimant an apology	1. Secretary of State for Justice 3. Lord Thomas LCJ 4. Liz Truss MP former Lord Chancellor	1. Ministry of Justice or Secretary of State for Justice 2. JCIO 3. LCJ 4. Lord Chancellor	1. Lord Chancellor 2. Lord Chief Justice
§ v	Refusal to allow the Claimant to call his witnesses to give oral evidence	1. Secretary of State for Justice 2. Hon Mrs Justice Laing	1. Ministry of Justice or Secretary of State for Justice 2. Mrs Justice Laing as Chair of Disciplinary Panel 3.If not, the Disciplinary Panel	Disciplinary Panel

§ vi	Refusal to refer the Claimant's complaints about being subjected to threats by fellow office holders for investigation	1. Secretary of State for Justice 2. Hon Mrs Justice Laing 3. Lord Thomas LCJ 4. Liz Truss MP former Lord Chancellor	1. Ministry of Justice or Secretary of State for Justice 2. Mrs Justice Laing as Chair of Disciplinary Panel. 3.If not, the Disciplinary Panel and the JCIO	Disciplinary Panel
§ vii	Refusal to call Underhill J to give evidence	1. Secretary of State for Justice 2. Hon Mrs Justice Laing	1. Ministry of Justice or Secretary of State for Justice 2. Mrs Justice Laing as Chair of Disciplinary Panel 3. If not, the Disciplinary Panel	Disciplinary Panel
§ viii	Make-up of the panel	Secretary of State for Justice	1. Ministry of Justice or Secretary of State for Justice 2. If not, LCJ and Lord Chancellor	1. Lord Chancellor 2. Lord Chief Justice
Claim 3				
§ (1)	Referral of Second Complaint to Nominated Judge	1. Secretary of State for Justice 2. Right Hon Lady Justice Gloster	1. Ministry of Justice or Secretary of State for Justice 2. Nominated Judge Right Hon Lady Justice Gloster 3. If not, JCIO	JCIO (amendment application not opposed in that respect)

§ (2)	The Nominated Judge's Decision	1. Secretary of State for Justice 2. Right Hon Lady Justice Gloster	1. Ministry of Justice or Secretary of State for Justice 2. Nominated Judge (Right Hon Lady Justice Gloster) 3. If not, JCIO	Nominated Judge (amendment application not opposed in that respect)

Legal Principles

Equality Act 2010

5.1 The starting point in identifying the correct Respondents to these claims is the Equality Act 2010. There is no dispute that as a Recorder, Employment Judge and Judge of the First-Tier Tribunal, the Claimant held a public office as defined in section 50(2) Equality Act 2010. By virtue of section 50(6) a person who is a "relevant person" in relation to the public offices held by the Claimant must not discriminate against a person appointed to such an office by subjecting the person to detriment. Section 50(8) says that a "relevant person" in relation to a public office must not, in relation to that office, harass the person appointed to it. Under section 50(9), in respect of at least some of the public offices held by the Claimant, a person who is a "relevant person" in relation to those offices must not victimise a person appointed to the office by subjecting them to detriment.

5.2 Section 52 Equality Act 2010 defines "relevant person" as follows:

> 52 …
> (6) "Relevant person", in relation to an office, means the person who, in relation to a matter specified in the 1st column of the table, is specified in the 2nd column… .

Matter	Relevant person
…	
Subjecting an appointee to any other detriment	The person who has the power in relation to the matter to which the conduct in question relates (or, if there is no such person, the person who has the power to make the appointment).
Harassing an appointee	The person who has the power in relation to the matter to which the conduct in question relates.

5.3 These provisions are separate from sections 39 and 40 Equality Act 2010, which make it unlawful for an employer to discriminate, victimise and harass an employee or applicant for employment.

5.4 Under s 109(1) Equality Act 2010, anything done by a person in the course of that person's employment is treated as also done by their employer. That means employers are liable for the acts of their employees in the course of employment. Vicarious liability is imposed by the statute. There are corresponding provisions for principals and agents in s 109(2). The Equality Act 2010 then goes one step further: s 110 imposes personal liability on individual employees or agents who do something that is treated as having been done by their employer or principal under s 109. That is the provision that allows employees to bring discrimination claims against named individuals as well as against their employer.

Judicial Discipline Regulations and Rules

5.5 As the outline chronology indicates, these claims relate to actions taken in respect of judicial discipline. It is therefore necessary to refer to the Judicial Discipline (Prescribed Procedures) Regulations 2014 SI 1919/2014 ("the Regulations") and the Judicial Conduct (Judicial and other office holders) Rules 2014 made pursuant to the Regulations ("the Rules").

5.6 The Regulations are made by the Lord Chief Justice with the agreement of the Lord Chancellor in exercise of powers conferred under the Constitutional Reform Act 2005. Section 108 of that Act confers certain disciplinary functions on the Lord Chief Justice and Lord Chancellor. Section 115 gives the Lord Chief Justice, with the agreement of the Lord Chancellor, power to make regulations providing for the procedures to be followed in investigating and determining allegations of misconduct by judicial office holders. Under Regulation 4 the Lord Chancellor must, with the agreement of the Lord Chief Justice (and others), designate officials for the purpose of performing functions under the Regulations. Regulation 4(2) says that officials so designated are known collectively as the Judicial Conduct Investigations Office. Regulation 4 confers certain powers on the JCIO. Under Regulation 6 complaints about office holders must (so far as relevant to these claims) be made to the JCIO.

5.7 Regulation 7 gives the Lord Chief Justice, with the agreement of the Lord Chancellor, power to make rules about the process to be applied in respect of allegations of misconduct. Regulation 9 defines a nominated judge as an office holder who is nominated by the Lord Chief Justice to deal with a case in accordance with rules made under Regulation 7. The Lord Chief Justice may nominate different office holders to deal with different cases, but in any particular case a nominated judge must be of at least the same rank as the office holder concerned.

5.8 Regulation 11 deals with disciplinary panels. It provides that a disciplinary panel is a panel consisting of (a) an office holder or former office holder who is of a higher rank than the office holder concerned; (b) an office holder or former office holder who is of the same rank as the office holder concerned; and (c) two other members,

neither of whom has been an office holder or a lawyer. The first two members must be nominated by the Lord Chief Justice. The Lord Chancellor, with the agreement of the Lord Chief Justice, must nominate the other members. The panel member appointed under sub-paragraph (a) must chair the disciplinary panel and exercise a casting vote if necessary.

5.9 Under Regulation 12, before making a decision under Regulation 15 in relation to a case, the Lord Chancellor and Lord Chief Justice must consider any advice provided by a person who has conducted an investigation into a case in accordance with rules made under Regulation 7. Where the Lord Chancellor and Lord Chief Justice have considered such advice and require further investigation before making a decision under regulation 15 they may, if they agree, refer a case for further investigation to a nominated judge, a disciplinary panel or others: see Regulation 13. Under Regulation 15, where the Chancellor and Lord Chief Justice have considered advice under Regulation 12 they may agree to dismiss a case or to take a particularly disciplinary action. Regulation 16 requires the JCIO to inform specified persons, including the office holder concerned, of the decision made by the Lord Chancellor and Lord Chief Justice under Regulation 15.

5.10 The Rules define “disciplinary panel” and “nominated judge” by reference to the Regulations. A “complaint” is defined as a complaint containing an allegation of misconduct by a person holding an office. The Rules apply where a complaint is made to the JCIO and where a nominated judge refers the case to the JCIO under Rule 97 (see further below).

5.11 Under Rule 20 a complaint must initially be considered by the JCIO. Rule 21 requires the JCIO to dismiss a complaint if, among other things, it is vexatious or without substance. If a complaint is not dismissed under Rule 21, the JCIO must either deal with it under the summary process (not relevant in this case) or refer the complaint to a nominated judge to consider: Rule 25.

5.12 Rule 26 provides that before a referral can be made to a nominated judge, the JCIO must provide the office holder concerned with details of the complaint and other information and invite the office holder to provide comments.

5.13 Part 4 of the Rules deals with complaints that are referred to a nominated judge under Rule 25. Under Rule 38 the nominated judge must consider a complaint and determine the facts of the matter; determine whether the facts amount to misconduct; and advise as to whether disciplinary action should be taken and if so what. The nominated judge has power under Rule 40 to make such enquiries and interview such persons as they consider appropriate. Under Rule 41 the nominated judge may advise the Lord Chancellor and the Lord Chief Justice that a complaint should be dismissed; dismiss a complaint; deal with a complaint informally; recommend that disciplinary action should be taken; or refer a complaint to an investigating judge. A nominated judge may only dismiss a complaint or deal with it informally if he or she considers that there has been no misconduct: rule 42. If

the nominated judge advises the Lord Chancellor and the Lord Chief Justice to dismiss a complaint or recommends that disciplinary action should be taken, the nominated judge must prepare a report. Rules 47 to 49 specify certain matters that must be addressed in the report of the nominated judge. Rule 50 requires the nominated judge to send his or her report to the JCIO and requires the JCIO to send it in turn to the office holder.

5.14 Under Rule 53 the office holder may provide comments on the report to the JCIO, request further investigation and, in some situations, request a disciplinary panel to consider the complaint. Unless the office holder confirms that they want a disciplinary panel to consider the complaint under rule 53(c) the JCIO must send the report and the office holder’s comments to the Chancellor and the Lord Chief Justice: Rule 56.

5.15 Disciplinary panels are dealt with by Part 6 of the Rules. Part 6 applies where (among other things) the Lord Chancellor and the Lord Chief Justice have referred a complaint to a disciplinary panel under Regulation 13 or 14. Rule 74 requires the disciplinary panel to be convened in accordance with Regulation 11. Rules 75 to 78 are concerned with the functions of a disciplinary panel. A disciplinary panel may consider and review any findings of fact; any recommendation as to the conduct of the office holder; and any proposed disciplinary action: Rule 75. Under Rule 76, where a disciplinary panel reviews any findings of fact, any question as to whether that fact is established must be decided on the balance of probabilities. Rule 79 gives the disciplinary panel power to make such enquiries as it considers appropriate to fulfil its functions and to request relevant documents. Rule 80 requires it to take oral evidence from the office holder concerned unless it considers that unnecessary. By virtue of Rule 81 it may take evidence, including oral evidence, from any other person.

5.16 Rule 82 requires the disciplinary panel to prepare a report setting out the facts of the case; the panel’s opinion on whether there has been any misconduct; and whether disciplinary action should be taken and if so what. Under Rule 83 the disciplinary panel must send its draft report to the office holder concerned. Rule 89 requires the disciplinary panel to send its report to the Lord Chancellor and the Lord Chief Justice.

5.17 Rules 97 and 98 are concerned with cases where no complaint has been made. Rule 97 says that where a nominated judge receives information from any source which suggests to them that taking disciplinary action might be justified they may refer the case to the JCIO. Under Rule 98 the JCIO must then investigate the case in accordance with Part 2 of the Rules as though it were a complaint of misconduct.

P v Commissioner of Police of the Metropolis

5.18 Police officers are another category of office holders in respect of whom the Equality Act 2010 makes separate provision. Because, at common law, they are not employees but office holders, s 42 deems them to be employed by the relevant

chief officer in respect of acts done by the chief officer, and employed by the relevant responsible authority in respect of acts done by that responsible authority. Since s 39 prohibits discrimination by employers, that enables them to bring claims under the Equality Act. Section 43 identifies the relevant chief officers and responsible authorities.

5.19 In P v Commissioner of Police of the Metropolis [2018] ICR 560 the Supreme Court was concerned with a complaint of discrimination brought by a police officer who had been found guilty of misconduct and dismissed by a police misconduct panel constituted under the Police (Conduct) Regulations 2008. The difficulty that arose was that the relevant disciplinary functions were entrusted by those Regulations to misconduct panels and the exercise of those functions by a misconduct panel was not an act done by a chief officer or relevant authority. The Equality Act 2010 did not make provision for police officers to bring a complaint of discrimination against a misconduct panel, whether by deeming them to be employed by the misconduct panel in respect of acts done by it, or otherwise. However, Council Directive 2000/78/EC conferred on P a directly effective right to be treated in accordance with the principle of equal treatment in relation to employment and working conditions, including dismissals. Read literally, s 42 failed to provide a remedy for someone in P's position. The Supreme Court therefore held that s 42(1) Equality Act 2010 should be construed as applying to the exercise of disciplinary functions by misconduct panels if required.

5.20 Mr Cooper QC submits, and I agree, that the position in this case is materially different. There is not a gap in s 50 or 52 in the way there was in s 42. Section 50 makes it unlawful for the relevant person to discriminate against an office holder. Section 52 identifies who the relevant person is by reference to the power that is actually being exercised. If no specific person has that power, the relevant person is the person who has the power to make the appointment. If P had been covered by these provisions, s 50 would have made it unlawful for the relevant person to discriminate against her by terminating her appointment and s 52 would have identified the relevant person as the person with the power to terminate her appointment, i.e. the police misconduct panel.

5.21 Although the situations are materially different in that respect, Mr Cooper QC submits that what was said by the Supreme Court at paragraph 32 is directly analogous to this case. The Supreme Court held that the exercise of disciplinary functions by panels on whom those functions were conferred by secondary legislation were not acts done by chief officers or responsible authorities. Nor could the exercise of those functions generally be regarded as something done by an employee of the chief officer or responsible authority within the meaning of s 109(1), bearing in mind that the panel exercised its most significant functions collectively, and that, at least, those of its members who were police officers would not be employees. Nor could the panel be regarded as exercising its disciplinary functions as the agent of the chief officer or the responsible authority, within the

meaning of s 109(2), because the relevant powers were conferred directly on the panel by the 2008 Regulations.

5.22 I agree that the position in respect of disciplinary panels under the Regulations is analogous to that of police misconduct panels in the respects to which the Supreme Court referred in paragraph 32. Although the provisions governing police misconduct and judicial misconduct are not identical, the scheme I have outlined above makes clear that disciplinary panels under the Regulations exercise their functions collectively; the members are not employees; and the relevant powers are conferred directly on the disciplinary panel.

Quasi-corporate entities

5.23 Questions arise in this case as to how proceedings should be brought against particular “entities”. A natural or legal person can be sued as such. A corporation is a legal person separate from the natural persons connected with it. The law recognises as legal persons capable of being sued, not just formally constituted companies or corporations but, in some situations, what are referred to as quasicorporations. The question is whether statute has, expressly or impliedly, given the entity in question the right to sue or be sued as such.

5.24 Mr Cooper QC referred me to relevant authorities: The Chaff and Hay Acquisition Committee v J. A Hemphill and Sons Proprietary Ltd (1947) 74 CLR 375; Inland Revenue Commissioners v Bew Estates [1956] 1 Ch 407; Knight and Searle v Dove [1964] 2 QB 631; and In re Edis’s Declaration of Trust [1972] 1 WLR 1335. It is difficult to identify generally applicable principles to be applied in determining whether statute does, expressly or impliedly, create a quasi-corporate entity capable of being sued as such, particularly given that the entities at issue in those cases were different from those involved in these claims. Factors identified in those cases include whether the entity is given the capacity to own property and the capacity to act by agents and whether it has a specific name. Fundamentally this is an exercise in construing the legislation.

5.25 I should also refer to the approach taken in a different situation, where the entity is not a quasi-corporation but is an unincorporated association. That is an association that is no more than a collection of individuals linked by agreement into a group. It does not have a separate legal personality. In the Employment Tribunal, it is possible to bring proceedings against such an association in the name of the association or a representative respondent, provided that the members of the board or management committee are actually aware of the proceedings and that, where allegations of misconduct against a particular member are made, that member is joined: Nazir v Asim [2010] ICR 1225.

Vicarious liability

5.26 The Claimant seeks to rely on common law principles of vicarious liability. Vicarious liability in tort requires, first, a relationship between the defendant and the

wrongdoer and, secondly, a connection between that relationship and the wrongdoer's act or default, such as to make it just that the defendant should be held legally responsible to the claimant for the consequences of the wrongdoer's conduct.

5.27 As to the first element, the relationship between the defendant and the wrongdoer can give rise to vicarious liability even in the absence of a contract of employment. The essential elements are that the tort was committed as a result of activity being undertaken by the wrongdoer on behalf of the defendant, that that activity was integral to the defendant's business activities and that the defendant, by employing the wrongdoer to carry out the activity, had created the risk of the tort being committed by the wrongdoer. Those criteria are designed to ensure that liability is imposed where it is fair, just and reasonable to do so: see Cox v Ministry of Justice [2016] AC 660 SC.

5.28 As to the second element, the question is fundamentally whether there is sufficiently close connection between the wrongdoer’s job (or position) and their wrongful conduct to make it right, as a matter of social justice, for the employer to be held liable: see Mohamud v Wm Morrison Supermarkets plc [2016] AC 677 SC.

5.29 The underlying basis of the principle of vicarious liability is that it is considered just in some circumstances for the employer or equivalent to be held liable for the acts of the individual. Essentially, the need for such liability arises because the employer or equivalent defendant is better placed to compensate the victim than the individual wrongdoer is.

Amendment

5.30 Rule 34 of the Employment Tribunals Rules of Procedure give the Tribunal power to add any person as a party to Tribunal proceedings if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal that it is in the interests of justice to have determined in the proceedings. The Tribunal also has power to remove any party apparently wrongly included.

5.31 The principles to be applied in deciding whether to allow an amendment to a claim are well-established: see in particular Selkent Bus Company Ltd v Moore [1996] ICR 836 and Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650. Essentially:

5.31.1 The discretion to amend must be exercised judicially and taking into account all the relevant circumstances.

5.31.2 The Tribunal should consider the nature of the amendment: does it simply add detail to existing allegations, does it apply a new label to facts already pleaded, or does it make entirely new factual allegations that change the basis of the existing claim?

5.31.3 If the amendment seeks to add a new complaint or cause of action, the Tribunal should have regard to any applicable time limit for bringing such

a claim. However, that is just one factor in deciding whether to allow the amendment; it is not by itself determinative.

5.31.4 The Tribunal must also consider the timing and manner of the application, including the length of and reasons for any delay in making the application.

5.31.5 Having considered all the relevant facts and circumstances, fundamentally the Tribunal must balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

5.32 The merits of the claim a claimant is seeking to add can be relevant. In balancing the injustice and hardship to each party, it is clear that a Tribunal can take into account that the proposed claim is “obviously hopeless”: see most recently Herry v Dudley MBC UKEAT/0170/17/LA. In Gillett v Bridge 86 Ltd UKEAT/0051/17/DM the EAT (Soole J) went further, suggesting that a Tribunal could take into account whether the claim had “reasonable prospects of success”. However, that test was not applied in Herry.

Strike out and Deposit orders

5.33 Under Rule 37 of the Employment Tribunal Rules of Procedure 2013, a Tribunal may strike out all or part of a claim on the basis that (among other things) it has no reasonable prospect of success.

5.34 Under Rule 39, where a Tribunal at a preliminary hearing considers that any allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring the party to pay a deposit of not more than £1000 as a condition of continuing to advance that allegation or argument. Rule 39(2) requires the Tribunal to make reasonable enquiries about the party’s ability to pay the deposit and to have regard to that when deciding the amount of the deposit.

5.35 In considering whether a claim or response has “no reasonable prospect of success” the question is not whether it is likely to fail; there must be no reasonable prospects: see Balls v Downham Market High School and College [2011] IRLR 217 EAT.

5.36 In a case where the central facts are in dispute, in general it is not appropriate to strike out: see North Glamorgan NHS Trust v Ezsias [2007] ICR 1126. It is only in an exceptional case that striking out might be appropriate, for example where there is no real substance to the factual assertions made, particularly if contradicted by contemporary documents, or where the facts sought to be established were “totally and inexplicably inconsistent with the undisputed contemporaneous documentation.”

5.37 Further, as a general principle, discrimination cases should not be struck out except in the very clearest circumstances: see e.g. Anyanwu v South Bank Students’ Union [2001] IRLR 305, HL. That does not mean that they cannot be struck out,

but indicates that Tribunal should exercise particular caution in discrimination cases. Guidance was given by the EAT in Mechkarov v Citibank NA [2016] ICR 1121:

5.37.1 Only in the clearest case should a discrimination claim be struck out;

5.37.2 Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;

5.37.3 The Claimant's case must ordinarily be taken at its highest;

5.37.4 If the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and

5.37.5 A Tribunal should not conduct an impromptu mini-trial of oral evidence to resolve core disputed facts.

5.38 Nonetheless, discrimination claims can in appropriate cases be struck out: see Ahir v British Airways plc [2017] EWCA Civ 1392. The Court of Appeal reminded Tribunals that they should not be deterred from striking out claims, including discrimination claims, involving a dispute of fact if they were indeed satisfied that there was no reasonable prospect of the facts necessary to liability being established, and provided that they were keenly aware of the danger of reaching such a conclusion without the full evidence having been heard and explored. Again, this is particularly so in a discrimination case. The question whether that threshold is met is a matter of judgment for the Tribunal in each case. The Court of Appeal held at para 24:

> In a case of this kind, where there is on the face of it a straightforward and welldocumented innocent explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation without the claimant being able to advance some basis, even if not yet provable, for that being so.

5.39 The threshold for making a deposit order, "little reasonable prospect of success", is a lower one, but the Tribunal must have a proper basis for doubting the likelihood of the party being able to establish the essential facts. The Tribunal is entitled to take into account not only the purely legal issues, but also the likelihood of the party being able to establish the facts essential to his or her case, and in doing so, to reach a provisional view as to the credibility of the assertions being put forward: see: Van Rensburg v Royal Borough of Kingston-upon-Thames UKEAT/0095/07.

Who is the correct Respondent?

6.1 The appropriate starting point must be to decide who is the correct Respondent to the Claimant's claims. That depends on whose acts are made unlawful by the Equality Act 2010, so as to give rise to a cause of action under that Act. By virtue of s 50 and 52, the person whose acts are made unlawful is the person who has the power in relation to the matter to which the conduct in question relates. That means it is necessary to identify the conduct complained of, and then to identify the person who has the power in relation to the matter to which that conduct relates. That cannot, it seems to me, be done in a broad brush or general way. It requires discrete consideration of each complaint the Claimant makes. Nor is it appropriate

simply to say that the Ministry of Justice, Secretary of State for Justice, Lord Chancellor and/or Lord Chief Justice must be liable because the conduct complained of relates to acts done by judicial office holders. If Parliament had intended such an approach that is what the Equality Act 2010 would have said.

6.2 I therefore deal in turn with the specific allegations, as summarised in the agreed lists of issues. My findings are as follows.

6.3 Claim 1 § 1: Insofar as the Claimant complains of the decision of Underhill LJ to refer the matters raised by the Presiding Judge on 17 June 2015 to the JCIO, the correct Respondent is the Nominated Judge in judicial complaint 22092/2015. Where a Nominated Judge receives information suggesting that disciplinary action might be justified and no complaint has been made, under Rule 97 the power to make a referral to the JCIO is vested in the Nominated Judge. This is not a power of the Ministry of Justice, the Secretary of State for Justice, the Lord Chancellor or the Lord Chief Justice. Nor is it a power of the Lord Chief Justice delegated to the Nominated Judge. The Regulations and the Rules made pursuant to them confer the power directly on the Nominated Judge. The role of the Lord Chief Justice is to nominate the office holder to deal with a case in accordance with the Rules: Regulation 9. The person who has the power in relation to making a referral to the JCIO is the Nominated Judge.

6.4 I do not accept the Claimant's submission that the Ministry of Justice or the Secretary of State for Justice is the appropriate Respondent. The Equality Act 2010 legislates to prohibit discrimination by identified persons (here the relevant person) and, by the mechanism described above, to impose vicarious liability on employers and principals in specified circumstances. The relevant person in this complaint is the Nominated Judge. The Nominated Judge is not an employee of the Ministry of Justice or the Secretary of State for Justice. Nor was the Nominated Judge their agent – he performed functions conferred directly on him by the Regulations and the Rules. The Act therefore does not provide for the Secretary of State or the Ministry of Justice to be liable in the circumstances about which the Claimant complains. Nor is it necessary to impose vicarious liability on them as a matter of social justice applying common law principles, even if that were possible. There is a properly identifiable Respondent under the legislation against whom a claim can be brought and no suggestion that the Claimant would not be adequately compensated if his claim were to succeed.

6.5 Insofar as the Claimant complains of the decision of the JCIO to refer the first complaint by the member of the public to the Nominated Judge, the correct Respondent is the JCIO. It is the JCIO that is required to consider a complaint under Rule 20, dismiss it in certain circumstances under Rule 21, and otherwise deal with it under the summary process (not applicable) or refer it to a Nominated Judge under Rule 25. The "person" with the power in relation to referring the first complaint to a Nominated Judge was therefore the JCIO.

6.6 I am satisfied on a proper construction of the Regulations that the JCIO should be named as such in a quasi-corporate capacity. The JCIO is different from the entities that were treated as quasi-corporations in the cases referred to above and, for example, the legislation does not give the JCIO express powers to hold property or act through agents. Nonetheless, Regulation 4 is explicit in stating that the officials designated by the Lord Chancellor and Lord Chief Justice to perform functions under the Regulations are to be known collectively as the JCIO. The Regulations and Rules confer powers and functions on the JCIO in that name. It is in that sense distinct, and deliberately so, from the Ministry of Justice as a whole. As I understand counsel's submissions, there is no dispute by the JCIO that it can properly be named as a Respondent. Nor is there any suggestion that it is not in a position adequately to compensate the Claimant should his claims succeed.

6.7 Neither the Ministry of Justice nor the Secretary of State for Justice is the correct Respondent. The power to refer a complaint of alleged judicial misconduct to a Nominated Judge is not conferred on them. These are, of course, matters of some constitutional importance. For the same reasons I have already outlined, it is not necessary or appropriate to impose vicarious liability on them when there is a properly identifiable Respondent and no suggestion that it is not willing and able adequately to compensate the Claimant.

6.8 Claim 1 § 5: The correct Respondent is the Nominated Judge in judicial complaints 22092/2015 and 22178/2015. The Claimant is complaining about the advice given by Underhill LJ in his report to the JCIO on 13 January 2016 in which he determined that the Claimant had committed misconduct and recommended that he be given a formal warning. In doing so he was performing functions conferred on him as Nominated Judge by Part 4 of the Rules, in particular Rules 38, 41 and 50. The Nominated Judge is therefore the person with the power in relation to the matter complained of for the purposes of s 52 Equality Act 2010.

6.9 For similar reasons to those in respect of §1 above, the Ministry of Justice and the Secretary of State for Justice are not appropriate Respondents, whether under the Equality Act 2010 or by way of common law vicarious liability. Indeed, there is a clear separation of functions under the Rules and Regulations. The Nominated Judge must consider the complaint, determine the facts, determine whether there has been misconduct, and, if so, advise on whether there should be disciplinary action and what it should be. The Lord Chancellor and Lord Chief Justice must consider such advice before making a decision, but it is for them under Regulation 15 to agree whether to dismiss the case or take disciplinary action.

6.10 Claim 1 § 7: Allegation 7 as pleaded is a complaint that the JCIO referred the Claimant's matter to a disciplinary hearing. In the original claim form, the Claimant reserved his position as regards submissions and recommendations made by the JCIO. In paragraph 22 of the response the Respondents pleaded that the JCIO provided advice to the Lord Chief Justice and Lord Chancellor recommending that the matter be referred to a panel and that the advice was accepted by them. In the

Claimant's further particulars that was essentially repeated at paragraphs 29 and 30. However, in the Claimant's accompanying schedule of discriminatory conduct, the complaint made is that the JCIO referred the complaint against the Claimant to a disciplinary panel and that is reflected in the agreed list of issues.

6.11 The discrimination complaint made by the Claimant is therefore on the face of the pleading a complaint about something he contends the JCIO did (although it appears from his own further particulars that that may not be factually accurate). If he were complaining about the decision of the Lord Chief Justice and Lord Chancellor, communicated to him on 23 March 2016, to refer the matter to a disciplinary panel, they would plainly be the appropriate Respondents: under Regulation 13 the power to make a reference to a disciplinary panel in these circumstances is a power of the Lord Chancellor and Lord Chief Justice. However, that is not his complaint. Nonetheless, it seems to me that the Lord Chief Justice and the Lord Chancellor remain the appropriate Respondents to this claim. The JCIO plainly did not have power to refer the Claimant's case to a disciplinary panel in these circumstances. The persons with the power in relation to the matter to which the (alleged) conduct relates are the Lord Chief Justice and the Lord Chancellor.

6.12 Claim 2: § i, v, vii: Insofar as these complaints relate to the conduct of the disciplinary hearing and the content of the Disciplinary Panel's report, the correct Respondent is the Disciplinary Panel in judicial complaints 22092/2015 and 22178/2015. Allegation i is about findings or decisions set out in the final report of the Disciplinary Panel dated 19 January 2017. Rule 82 requires the Disciplinary Panel to prepare a report setting out the facts of the case; whether in its opinion there has been any misconduct; and whether disciplinary action should be taken and if so what. Allegations v and vii are about what might be called case management decisions of the Disciplinary Panel. Under Rule 79 the Disciplinary Panel may make such enquiries as it considers appropriate to fulfil its functions, and under Rule 81 it may take oral evidence from any person. The power to decide whether to call particular individuals to give oral evidence is conferred by the Rules on the Disciplinary Panel. These three allegations relate to matters in respect of which the relevant power is conferred by the Rules on the Disciplinary Panel. There is no basis under the Equality Act 2010 for imposing liability on anyone other than the Disciplinary Panel. As in P, the members of the disciplinary panel were not employees of the Lord Chief Justice or Lord Chancellor and they were not their agents either. Further, for reasons similar to those I have already outlined, there is no basis for seeking to impose vicarious liability at common law on the Ministry of Justice, Secretary of State for Justice, Lord Chancellor or Lord Chief Justice. There is no suggestion that the Claimant would not be adequately compensated were a complaint against the Disciplinary Panel to succeed.

6.13 In my view the correct approach is to name the Disciplinary Panel as such, by reference to the relevant judicial complaints. I do not consider that on a proper construction of the Rules and Regulations the Disciplinary Panel in any particular

complaint is a quasi-corporate entity. The Regulations create one JCIO and expressly confer that name on it. Disciplinary Panels are different. The Regulations specify how a Disciplinary Panel is to be constituted in any particular case, but they do not create a quasi-corporate entity. It would not be correct, as the Claimant submits, to name only the Chair of the Disciplinary Panel. The Rules confer functions on the Disciplinary Panel collectively. The Disciplinary Panel is required to be convened in accordance with Regulation 11 and is defined in the Rules by reference to that Regulation. While the senior ranking office holder is required to chair the Panel and exercise a casting vote if necessary, that does not prevent the Panel from acting collectively. I have already indicated that in my view a Disciplinary Panel is analogous to a Police Misconduct Panel in the respects referred to at paragraph 32 of the decision of the Supreme Court in P.

6.14 The alternatives, therefore, are to name the Disciplinary Panel as such, or to name each individual member of the Disciplinary Panel. In this case, neither party is seeking to name each individual member of the Disciplinary Panel. The situation is in my view analogous to the situation in Nazim involving an unincorporated association, and the underlying principles identified in that case also apply here. Provided that each member of the Disciplinary Panel is actually aware of the proceedings, and provided that where a specific complaint is made about a particular Panel member, that member is joined individually, I find that it is appropriate to name the Disciplinary Panel as a whole as the appropriate Respondent. The complaints in this case are about the decisions of the panel and its report, not about specific conduct by a particular individual. If the Disciplinary Panel is to be named as a whole, the Respondents will need to confirm to the Tribunal that each Panel member is aware of these proceedings.

6.15 Allegation i also forms the basis of a complaint that the Lord Chancellor and Lord Chief Justice directly discriminated against and victimised the Claimant because they accepted and adopted the findings of the Disciplinary Panel. The appropriate Respondents to that part of the complaint are the Lord Chancellor and Lord Chief Justice. This part of the complaint relates to the letter written by the Lord Chief Justice on 3 April 2017, confirming that he and the Lord Chancellor accepted the findings and recommendation of the disciplinary panel. In doing so, the Lord Chief Justice and Lord Chancellor were exercising their functions under Regulation 15. They were the people with the relevant power for the purposes of s 52 Equality Act 2010.

6.16 Claim 2 § ii is about the refusal of the Disciplinary Panel to consider the Claimant's allegations of discrimination, victimisation and harassment. That is said to amount to harassment, victimisation and indirect discrimination. The Claimant also complains that by accepting and adopting the Panel's decision the Lord Chief Justice and the Lord Chancellor victimised him. There is a dispute about whether the Disciplinary Panel had power under the Rules to consider the Claimant's complaints.

Nonetheless, to the extent that it is the decision of the Disciplinary Panel that it could not deal with those complaints, set out in its final report, about which the Claimant complains, it seems to me that the person with the power in relation to the matter to which the conduct in question relates must in those circumstances again be the Disciplinary Panel.

6.17 To the extent that this is a complaint that the Lord Chancellor and Lord Chief Justice victimised the Claimant because they accepted and adopted the findings of the Disciplinary Panel, the appropriate Respondents are the Lord Chancellor and Lord Chief Justice. This part of the complaint relates to the letter written by the Lord Chief Justice on 3 April 2017, confirming that he and the Lord Chancellor accepted the findings and recommendation of the disciplinary panel. In doing so, the Lord Chief Justice and Lord Chancellor were exercising their functions under Regulation 15. They were the people with the relevant power for the purposes of s 52 Equality Act 2010.

6.18 Claim 2 § iv: The Claimant complains of the failure or refusal to offer him an apology in respect of the "suspension" events in November 2015. This is not a matter dealt with by the Rules or Regulations. The Disciplinary Panel recommended an apology by a suitably senior person, without identifying who that should be. The question under s 52 is therefore who had the power to make or refuse to make an apology? On the basis of the information before me it appears that the events involved members of the judiciary and potentially officials. In those circumstances, the Secretary of State for Justice, the Lord Chancellor and/or the Lord Chief Justice might each be the appropriate person with the power to make or refuse to make an apology. If there was no such person, the person with the power to appoint the Claimant to his various judicial roles would be the relevant person under s 52. At this stage I therefore find that each of the Secretary of State for Justice, the Lord Chancellor and the Lord Chief Justice could be correctly named as a Respondent to this complaint.

6.19 Claim 2 § vi: The correct Respondents are the Disciplinary Panel in judicial complaints 22092/2015 and 22178/2015, the Lord Chancellor and the Lord Chief Justice. This allegation, based on the content of the Disciplinary Panel's report, complains of a refusal to refer the Claimant's complaints about being subjected to threats by fellow office holders for investigation. There is no express provision in the Rules or Regulations dealing with this. Rule 97 allows a matter to be referred to the JCIO, in the absence of a complaint, by a Nominated Judge who has received information about potential misconduct from any source. It seems to me that had the Disciplinary Panel considered that there was information before them suggesting that disciplinary action might be justified in respect of these matters raised by the Claimant, they could have requested that the information be put before a Nominated Judge. Likewise, if the Lord Chancellor and Lord Chief Justice had thought so on considering the report, they too could have made such a referral.

The Disciplinary Panel, the Lord Chancellor and the Lord Chief Justice each had the relevant power, so far as it existed, and each is therefore an appropriate Respondent.

6.20 Claim 2 § viii: The correct Respondents are the Lord Chancellor and the Lord Chief Justice. This is a complaint about the make-up of the Disciplinary Panel. Regulation 11 requires the Lord Chief Justice to nominate the first 2 members of a Disciplinary Panel and the Lord Chancellor to nominate the other members with the agreement of the Lord Chief Justice. They are clearly the persons with the power in relation to the composition of the Disciplinary Panel.

6.21 Claim 3 § (1): The correct Respondent is the JCIO, for precisely the same reasons as apply in Claim 1 §1 in respect of the first complaint.

6.22 Claim 3 § (2): The correct Respondent is the Nominated Judge in judicial complaint 25979/2016, for precisely the same reasons as apply in Claim 1 § 5 in respect of the first complaint.

Amendment, strike-out and deposit

7.1 Having identified the correct Respondents, I now turn to consider whether the Claimant has brought proceedings against those Respondents and, if not, whether he should be allowed to amend his claims to do so and whether the claims against the incorrect Respondent should be struck out. There is some overlap with the question whether each complaint has reasonable prospects of success more generally. I therefore deal with issues relating to striking out on that ground or making deposit orders at the same time. I deal with each allegation in turn.

7.2 The Claimant gave some oral evidence about his ability to pay a deposit order, although he had not produced any documentary evidence about this. I deal with his ability to pay in the separate deposit order of today's date.

Claim 1 §1 and §5

7.3 In Claim 1 §1 and §5 the claims are currently brought against the Secretary of State for Justice. If his argument that the Ministry of Justice or Secretary of State for Justice is the correct Respondent is rejected, the Claimant seeks to amend Claim 1 to name the Nominated Judge as Respondent to these allegations. Although not put in these terms at the preliminary hearing, I have also treated this as an application to join the JCIO as Respondent to §1.

7.4 I refuse this amendment application. These claims relate to events in June/July 2015 and January 2016. The time limit for bringing claims against new Respondents has long passed. The factors relevant to deciding whether it would be just and equitable to extend time for bringing the claim are substantively the same factors that are relevant to deciding where the balance of justice and hardship lies in considering the amendment application. The Claimant is an expert in employment law. Indeed,

he represented the interested party in the Supreme Court in P. He sits as an Employment Judge. His claim was lodged with the benefit of expert legal advice. Questions about whether the correct Respondents were named were identified at an early stage. No application to amend was made until March 2019, and extremely late in the day the Claimant withdrew that application and substituted a different one. Whilst I accept that the Claimant's ill health and preoccupation with other matters may have led to the late withdrawal of his first amendment application, and that these proceedings were stayed for a period, nonetheless no explanation for the overall delay in seeking to join the correct Respondents has been identified. These factors weigh against allowing an amendment.

7.5 On the other hand, these are complaints of discrimination, and if I refuse to allow the amendment, the Claimant will be prevented from bringing them. That would give rise to prejudice and hardship and weighs in favour of allowing the amendment. However, there would be prejudice to the Nominated Judge and the JCIO if I allow the amendments four years after the events concerned. That would be particularly so in the case of the Nominated Judge, an individual who has to date played no part in the proceedings.

7.6 In seeking to balance the relative prejudice, it is relevant to consider, to a limited extent, what appear at this stage to be the merits of these specific complaints. On the information before me these complaints appear to fall into the category of being "obviously hopeless." Under Rule 97, the Nominated Judge had only to be satisfied that taking disciplinary action "might be justified" to decide to refer a case to the JCIO. Publicly accusing another judge of reaching a decision for discriminatory reasons might justify the taking of disciplinary action and the Nominated Judge had information about a speech given by the Claimant that might give rise to such a concern. The Claimant does not identify a comparator who was treated more favourably by the Nominated Judge, nor any evidence on which he will rely to justify an inference that race or a protected act played any part in the decision of the Nominated Judge to refer this matter to the JCIO. As for the JCIO, under Rule 21 it has limited powers to dismiss a complaint. The potentially relevant grounds are that the complaint is vexatious; without substance; untrue, mistaken or misconceived; or is a complaint that, even if true, it would not require disciplinary action. If none of those grounds applies and the summary process does not apply (as here) the JCIO must refer the complaint to a Nominated Judge. The Claimant has not identified any basis on which he will argue that the JCIO ought to have found that the first complaint fell into any of the categories that could have led to its dismissal. He does not identify a comparator treated more favourably by the JCIO in that respect, nor any evidence on which he will rely to justify an inference that race or a protected act played a part in the decision of the JCIO to refer this complaint to a Nominated Judge. Turning to §5, the Nominated Judge gave advice that on its face is reasoned and balanced. The Claimant does not identify a comparator who was treated more favourably by the Nominated Judge, nor any evidence on which he will rely to justify an inference that race or a protected act played a part in the decision of the Nominated Judge to refer this matter to the JCIO. In the case of both the Nominated

Judge and the JCIO, on the face of it there is a straightforward and well-documented innocent explanation for what occurred and a mere assertion that that explanation is not the true one. Although disclosure has not yet taken place, the Claimant does not really go further than asserting that there might be some document that points to a discriminatory motive. Although these are pleaded as complaints of harassment in the alternative, the focus of the submissions before me was on the direct discrimination and victimisation complaints.

7.7 Weighing all the relevant factors, I find that the balance lies in favour of refusing the amendment. The delay in making this application in all the circumstances set out above, and the prejudice to the potential Respondents that would be caused by allowing it at this late stage outweigh the prejudice and hardship to the Claimant. That is particularly so where the Claimant will be able to pursue complaints relating to other aspects of his treatment, and where this part of the claim appears on the information currently before me to be obviously hopeless.

7.8 Further, I find that the claims against the Secretary of State for Justice in respect of claim 1 §1 and §5 should be struck out on the basis that they have no reasonable prospect of success. For the reasons set out in detail above, the Secretary of State is not the correct Respondent to these claims under the Equality Act 2010 and claims against him cannot succeed in those circumstances. That is a legal issue, which I have determined above having heard full argument about it.

7.9 That means that the claims relating to §1 and §5 in Claim 1 are struck out.

Claim 1 §7

7.10 The correct Respondents to the claims relating to §7 in Claim 1 are the Lord Chief Justice and the Lord Chancellor. Although he has set out the factually correct position, the Claimant has expressly made a complaint of discrimination against the JCIO. However, almost accidentally, the currently named Respondent to these claims is, in fact, the Secretary of State for Justice. One person obviously holds the roles of Lord Chancellor and Secretary of State for Justice. I can see no prejudice in amending that to the Lord Chancellor, nor any proper basis for refusing to allow such an amendment.

7.11 As to whether the Lord Chief Justice should also be added as a Respondent to this part of the claim, the long and largely unexplained delay by an expert and legally represented Claimant referred to above applies equally to this allegation. The prejudice to the Lord Chief Justice in allowing the amendment would be somewhat less - the Lord Chief Justice is already a party to Claim 2 and has some involvement in these proceedings – but it would still be real and significant. It would require time and public expense, and would add to the impact of the proceedings. Further, under Regulation 13, the power to make a reference to a disciplinary panel is a joint power of the Lord Chief Justice and the Lord Chancellor. One of those office holders is a Respondent in respect of this allegation, so refusing to allow the amendment would not prevent the Claimant from pursuing it. Finally, the Claimant's pleaded case does

not include a complaint about the decision of the Lord Chief Justice and the Lord Chancellor; it includes a seemingly erroneous complaint about the JCIO. Joining the Lord Chief Justice as a party to a claim that is not, in fact, advanced against him, lacks logic. Weighing all those factors, I find that the balance again lies in favour of refusing the amendment. The claims in Claim 1 §7 will therefore proceed only against the Lord Chancellor.

7.12 The Respondents invite me to strike this claim out on the basis that it has no reasonable prospect of success. There do seem to me to be real difficulties with this claim. First, the pleaded complaint of discrimination and victimisation is made against the JCIO not the Lord Chancellor or Lord Chief Justice. Subject to further amendment, that may be an insuperable hurdle. Secondly, there was on the face of it a welldocumented and straightforward innocent explanation for the decision to refer the matter to a disciplinary panel: the Lord Chief Justice wrote in his letter of 23 March 2016 that the matter was being referred because the Claimant had raised new matters that had not been considered by the Nominated Judge. The Claimant had indeed done so in his detailed response on 3 February 2016. The powers of the Lord Chancellor and the Lord Chief Justice under Regulation 13 are limited. If they require further investigation having considered the advice of the Nominated Judge they must refer the case to a person listed in Regulation 13(2) for investigation in accordance with the Rules. That includes (although it is not limited to) a Disciplinary Panel. In deciding to whom the matter should be referred, the Lord Chancellor and Lord Chief Justice had before them the advice and recommendations of the Nominated Judge to the effect that disciplinary action should be taken. There is in my view some force in the submission that on the face of it reference to a disciplinary panel was inevitable in those circumstances. The Claimant does identify comparators but on the information before me no complaint had been made to the JCIO or a Nominated Judge about those comparators and the Lord Chancellor and Lord Chief Justice were not called on to exercise their powers under Regulation 13 or 15 in their case. It seems to me that in all those circumstances the Claimant is likely to face real difficulties in proving facts from which the Tribunal could infer that the reason for the decision to refer his case to a Disciplinary Panel was race or a protected act. Likewise, the Claimant is likely to face real difficulties in proving facts from which the Tribunal could infer that this was unwanted conduct related to race.

7.13 However, I have reminded myself of the high threshold for striking out a discrimination complaint, as set out in the cases referred to above. The full evidence has not been heard or explored. Disclosure has not yet taken place. The Claimant's case is not conclusively disproved by or totally and inexplicably inconsistent with undisputed contemporaneous documents. My understanding is that the Lord Chancellor and Lord Chief Justice could have referred the matter to others to investigate under Regulation 13 and it may be necessary to explore why they chose a Disciplinary Panel. In those circumstances, while this comes close to a mere assertion that the explanation given is not the true one, I cannot say that this part of the claim has no reasonable prospect of success. However, I do find that it has little

reasonable prospect of success and that it is appropriate to order the Claimant to pay a deposit as a condition of continuing with it. That is dealt with in a separate deposit order.

Claim 2 § i

7.14 The correct Respondents to the claims in respect of Claim 2 § i are the Disciplinary Panel and (for accepting and adopting the Panel's findings) the Lord Chancellor and Lord Chief Justice. "Lord Thomas former Lord Chief Justice" and "Liz Truss MP former Lord Chancellor" are already Respondents to this part of the claim. I can see no proper basis for refusing to allow an amendment to refer to their offices correctly as the Lord Chief Justice and the Lord Chancellor and I allow such an amendment (in respect of this and each other allegation in Claim 2 where those Respondents are incorrectly named). The Claimant seeks to amend the claim further to join the Disciplinary Panel as Respondent to this part of the claim.

7.15 The points made in respect of claim 1 about the Claimant's expertise and that of his advisors, the delay in making this amendment application, and the absence of a clear explanation for that delay, are again relevant. They weigh against allowing the amendment (although I note that Claim 2 relates to later events, which reduces the delay and the prejudice arising from it). The fact that the Claimant and his advisors appear consciously to have chosen only to bring the claim against the chair of the Disciplinary Panel also weighs against allowing the amendment. The proposed amendment is not simply a re-labelling exercise, because the Claimant seeks to join entirely new Respondents. I acknowledge, as Mr Cooper QC submits, that there would be very real prejudice to the other three members of the Disciplinary Panel in joining them as Respondents so long after the event. I do not underestimate that. On the other hand, the factual allegations remain as originally pleaded and the chair of the Disciplinary Panel has been named as a Respondent throughout. The overriding objective is concerned with justice, not technicality. The Panel's written report is detailed and lengthy, so the need for the Panel members to rely on their memories of what happened may be limited. As I explain below, I am not persuaded that this allegation has little or no reasonable prospect of success. If I refuse to allow the amendment, the Claimant will be unable to pursue it, despite having advanced materially the same claim against the chair of the Disciplinary Panel from the outset. If I allow the amendment, he will be able to pursue it, at the cost of real prejudice to the other three members of the Disciplinary Panel and in circumstances where there are real concerns about the timing and manner of the amendment application. The decision here is finely balanced. However, overall I find that the balance lies in favour of allowing the amendment. The prejudice to the Claimant in not being able to advance this complaint at all just outweighs that to the members of the Disciplinary Panel that arises from allowing the amendment.

7.16 Claim 2 § i will therefore proceed against the Disciplinary Panel, the Lord Chancellor and the Lord Chief Justice. However, the claims against the Secretary of State for Justice and the Hon Mrs Justice Laing have no reasonable prospect of success. For

the reasons set out in detail above, they are not the correct Respondents to this claim under the Equality Act 2010 and a claim against them cannot succeed in those circumstances. That is a legal issue, which I have determined above having heard full argument about it.

7.17 I have no hesitation in refusing the Respondents' application to strike out this part of the claim, or to order the payment of a deposit. I am not persuaded that it has little or no reasonable prospect of success. The relevant parts of paragraphs 80 and 106 of the Panel's report are set out above. On the face of it, the Panel arguably relied on the Claimant's own BAME ethnicity as being relevant to the seriousness of the misconduct. The Lord Chancellor and the Lord Chief Justice accepted the Panel's findings and agreed with its recommendations. Mr Cooper QC submits that the Panel was simply saying that because of the Claimant's characteristics and those of his audience, his views were likely to command particular respect. That does not seem to me to be an answer to the concern. The Claimant submits that assumptions about the way all BAME people think or approach matters are implicit in the Panel's reasoning. He points out that he was a person of African heritage speaking to an audience that was predominantly Bengali, and also included people from many other ethnic and religious backgrounds, yet the Disciplinary Panel thought his and their ethnicity was relevant. His argument is that the difficulty with the Respondents' hypothetical comparators - e.g. a white judge speaking to an audience by whom s/he was likely to be particularly respected – is that the Panel would not have thought the ethnicity of the judge or the audience relevant at all in that scenario. The Claimant's position is plainly arguable. That is not to say that this part of the claim will inevitably succeed – it will be necessary to consider the whole of the Panel's report and reasoning and any other evidence – but it cannot be said that it has little or no reasonable prospect of success.

Claim 2 § ii

7.18 The correct Respondents to the claims relating to Claim 2 § ii are the Disciplinary Panel and (for accepting and adopting the Panel's findings) the Lord Chancellor and the Lord Chief Justice. As set out above, I have allowed an amendment to substitute the Lord Chancellor and the Lord Chief Justice for the Third and Fourth Respondents to Claim 2 as currently named. The factors relevant to deciding whether to allow an amendment to join the Disciplinary Panel as a Respondent are set out in Claim 2 § i above. The prospects of success of this part of the claim are weaker but it is not "obviously hopeless." The Disciplinary Panel had only the powers and functions conferred on it by the Regulations and the Rules. That did not expressly include determining complaints of discrimination, victimisation and harassment. The Disciplinary Panel's stated reasons were that it could not deal with such complaints and, in any event, that they did not assist it in deciding whether the Claimant had committed misconduct or what the penalty should be. On the face of it, the Disciplinary Panel gave a straightforward and innocent explanation. On the other hand, the content of paragraphs 80 and 106 of the Panel's report might be relied on in inviting the Tribunal to draw an inference of discrimination more broadly, particularly in respect of a failure to pursue the Claimant's own complaints of discrimination or to consider whether his allegations, if true, might affect its

approach. Further, in circumstances where the Disciplinary Panel is to be joined as a Respondent in respect of § 1 in any event, the prejudice to the Panel is somewhat less, although it is still real and substantial. Weighing all the relevant factors, again the balance just lies in favour of allowing the amendment.

7.19 However, the claims against the Secretary of State for Justice and the Hon Mrs Justice Laing have no reasonable prospect of success. For the reasons set out in detail above, they are not the correct Respondents to these claims under the Equality Act 2010 and claims against them cannot succeed in those circumstances. That is a legal issue.

7.20 I have already explained why this part of the claim is not "obviously hopeless." For the same reasons I am not persuaded that it has no or little reasonable prospect of success. This should not be taken as an indication that this part of the claim is likely to succeed. The Tribunal will need to determine it on its merits. Rather, it does not reach the high threshold of having little or no reasonable prospect of success.

Claim 2 § iv

7.21 The correct Respondents to the claims relating to Claim 2 § iv are the Secretary of State for Justice, the Lord Chancellor and the Lord Chief Justice. In the light of the amendment I have already allowed to substitute the correct title of the latter two office holders, those three Respondents are the Respondents currently named in respect of this allegation and no amendment is required.

7.22 There is no application to strike out this part of the claim or for a deposit order to be made.

Claim 2 § v and vii

7.23 The correct Respondent to the claims relating to Claim 2 § v and vii is the Disciplinary Panel.

7.24 In respect of these two claims I find that the complaint is "obviously hopeless". The Panel has given a straightforward and well-documented innocent explanation for not hearing evidence from Underhill LJ or hearing oral evidence from the Claimant's witnesses, namely (1) that it was not hearing an appeal from Underhill LJ's advice, but was reaching its own advice about the issues; and (2) that it was not necessary to hear oral evidence from the Claimant's witnesses because what they said in their statements was either uncontentious, not material, or amounted to the witnesses' opinions on matters that it was for the Panel to decide. The Panel produced a long and detailed report showing careful consideration of the material advanced by the Claimant. It heard oral evidence from him. It was able to view a recording of the speech. Its decision not to hear oral evidence from others is on the face of it unremarkable and unsurprising. While the content of paragraphs 80 and 106 of its report means that the complaints relating to those paragraphs and to the Panel's approach to the Claimant's own complaints of discrimination cannot be said to have little or no reasonable prospect of success, that does not infect the whole of the Panel's approach. Those paragraphs relate to the Panel's reasoning about whether

what happened amounted to misconduct and the severity of any such misconduct. That does not affect its approach to these everyday case management decisions. The Claimant does not identify a comparator treated more favourably by the Disciplinary Panel (or even other Disciplinary Panels) in that respect.

7.25 The weakness of these complaints tips the balance in favour of refusing this amendment application.

7.26 Further, I find that the claims against the Secretary of State for Justice and Laing J in respect of Claim 2 § v and § vii should be struck out on the basis that they have no reasonable prospect of success. For the reasons set out in detail above, the Secretary of State and Laing J are not the correct Respondents to these claims under the Equality Act 2010 and claims against them cannot succeed in those circumstances. That is a legal issue.

7.27 That means that claim 2 § v and § vii are struck out.

Claim 2 § vi

7.28 The correct Respondents to the claims relating to Claim 2 § vi are the Disciplinary Panel, the Lord Chancellor and the Lord Chief Justice. As set out above, I have allowed an amendment to substitute the Lord Chancellor and the Lord Chief Justice for the Third and Fourth Respondents to Claim 2 as currently named. As to whether to allow an amendment to join the Disciplinary Panel as a Respondent to this allegation, I consider that it is comparable to § ii and for similar reasons I allow the amendment application. Likewise, for similar reasons, I find that this part of the claim does not have little or no reasonable prospect of success, insofar as it relates to the Disciplinary Panel. Nor am I persuaded on the information before me that the claim against the Lord Chancellor and Lord Chief Justice has little or no reasonable prospect of success. This is not a matter on which there is a detailed, written decision that can be taken as the starting point. On the currently available information this cannot be said to be the type of "clearest case" in which striking out is justified, nor to have little reasonable prospect of success. However, the claims against the Secretary of State for Justice and the Hon Mrs Justice Laing have no reasonable prospect of success. For the reasons set out in detail above, they are not the correct Respondents to this claim under the Equality Act 2010 and a claim against them cannot succeed in those circumstances. That is a legal issue.

Claim 2 § viii

7.29 The correct Respondents to the claims relating to Claim 2 § viii are the Lord Chancellor and the Lord Chief Justice. The Secretary of State is the currently named Respondent to this part of the claim and, as above, I allow an amendment to substitute the Lord Chancellor.

7.30 As to whether the Lord Chief Justice should also be added as a Respondent to this complaint, most of the relevant factors are referred to in respect of Claim 1 § 7 above. This claim is different from Claim 1 § 7 because the power to nominate the

members of the Disciplinary Panel is not jointly held under Regulation 11. Only the Lord Chief Justice has the power to nominate the first two members; the second two are appointed by the Lord Chancellor with the agreement of the Lord Chief Justice. That means having one of those two office holders as Respondent would not allow the Claimant to pursue the whole of this complaint. That weighs in favour of allowing the amendment. The delay and consequent prejudice are also less in this claim than Claim 1. The prospects of success of this part of the claim are weak, but not obviously hopeless, as described below. On balance, given that this claim will proceed against the Lord Chancellor in any event, that the Lord Chancellor is only responsible for appointing half the Disciplinary Panel, and that the Lord Chief Justice is involved in Claim 2 in other respects already, I find that the balance lies in favour of allowing the amendment.

7.31 Turning to whether this part of the claim should be struck out or the Claimant should be ordered to pay a deposit as a condition of continuing with it, again there are difficulties with it. The Disciplinary Panel comprised four members, one of whom describes herself as of Indian heritage and one of whom describes himself as British Indian. Plainly there was no Panel member of black African ethnicity and it is not suggested that having Panel members with Indian ethnicity is an answer to the Claimant's harassment complaint. But the Panel did have some ethnic diversity. The principal difficulty with this part of the claim is that the Claimant has not identified the basis for contending that the appointment of this Panel amounted to unwanted conduct related to race. Having regard again to the legal principles and the high threshold for striking out a discrimination complaint, I am not satisfied that the claim has no reasonable prospect of success. There has not been disclosure. I do not have information about how potential Panel members are identified and selected generally, nor how that was done in this case. But I do find that the Claimant has little reasonable prospect of proving facts from which the Tribunal could infer that by appointing this Disciplinary Panel the Lord Chief Justice and Lord Chancellor were subjecting him to unwanted conduct related to race. There is nothing in the pleadings or the material before me that points to such a conclusion. I consider that it would be appropriate to make a deposit order in this respect, and I have dealt with that separately.

7.32 Further, I find that the indirect discrimination complaint based on § viii has little reasonable prospect of success and that a deposit order should be made. The Claimant would need to establish that the Respondent had the PCP on which he relies, of holding misconduct hearings without a panel member of the same race as the relevant judge. The Claimant has identified no basis whatsoever on which he would contend that the Tribunal could infer that there was such a PCP. Further, he would need to establish that having one's case heard by a Disciplinary Panel that did not include someone of the same race would put a person at a substantial disadvantage because the Panel would have inferior knowledge and appreciation of the discrimination issues, and that he was put at such a disadvantage. The Claimant has again identified no evidential basis that would justify the Tribunal in reaching such conclusions. Given that disclosure has not yet taken place, I cannot

say that this claim has no reasonable prospect of success. Information about the composition of Disciplinary Panels has not yet been provided. But on the material before me it has little reasonable prospect of success.

Claim 3 § (1) and (2)

7.33 The correct Respondent to the claims relating to Claim 3 § (1) is the JCIO. The application to amend Claim 3 to name the JCIO as Respondent to § (1) is not opposed and I allow it. The correct Respondent to the claims relating to Claim 3 § (2) is the Nominated Judge in judicial complaint 25979/2016. The application to amend Claim 3 to substitute the Nominated Judge for the Rt Hon Lady Justice Gloster as Respondent to § (2) is not opposed and I allow it.

7.34 The claims against the Secretary of State for Justice and the Rt Hon Lady Justice Gloster in respect of Claim 3 § (1) and against the Secretary of State for Justice in Claim 3 § (2) have no reasonable prospect of success and are struck out. For the reasons set out in detail above, the Secretary of State and Gloster LJ are not the correct Respondents to these claims under the Equality Act 2010 and claims against them cannot succeed in those circumstances. That is a legal issue.

7.35 There is no application for these claims to be struck out or for the Claimant to be ordered to pay a deposit as a condition of continuing with them.

Employment Judge Davies

15 November 2019

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

18 November 2019

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