EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms L Nessa **v** **The Royal Borough of Kensington and Chelsea**

Heard at: London Central (by video – CVP) **On**: 15 September 2020

Before: Employment Judge E Burns (sitting alone)

Representation

For the Claimant: Mr N Roberts (counsel)

For the Respondent: Ms S Harding (counsel)

PRELIMINARY HEARING RESERVED JUDGMENT

The judgment of the Employment Tribunal is as follows:

(1) The victimisation claims relating to detriments 2(a) and 2(b) in the list of issues have little reasonable prospects of success. Deposit orders are made under Rule 39.

(2) The victimisation claim relating to detriment 2(c) in the list of issues has no reasonable prospects of success and is struck out under Rule 37.

(3) The harassment claim in relation to detriments 2(a) and 2(b) in the list of issues has little reasonable prospects of success. A deposit orders is made under Rule 39.

(4) The victimisation claim relating to detriment 2(c) in the list of issues has no reasonable prospects of success and is struck out under Rule 37.

REASONS

INTRODCUTION

1. This reserved judgment needs to be read by the parties in conjunction with the deposit order made on the same date. This document provides the reasons why I decided to make a deposit order and for the strike out. The deposit order contains details of the deposit orders made and the information taken into account setting the deposits.

BACKGROUND TO PRELIMINARY HEARING

2. The claimant is a current employee of the respondent. She has been absent on long term sick leave since 4 February 2019.

3. This is the claimant's second employment tribunal claim against the respondent. She issued her first claim in 2019 and it was allocated case number 2202574/2019. The complaints contained in that claim, which include a claim of disability discrimination, are due to be heard at a final hearing lasting 8 days in March 2021.

4. The claimant issued this second claim on 5 May 2020, although she had previously sought to introduce it by way of an amendment to her first claim in an application sent by email on 28 February 2020. That application was unable to be considered due to the COVID-19 pandemic.

5. The second claim primarily concerns the content of two emails sent by the respondent's in-house solicitor to the claimant's solicitor during the course of the litigation arising out of the first claim. The claimant raised an internal grievance about the emails. The second claim also incorporates a complaint about how the respondent dealt with that complaint.

6. The specific issues to be determined were discussed at a case management hearing held on 17 July 2020 and agreed between the parties as follows.

Victimisation

1. It is admitted the Claimant performed the following protected acts:

(a) The Claimant's grievances dated 29 January 2019 and 30 April 2019;
(b) The Claimant's claim with case number 2202574/2019 dated 5 July 2019;
(c) The Claimant's application to add claims of victimisation and harassment dated 28 February 2020; and
(d) The Claimant's complaint to the Respondent's Head of Legal dated 3 March 2020

2. Did the Respondent carry out any of the following treatment:

(a) The Respondent asking the Claimant to identify the names of deceased family members who had died in the Grenfell fire and precise details of family relationships and whether the Claimant was present during the Grenfell fire on 24 February 2020.

(b) The Respondent's email of 25 February 2020, particularly the passage quoted at paragraph 9 of the Grounds of Complaint.

(c) The Respondent's refusals of 25 and 27 March 2020 to provide substantive responses to the Claimant's complaints

3. If so, did any such treatment constitute detriments?

4. If so, were detriments (a) and (b) done because of protected acts (a) to (b); and/or was detriment (c) done because of protected acts (a)-(d)?

5. What, if any, of the detriments are protected by "judicial legal immunity"?

Harassment

6. Paragraph 2 above is repeated.

7. Was this conduct related to the Claimant's disability?

8. If so, was it unwanted?

9. If so, did the conduct have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

10. What, if any, of the conduct is protected by "judicial legal immunity"?

7. The parties also agreed that there should be a preliminary hearing held in public to consider the respondent's application:

(a) that the claim should be struck out because 'judicial legal immunity' applies to the entire claim (see list of issues paragraphs 5 and 10);

(b) whether the claim otherwise lacks prospects of success and so should be struck out under rule 37(1)(a) or a deposit order made under rule 39 of the tribunal rules.

8. These two broad issues broke down into a number of sub-issues as a result of the specific submissions the parties made at the preliminary hearing. I have explained these further below.

THE PRELIMINARY HEARING

9. The preliminary hearing was a remote hearing which had been consented to by the parties. The form of remote hearing was V: video fully (all remote). A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing.

10. There was an agreed trial bundle of 253 pages prepared for the hearing. It contained evidence by way of documents, but I did not hear any witness evidence nor have any witness explain the documents to me. The only witness evidence was a short witness statement from the claimant as to her means to pay a deposit. The information contained in the statement was accepted by the respondent and therefore the claimant did not give evidence orally.

11. In addition, I was provided with some additional materials by email during the course of the hearing as the bundle was incomplete.

12. Counsel for both parties prepared written skeleton arguments and bundles of authorities and I thank them for these.

13. I apologise to the parties that it has taken me much longer than anticipated to deliver this reserved judgment.

KEY FACTS

14. As I did not hear witness evidence at the preliminary hearing, I have deliberately not made any final findings of fact. Where any of what I have set out below is disputed between the parties, what I have said below represents the version of events I consider would be most likely to be found at the final hearing in this claim.

15. In the course of her employment, the claimant spent a substantial amount of time responding to issues arising from the fire at Grenfell Tower on 14 June 2017.

16. The claimant's first claim includes various claims of disability discrimination. Her claim form explains that she relies on a number of medical conditions to bring her within the definition of a disabled person contained in the Equality Act 2010. These are said to be dyslexia, depression, PTSD, anxiety and suicidal thoughts.

17. The claim also includes a claim for personal injury. All that is said about this in the claim form was:

    "*The claimant also claims personal injury to the effect of the discriminatory treatment set out above."*

18. The case was initially case managed on 2 December 2019. Because of the potential need to obtain expert medical evidence to deal with the personal injury claim at the remedy stage, the case was listed for a final hearing to consider liability only.

19. The respondent did not initially accept that the claimant was disabled within the meaning of the Equality Act 2010. The claimant was ordered to disclose her medical notes and serve an impact statement, which she did.

20. The respondent had not confirmed whether or not it accepted that the claimant was a disabled person (despite having been ordered to do so by

27 January 2020). This led the claimant's solicitor to write to the tribunal seeking an unless order on 13 February 2020 (15:42). The respondent's in-house solicitor entered into correspondence with the claimant's solicitor and the tribunal about this. The emails about which the claimant complains were part of this correspondence.

21. The respondent's in-house solicitor responded to the unless order application with a somewhat confusing response sent by email on 14 February 2020 (15:29). It deals not simply with the issue of whether the respondent accepted that the claimant was a disabled person, but also refers to the burden of proof required to be discharged by the claimant to succeed in a disability discrimination claim and makes some comments under the heading "*Causation and remoteness with regard to the claim for personal injury for the medical condition of stress and depression*."

22. The claimant's solicitor responded in an email to the tribunal and the respondent's solicitor on 18 February 2020 (12:00) essentially saying that the respondent's email did not address the key issues, which were whether or not the respondent accepted that (1) the claimant was disabled by virtue of each of the medical conditions relied upon and (2) it had knowledge of these at the material times.

23. The respondent's in-house solicitor replied in an email sent to the claimant's solicitor and the tribunal on 24 February 2020 (16:22). It begins:

"*We are now in a position to fully respond to the issues raised below, as to whether the Respondent concedes to the Claimant's disabilities*."

It then addresses the medical conditions in turn. Of PTSD it says:

"*PTSD:* *not conceded. The Claimant claims that she lost 5 members of the family in the fire which led to her suffering from symptoms of the PTSD. To discharge her burden of proof, will the Claimant please supply the following details:*

- *The names of the deceased;*
- *The precise details of the five deceased's' relationship with the Claimant.*
- *Was the Claimant present during the tragic fire.*

We understand that these issues are of a sensitive nature and were not explored during the internal process to avoid causing the Claimant further anxiety."

24. The claimant's solicitor responded to the above email on 24 February 2020 (17:15) saying:

"PTSD – this request by the Respondent's representative is outrageous and <u>we formally ask that they withdraw it forthwith</u>. The Respondent is well aware that the Claimant has a PTSD diagnosis and that the diagnosis and ongoing treatment were provided by and paid for by the Respondent via its Grenfell service. Asking the Claimant to identify the deceased family members and explain her relationship with them is not relevant to the

question of disability. We are dismayed that this has been requested so nonchalantly in circumstances where the Respondent is aware of the diagnosis and paying for ongoing treatment. We consider this has been done intentionally to antagonise the Claimant and cause further upset to her by having her unnecessarily relive her trauma. We will be seeking exemplary and aggravated damages in this regard. The Claimant is psychologically fragile and the Respondent's request insensitive and unreasonable."

25. As I understand the position, without having seen or heard any relevant evidence, the respondent had arranged for the claimant to have counselling at some point and the notes from the counselling were disclosed as part of her medical records. These notes included reference to the claimant having family members who died as a result of the Grenfell fire and it was this that prompted the query.

26. The respondent's in-house solicitor responded to the objection contained in the claimant's solicitor's email within minutes (17:45) saying:

"*If the Claimant chooses to bring a claim, I have repeatedly stated that she has the obligation to discharge her burden of proof. The death of five family members is contained in the medical records, and stated as a cause of the PTSD. As such, the request still persists."*

27. This was met with the following response from the claimant's solicitor (sent on 25 February 2020 at 09:58):

"*The cause of the PTSD has nothing to do with the fact that the Claimant has PTSD and that this condition meets the s.6 definition of disability. If the Respondent's representative can explain to us (and the ET), with reference to s.6 Equality Act 2010, the relevance of the names of the deceased and their relationship to the Claimant and how this will assist the ET in disposing of the disability issue, we will take further instructions.*

We would have hoped that even if the Respondent had instructed their representative to ask the Claimant to particularise the deceased, their representative would have the professional capability and integrity to explain to their client that what is being asked of the Claimant is inappropriate on so many levels, particularly coming from the Local Authority where the Grenfell tragedy occurred, notwithstanding that what is being asked is in no way relevant to the question of whether the PTSD is a s.6 disability."

28. The respondent's in-house solicitor then responded saying:

"*Raising such matters were avoided during the internal process for the reasons outlined by Ms Smajlovic. The circumstances were tragic and the quest to be sensitive to the Claimant.*

The veracity of the Claimant's claim that the five deaths were that of ***family members*** *has come into question. As such the Respondent wants to ensure that the Claimant is put to proof to supply this information. If it is established that there was no close connection of the deceased's' (sic) with the*

Claimant, as claimed, then the veracity of the Claimant's claim on the grounds of PTSD also comes into question. If the Claimant can demonstrate that she is not on Grenfell 'bandwagon', she should not have a problem disclosing this information.

While the request may appear to be insensitive in the circumstances, but that is the nature of litigation. The Claimant has brought a claim and as such should expect that issues that are sensitive would also be explored.

The Claimant has a choice of not responding to the request but may have to answer the questions under oath at the substantive hearing." (sent on 25 February 2020 at 11:49).

29. The claimant submitted an internal complaint about the request for information from and the comments made by the respondent's in-house solicitor to the respondent on 25 February 2020. The respondent's director of HR and OD initially responded (on 2 March 2020) saying:

"*With regard to us seeking information relating to your claim that 5 deceased family members were victims of the tragedy at Grenfell, a number of witnesses have stated their verbal conversations with you confirmed that they were not close family members but acquaintances and possibly a distant relative. The rule of litigation is that the one who asserts has the burden of providing evidence to that effect. That is simply what our instructed solicitor has been exploring with you. It is highly likely that this issue will arise at the substantive hearing and you will be compelled to reply. Failure to do so may result in the tribunal drawing adverse inferences. Normally, you cannot pick and choose what evidence will be explored."*

30. This led to the claimant complaining to the respondent's Director of Law on 3 March 2020. In the meantime, the claimant sought to amend her first claim to add a claim of victimisation. The claimant was initially informed that her complaint would be investigated. She was told later that it would be inappropriate to give a substantive response to it because the claimant had raised the same complaint with the employment tribunal. The respondent indicated that the claimant would receive a substantive response once the legal proceedings had been concluded.

31. Although not particularly relevant facts for the purpose of the preliminary hearing, I include for the sake of completeness that the respondent conceded that the claimant was disabled by virtue of the PTSD on 11 March 2020. In addition, although the claimant did not name her five family members that died in the Grenfell fire, she did provide the following further details on 28 February 2020:

"*The family members are related by marriage. That is they are the second cousins of the Claimant's brother's wife. She would see them at weddings and other family events but would not see them every day. In the Claimant's culture (Bangladeshi) whether you are related by blood or marriage, it is all considered to be family.*

The Claimant has never asserted that losing these family members was the sole cause of the PTSD. It was a contributing factor. The Claimant is aware of at least two other individuals who were employed by the Respondent and worked on Grenfell and who were subsequently diagnosed with PTSD as a result, but neither of them had family members involved in the fire."

LAW

Strike Out / Deposit Orders

32. The tribunal's power to strike out claims and responses is found in Rule 37(1) of the Tribunal Rules. Rule 37(1)(a) allows the tribunal, at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim on the grounds that it has no reasonable prospect of success.

33. An alternative is to order a deposit under Rule 39(1) where all or part of the claim has little reasonable prospects of success. A deposit of up to £1,000 can be ordered as a condition of continuing to advance each weak allegation.

34. Rule 39(2) requires the tribunal to male reasonable enquires into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of any deposit.

35. The overriding objective in Rule 2 of the Tribunal Rules can also be relevant when considering applications for a strike out/deposit order.

36. The courts have repeatedly warned of the dangers of striking out discrimination claims on the grounds that they lack prospects of success, particularly where "the central facts are in dispute" e.g. in *Anyanwu v. South Bank Student Union* [2001] ICR 391 at [24] and [37] and *Ezsias v. North Glamorgan NHS Trust* [2007] ICR 1126 at [29].

37. However, while exercise of the power to strike out should be sparing and cautious in discrimination claims, there is no blanket ban on such practice.

38. The question of striking out discrimination claims was considered by the Court of Appeal in *Ahir v. British Airways Plc* [2017] EWCA Civ 1392, where Underhill LJ stated at [16]: "Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment."

39. I am not restricted to a consideration of purely legal issues. I am entitled to have regard to the likelihood of the party being able to establish the facts essential to his case, and, in doing so, to reach a provisional view as to the

credibility of the assertions being put forward (*Van Rensburg v Royal Borough of Kingston-upon-Thames* UKEAT/0095/07).

40. Similar considerations apply to those required as in a strike out application under rule 37(1)(a) where a claim is said to have no prospects of success. The test of 'little prospect of success' under rule 39 is, however, plainly not as rigorous as the test of 'no reasonable prospect' under rule 37 and the consequences of a deposit order are not as severe as a strike out order. It therefore follows that a tribunal has a greater leeway when considering whether to order a deposit.

41. An order should be for payment of an amount that the paying party is capable of paying with the period set (*Hemdan v Ishmail* [2017] IRLR 228, EAT) taking into account his or her net income and any savings. The employment tribunal must give its reasons for setting the deposit at a particular amount (*Adams v Kingdom Services Group Ltd* UKEAT/0235/18).

Judicial Proceedings Immunity

42. Judicial proceedings immunity is a common law concept which has developed in England and Wales. Its application is not yet entirely settled. Although I have been referred to a number of relevant authorities, unfortunately none has provided a sufficiently comprehensive enunciation of the law to make my decision in this case easy.

43. The origins of the concept are the establishment of the principle that witnesses should be immune from the risk of a claim of defamation arising out of what they say on the witness stand. The policy reasons for this are said to be twofold. The first is to encourage witness to participate fully in the administration of justice by giving all the evidence they ought to give. The second is to negate the possibility of collateral proceedings arising out of the main litigation.

44. Over the course of several years and cases, the concept has developed. It is now clear that judicial proceedings immunity can provide a defence to any cause of action or legal process save for various recognised and established exceptions such as perjury and malicious prosecution or a costs award.

45. Another exception that has been developed in recent years concerns claims such as this, which arise under the Equality Act 2010. Although previously rejected as existing, the Supreme Court decision in the case of the *P v Commissioner of Police of the Metropolis* [2018] ICR 560 applied this very exemption. It held that the combined effects of Article 3 and 9 of Council Directive 2000/78/EC (the Equal Treatment Directive) was that all persons in the United Kingdom had the right to be treated in accordance with the principle of equal treatment in relation to employment and working conditions, with the principles of equivalence and the right to an effective remedy also being at play.

46. I have been invited to treat that case as confined to its specific, unusual facts. I disagree and it is reassuring that HHJ Auberach in the Employment Appeal Tribunal rejected a similar submission in the case of *Aston v The*

Martlett Group Limited [2019]. The ratio of the decision in *P* is captured correctly by at paragraph 95 of his judgment in that case. He says:

"Any person must have the right to present to an employment tribunal (as the judicial body that can provide an effective remedy, and is the one to which others have access) a claim of an infringement of a right within scope of the Equal Treatment Directive."

47. Moreover, I agree with his conclusion at paragraph 91 that the position is not different for victimisation when compared to other forms of discrimination.

48. There is, however, a lack of clarity in the authorities in relation to two key issues which arise in this case:

(a) What is the scope of the immunity? Does it extend to cover all actions (and omissions) that arise in the course of judicial proceedings or does it have limits? In this case, does it extend to things said in correspondence between the representatives of the parties?

(b) Can things done in the course of judicial proceedings come within the scope of the Equal Treatment Directive? In this case, do things said in correspondence between the representatives of the parties come within the scope of the Equal Treatment Directive? Does it make a difference that the claimant is still employed by the respondent and/or that the respondent was at the relevant time represented by its own in-house solicitor?

Scope of Judicial Proceedings Immunity

49. In the case of *Lincoln v Daniels* [1962] 1 QB 237 three categories of judicial proceedings immunity are identified:

*"The first category covers all matters that are done coram judice [*in the presence of a judge*]. This extends to everything that is said in the course of proceedings by judges, parties, counsel and witnesses and includes the contents of documents put in as evidence.*

The second covers everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of the proceedings and starting with the writ or other document which institutes the proceedings.

The third category is the most difficult of the three to define. It is based on the authority of Watson v McEwan [[1905] A.C.480] in which the House of Lords held that privilege attaching to evidence which a witness gave coram judice extended to the precognition or proof of that evidence taken by a solicitor."

50. Correspondence between the representatives of the parties potentially falls into the second category.

51. There is clear authority for the proposition that it is within scope in the case of *Dathi v South London & Maudsley NHS Trust* [2008] IRLR 350. In this case the successful claimant in a discrimination case, who had also been awarded costs, tried to pursue a fresh claim against the respondent based on two letters that had been written in the course of the earlier proceedings. The Employment Appeal Tribunal held that judicial proceedings immunity applied to the fresh claim.

52. The claimant had conceded that one of the letters was akin to a pleading and so unsurprisingly, Judge McMullen QC held that it fell within the second category found in Lincoln v Daniels.

53. The other letter was written by the respondent's representative (not a lawyer) to the claimant's representative (a firm of solicitors) which concerned the issue of disclosure and what should and should not be included in the trial bundle. It is very typical of the type of correspondence that is written during preparation for a hearing. The claimant's complaint about the letter was that the respondent had sought to prejudice the claimant by refusing to disclose certain documents.

54. The EAT held that judicial immunity applied to this other letter. It analysed how the letter had come into being and for what purpose it had been written carefully and concluded that it fell into the second category under *Lincoln v Daniels* saying:

"The letter came into existence not only for the purpose of the proceedings but was pursuant to a direct order of the tribunal in relation to disclosure and bundle preparation." (27)

55. A similar decision was reached on similar facts in the Employment Appeal Tribunal case of *Bird v SyIvester* [2008] IRLR, but can be distinguished because the claimant brought the proceedings against the solicitor that represented the respondent in the earlier litigation, rather than the same respondent.

56. As a judge sitting at first instance, I am bound by legal decisions of the higher courts. I have, however, been invited to decide that these cases are wrongly decided in light of the later decision by the superior Court of Appeal in *Singh v Reading Borough Council* [2013] 1WLR 3052, CA.

57. In *Singh* the claimant brought her initial claim while still employed. When the respondent put undue pressure on a witness to falsify evidence, the claimant resigned. She sought leave to add a claim of constructive unfair dismissal relying on the respondent's conduct as a fundamental breach. At first instance it was held that her claim could not proceed because the contents of the witness statement and the respondent's conduct connected with its preparation attracted judicial proceedings immunity. This decision was eventually reversed by the Court of Appeal.

58. Giving the leading judgment, having considered a number of earlier authorities, Lewison LJ concluded that judicial proceedings immunity did not

apply to everything said or done in the preparation for judicial proceedings. He concluded:

"(i) the core immunity relates to the giving of evidence and its rationale is to ensure that persons who may be witnesses in other cases in the future will not be deterred from giving evidence by fear of being sued for what they say in court; (ii) the core immunity also comprises statements of case and other documents placed before the court; (iii) that immunity is extended only to that which is necessary in order to prevent the core immunity from being out flanked; (iv) whether something is necessary is to be decided by reference to what is practically necessary; (v) where the gist of the cause of action is not the allegedly false statement itself, but is based on things that would not form part of the evidence in a judicial inquiry, there is no necessity to extend the immunity; (vi) in such cases the principle that a wrong should not be without a remedy prevails." (paragraph 66)

59. Mr Roberts, for the claimant, invited me to interpret the above as meaning correspondence between the parties is outside the scope of the immunity. This is because it neither relates to the giving of evidence or constitutes a statement of case or other document placed before the court and therefore does not fall into the core immunity said to consist of (i) and (ii). Nor is it necessary to find that interparty correspondence is within scope to prevent the core immunity being outflanked.

60. It is a compelling argument, but not one which can accept. I consider that I bound by *Dathi* and *Bird*. I do not agree that the decision in *Singh* allows me to ignore these decisions. This is because the case of *Singh* is concerned with the preparation of witness statements rather than other parts of the process of preparing for a hearing. LJ Lewison does not consider the decisions in *Dathi* or *Bird* during his review of the relevant authorities and say they are wrongly decided. Although he correctly identifies the core immunity, his analysis is not sufficiently comprehensive to rule out its application to interparty correspondence.

61. Where *Singh* is helpful is in reiterating that there is always a balance to be struck between judicial proceedings immunity and the principle that a wrong should not be without a remedy. The case encourages us to not apply judicial proceedings immunity in a blanket manner, but to recognise that there are circumstances where parties may try to use it as a cover for actions that should not be part of the legitimate conduct of litigation.

62. It is noteworthy that in one of the leading cases on victimisation claims, *Derbyshire and others v St Helens Metropolitan Borough Council* [2007] ICR 841, the victimisation consisted of a letter written by the respondent to the claimants in the course of the proceedings. The decision of the Supreme Court was that the letter was unlawful because it crossed a line. It went beyond constituting a legitimate attempt by the employer to protect itself in litigation, which is lawful (*British Medical Association v Chaudhary* [2007] IRLR 800, CA). Judicial proceedings immunity was not argued, but I consider the approach in the case is informative.

63. My conclusion is that, on the face of it, genuine interparty correspondence will always fall within the scope of judicial proceedings immunity. However, there may be occasions where a respondent may try to use interparty correspondence to threaten the claimant or intimidate them into withdrawing their claim. Such correspondence does not attract judicial proceedings immunity because it crosses the line which was identified in the cases of *Derbyshire, Khan and Chaudahry.*

64. I recognise that this conclusion means that it is necessary to review the factual circumstances in each case, in order to decide if the correspondence in question genuinely deserves to be protected by the immunity. I note that this is what effectively what was done in the case of *Dathi*. I do not consider, however, that this would cause employers to be unduly fettered in their ability to defend litigation robustly. Where the line should be drawn would depend on the particular circumstances.

65. Factors such as whether the correspondence was between legal representatives or the parties directly, whether the claimant continued to be employed, and the legitimacy of the content of the correspondence when considered against the issues in the litigation would all be relevant. In determining the issue, there would also be a need to acknowledge that participating in litigation is naturally stressful and causes distress and worry for parties. I add that although whether correspondence is between representatives rather than parties will be a relevant factor to be considered, we must not forget that representatives are duty bound to share some correspondence with their clients. However, they are also obliged to put the correspondence in context and explain it.

66. In reaching this conclusion, I am envisaging something akin to the way the "without prejudice" privilege is disapplied where there is "unambiguous impropriety" consistency of blatant discrimination (Woodward v Santander UK plc [2010] IRLR 834, EAT). The operation of sub-section 111A(4) of the Employment Rights Act 1996 is also similar, such that where a party behaves legitimately they are protected, but where there is "improper behaviour", the protection is rightly withdrawn if considered just to do so.

67. To conclude this section, I add that I have taken into account the other courses of action available to a claimant who believes they have received inappropriate correspondence. This includes making a strike out or costs application on the basis of conduct and/or seeking aggravated damages. The claimant could also complain to the representatives' regulatory body. I do not consider the potential availability of these other options should prevent a fresh claim being brought.

Scope of Equal Treatment Directive and Equality Act 2010

68. If my interpretation of how the judicial immunity proceedings doctrine should be applied to interparty correspondence is correct. it is important to note that not all interparty correspondence that crosses the line I have described will give rise to a fresh discrimination claim. In order to do so, the conduct which is the subject of the complaint of must come within the scope of the Equality

Act 2010. It is only when this is the case that the possibility of a fresh discrimination claim arises.

69. If my interpretation is incorrect and there is blanket coverage of all interparty correspondence sent during litigation, there is still the possibility of the immunity being trumped by EU rights where the discrimination or victimisation which is the subject of the claimant's complaint falls within the scope of the Equal Treatment Directive.

70. The purpose of the Equal Treatment Directive is "to lay down a general framework for combating discrimination on the grounds of *religion or belief, disability, age or sexual orientation as regards* ***employment and occupation****, with a view to putting into effect in the Member States the principle of equal treatment* (Article 1)." (emphasis added)

71. The precise scope of the Directive is contained in Article 3. The relevant part for the purposes of this claim says that it "*shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to …. employment and working conditions, including dismissals and pay*" (Article 3 (1)(c)).

72. The UK legislation implementing the Equal Treatment Directive is the Equality Act 2010. The scope provisions found in Article 3 are reflected in the Equality Act 2010 in sections 39 and 40. I set these out for the sake of completeness, noting as I do that the trumping argument only applies if the claim is within scope of the Equal Treatment Directive.

73. Sub-section 39(4) provides that an employer (A) must not victimise an employee of A's (B)—

    (a) as to B's terms of employment;
    (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;
    (c) by dismissing B;
    (d) by subjecting B to any other detriment.

74. Subsection 40(1) provides that an employer must not, *in relation to employment by it*, harass a person who is one of its employees.

75. It is also relevant to note that in the interpretation section of the Equality Act 2010, subsection 212(1) *"*detriment*"* does not include conduct that amounts to harassment. In this case, the harassment argument is argued as an alternative to the victimisation claim which forms the claimant's primary case.

76. In his decision in *Aston*, HHJ Auberbach concludes at paragraph 97 that:

    "*On balance, I do not think statements made by an employer, thought the medium of a witness giving evidence on oath at a hearing pf a claim against it, are within scope of [Article 3(1)(c) of the Equal Treatment Directive."*

He goes on to say however:

"Even if I am wrong in so saying at that level of generalisation, I am reinforced in that conclusion in this case by my consideration of the significance of the post-employment context."

and decides that the claim is also defeated by the operation of section 108 of the Equality Act 2010.

77. I find his caution in taking a generalised view informative. I interpret his comments as meaning that in some cases the activity will appear to be clearly and obviously outside scope of the Equal Treatment Directive and little detailed factual analysis will be required. The activity of giving witness evidence is one of those areas. I tend towards thinking that the position will be equally clear in relation to most activities associated with the conduct of litigation. As recognised in the case of *Khan v Chief Constable of West Yorkshire Police* [2001] 1 WLR 1947 once employment tribunal litigation begins the relationship between the parties changes: "*They are not only employer or employee but also adversaries in litigation.*" (paragraph 59) The relationship needs to be viewed through a different lens.

78. However, there may be activities where some analysis is required. The purpose of the analysis will be to determine whether the activity genuinely forms part of the conduct of litigation. This is very similar, if note the same, as the test I have suggested for determining if judicial proceedings immunity applies in the first place.

79. Where the claimant is still employed there is a natural and obvious risk that the content of correspondence will not be limited to the litigation and may have broader implications that clearly bring it into the scope of the Equality Act 2010 and/or the Equal Treatment Directive.

Harassment and Victimisation

80. Before concluding this section on the law and turning to its application to the likely facts in this case, I need to set out the legal tests which apply to claims of victimisation and harassment.

Victimisation

81. The definition of victimisation is contained in section 27(1) of the Equality Act which provides that:

'A person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.'

82. The definition of a protected act is found in section 27(2). I do not need to dwell on it in this case as the respondent concedes the claimant had done the protected acts upon which she relies.

83. The analysis the tribunal must undertake is in the following stages:

(a) first ask what actually happened;

(b) consider if the treatment falls within scope of the Equality Act 2010,

(c) consider if treatment short of dismissal constitutes unfavourable treatment (see below);

(d) finally, ask ourselves was the treatment because of the claimant's protected act.

84. The test for detriment was formulated in the case of *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 where it was said that it arises where a reasonable worker would or might take the view that they had, as a result of the treatment complained of, been disadvantaged in the circumstances in which they had to work. An unjustified sense of grievance will not amount to a detriment, however.

85. An essential question in determining the reason for the claimant's treatment is what, consciously or subconsciously, motivated the respondent to subject the claimant to the detriment? This is not a simple "*but for*" causation test, but requires a more nuanced inquiry into the mental processes of the respondent to establish the underlying "core" reason for the treatment. This does not mean that an obvious conscious attempt to punish the claimant or dissuade them from containing with a protected act is required. The respondent may subconsciously treat the claimant badly because of the protected act.

86. Two important cases which I have already mentioned are important authorities on how I should approach this case. The first is *Khan* in which the House of Lords accepted that an employer's decision not to provide a reference during the course of litigation was not an act of victimisation. The emphasis was on the employer's motive for acting. The real reason for withholding the reference was because the provision of the reference might prejudice the Chief Constable's case. This was a legitimate rather than a victimising motive.

87. In *Derbyshire,* as noted above, a letter sent to employees with equal pay claims was held to be an act of victimisation. In reaching this decision, the House of Lords reminded tribunals that the tribunal's main focus should be the point of view of the victim. This does not negate the need however to consider why the respondent acted as it did.

88. The protected act need only be one of the reasons. It need not be the only reason (EHRC Employment Code paragraph 9.10).

89. The shifting burden of proof found in section 136 of the Equality Act 2010 applies. Initially it is for the claimant to prove, on the balance of probabilities, primary facts from which we could conclude, in the absence of an adequate explanation from the respondent, that the reason for any unfavourable treatment was because of the claimant's protected act. If the claimant

succeeds, discrimination is presumed to have occurred, unless the respondent can prove otherwise. In order to discharge that burden of proof, the respondent must adduce cogent evidence that the treatment was in no sense whatsoever because of the protected act.

Harassment

90. Subsection 26(1) of the Equality Act 2010 provides:

"A person (A) harasses another (B) if

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

91. One of the issues I am asked to consider in this case is whether the conduct complained of is genuinely related to the protected characteristic of disability. The term "related to" is given a broad interpretation in case law and the EHRC Employment Code. It is a matter for the tribunal to determine in each case based on the factual matrix. The fact that the claimant considers that it is disability related is not determinative, nor is the alleged harasser's knowledge or perception, although both are relevant. The context is likely to be very relevant. This is an area where the shifting burden of proof may help.

92. Harassment does not have to be deliberate to be unlawful. If A's unwanted conduct (related to the relevant protected characteristic) was deliberate and is shown to have had the *purpose* of violating B's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for B, the definition of harassment is made out. There is no need to consider the effect of the unwanted conduct.

93. If the conduct was not deliberate, it may still constitute unlawful harassment. In deciding whether conduct has *the effect* of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B, we must consider the factors set out in section 26 (4), namely:

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that affect.

94. The respondent denies that it acted deliberately and argues that taking into account the circumstances, it would not be reasonable for the tribunal to find that the conduct had the effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

ANALYSIS AND CONCLUSIONS

95. I turn now to the application of the law to the likely facts in this case.

The Two Emails

96. I consider there is a chance that the tribunal hearing this case will decide that it has the jurisdiction to consider the emails written by Ms Chopra.

97. This could be either because:

(a) the tribunal agrees with my analysis of how judicial proceedings immunity operates, find that the emails cross a line and the conduct is within the scope of the Equality Act 2010; or

(b) the emails are covered by judicial proceedings immunity, but because the immunity is trumped in this case by the claimant's EU rights.

98. A factual analysis will be required as I have described above and therefore, as I have not heard the relevant evidence, this is not a case where it would be appropriate for me to determine the point and/ or strike the claim out for having no prospects of success.

99. For the reasons set out below, however, I consider this chance to be very small in the case of the first email such that her claim has little reasonable prospect of success. It is therefore appropriate for me to consider a deposit order. In my judgment, the likely outcome is that the tribunal will decide that this email is an example of genuine interparty correspondence which is covered by judicial proceedings immunity and/or which falls outside the scope of the Equality Act 2010 and/or Equal Treatment Directive.

100. I consider it is likely that the tribunal will decide that the second email is not covered by judicial proceedings immunity, but that it falls outside the scope of the Equality Act 2010 and Equal Treatment Directive. I therefore conclude that the claim in respect of the second email also has little prospect of success and a deposit order is appropriate.

101. In my judgment, that the claim falls outside the scope of the Equality Act 2010 is particularly clear when considering the harassment claim. Subsection 40(1) of the Equality Act 2010 appears to me to be very clear that an employer must not, in relation to employment by it, harass a person who is one of its employees. Any harassment here has no connection to the claimant's employment.

102. The factors I have taken into account are as follows:

- The starting point is that the emails were written by the respondent's representative, a solicitor, to another solicitor about issues in the case. This points strongly to them they are covered by judicial proceedings immunity and fall outside the scope of the Equality Act/ the Equal Treatment Directive. However, this alone cannot be determinative.

- Even though correspondence might be solicitor to solicitor, there is still a need to be mindful that the clients on both sides will read it

- Where there is an ongoing employment relationship, as in this case, respondents need to be careful when making allegations which impugn the honesty of the claimant

- In this case, the respondent was aware that the claimant was signed off as medically unwell. It is not clear if this extended to being aware that the claimant was psychology fragile, but the circumstances do suggest that the respondent should have tried to avoid causing distress to the claimant beyond that which no doubt arises from being involved in litigation against her employer in the first place

- The issue at hand, being discussed in the correspondence, was whether the claimant's PTSD constituted a disability. The cause of the PTSD was not relevant. The claim includes a personal injury claim, but the correspondence was not concerned with that at the time.

- Ms Chopra does not therefore appear to have a good reason to ask the claimant the questions she asked in her email of 24 February 2020 sent at 16:22. However, it is likely (from reading the correspondence) that she genuinely believed the questions did require an answer and that she was simply seeking what were, in her mind, the relevant facts. Ultimately this will be a matter for the tribunal to decide having heard Ms Chopra's evidence.

- The reference in the second email to a Grenfell bandwagon is very insensitive. My view is that the second emails implies that the claimant is on such a bandwagon. unless Ms Chopra has good grounds for accusing her of this, an email written in these terms has no place in litigation. Obviously, I have not heard Ms Chopra's explanation. It may be that she had good grounds for using this term, based on her experience of working for the respondent or her knowledge of the claimant's case.

- Despite this, I nevertheless consider it is likely that the tribunal will find an insufficient nexus between the email and the claimant's employment to bring it within the scope of the Equality Act 2010 and/or the Equal Treatment Directive.

103. For the sake of completeness, I add that if I am wrong about the tribunal's likely decision with regard to jurisdiction, I do not think that the victimisation claim, when argued in relation to either of the emails, has more than little reasonable prospects of success in any event. The harassment claim would be likely to succeed, however.

104. Dealing first with the victimisation claim relating to the emails, my view is that although the claimant is unlikely to be able to establish that she suffered a detriment. Applying the *Shamoon* test, I consider it likely the tribunal would find that it would be unreasonable for the claimant to conclude that she had

been disadvantaged *in the circumstances in which she has to work*. The emails have nothing to do with her job. They were not written by anyone involved in the claimant's line management.

105. In addition, the position with regard to causation does not favour the claimant. As noted above, the causation test for a victimisation claim is not a simple "but for" test. There is a need to examine the respondent's real motive, which in this case will require us to consider whether Ms Chopra's approach to the emails was deliberately designed to upset the claimant as a way of getting her to discontinue her claim or punish her for bringing it. I consider it unlikely that that the tribunal would reach this conclusion. This will depend on its findings on the facts, but I am required when considering an application for strike out to consider the likely conclusions that will be reached on the facts.

106. Turning to the harassment claim, as indicated above, if I am wrong about the jurisdiction issue, I consider the harassment claim would have reasonable prospects of succeeding. I consider it is likely the tribunal will find that the conduct in both emails relates to the claimant's disability of PTSD. The suggestion in the emails is that the claimant does not genuinely have PTSD. The focus of the emails are the claimant's disability. I judge that is likely that the tribunal will find that the emails had the effect, if not the purpose, of violating the claimant's dignity taking into account the claimant's perception, the circumstances and whether it is reasonable for the emails to have that affect.

Grievance

107. The respondent's conduct regarding the claimant's grievance is not covered by judicial proceedings immunity and falls clearly within the scope of the Equality Act 2010. There is no jurisdictional barrier to this part of the claim proceeding.

108. I consider that the claimant's prospects of success in relation to both the victimisation and harassments claim fall below the threshold required by rule 39(1) and therefore my decision is to strike the claim out.

109. There is a factual dispute between the parties in relation to this claim, but it only relates to the impact on the claimant. It is common ground that the respondent was going to investigate the complaint, but then changed its mind because of the employment tribunal proceedings. The respondent has indicated that it will still investigate the complaint, but not until after the proceedings have concluded.

110. The detriment to the claimant seems to me to be minimal. There is a delay in having her complaint investigated, but that is all. She is not working at the moment and it is difficult to see how a reasonable employee might take the view that as a result of the delay they have been disadvantaged in the circumstances in which she had to work. I appreciate the delay may have caused her some additional distress, but I do not cinder this is likely to have been significant when viewed in the context.

111. The reason I have concluded the claim has no reasonable prospects of success is because the claimant cannot succeed in showing that any detriment has been caused by her protected act. As I have indicated above the causation test is not a "but for" test, but requires consideration of what, consciously or subconsciously, motivated the respondent.

112. I am confident that any tribunal hearing this case would conclude that the real reason for the respondent's decision to postpone consideration of the complaint was genuinely because it considered it would be inappropriate to deal with it when it had become the subject of litigation. There was no attempt to dissuade the claimant from proceeding with that claim. Because the respondent's motive is so clear and obvious, this is not a case where the burden of proof assists because the claimant cannot establish facts that shift it.

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Employment Judge E Burns
2 February 2021

Sent to the parties on:

04/02/2021

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For the Tribunals Office