IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

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Judgment of the Employment Tribunal in Case No: 8000274/2023 Issued Following Open Preliminary Hearing Held at Edinburgh on the 7th of September 2023

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Employment Judge J G d'Inverno

15 **Ms Pauline Joyce**	**Claimant** **In Person**
Forth Valley Health Board	**Respondent** **Represented by:** 20 **Mr D James, Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The Judgment of the Employment Tribunal is:-

(First) That the claimant lacks Title to Present and the Tribunal lacks Jurisdiction to Consider the claimant's purported freestanding complaint of breach of her "freedom of expression" and the purported complaint is 30 dismissed for want of Jurisdiction.

(Second) The claimant's complaint, in terms of section 47B of the Employment Rights Act 1996, of having suffered detriment on the ground that she had made a protected disclosure, enjoys no reasonable prospect of 35 success and, in the circumstances presented, falls to be struck out, and is hereby struck out, in terms of paragraph 37(1)(a) of the Employment

Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, on the ground that it has no reasonable prospect of success.

Employment Judge: **J d'Inverno**
Date of judgment: **22 September 2023**
Date sent to parties: **22 September 2023**

I confirm that this is my Judgment in the case of Joyce v Forth Valley Health Board and that I have signed the Judgment by electronic signature.

REASONS

Overview

1. This case is one in which the claimant presents complaints:-

    (a) of having suffered detriment, in terms of section 47B of the Employment Rights Act 1996 ("the ERA"), on the ground that she had made a protected disclosure; and,

    (b) a freestanding complaint of breach of her Article 9 and Article 10 Human Rights which she describes as "the right of expression (to share information)"

2. The case called for Open Preliminary Hearing, in terms of Judge Kemp's Case Management Orders of 11th August 2023, for determination of the respondent's Application for Strike Out:-

    (a) Of the section 47B ERA claim in terms of Rule 37(1)(a), the specific ground founded upon being that the claims enjoy "no reasonable prospect of success"; and

    (b) Of the purported freestanding complaint of breach of Human Rights (of Expression) of which the claimant bears to give notice, for want of Jurisdiction

3. Ms Joyce appeared on her own behalf, the respondent, Forth Valley Health Board, was represented by Mr D James, Advocate. There was before the Tribunal a Hearing bundle extending to some 87 pages to some of which reference was made in the course of submissions.

4. No oral evidence was adduced at the Hearing, the respondent taking the claimant's averments *pro veritate* (that is assuming that the claimant in fact proves all that she offers to prove), for the purposes of the Strike Out Application.

5. Both the claimant and the respondent's representative addressed the Tribunal in submission. The respondent's representative addressed the Tribunal first, the claimant responded and the respondent's representative exercised a limited right of reply.

6. There was also before the Tribunal and copied to the claimant the following authorities, all of which the Tribunal found relevant and helpful:-

   (1) **Dr P B Singh v Professor I Truscott** [2011] CSIH 84 XA99/10
   (2) **South London Mawdsley NHS Trust v Mrs S Dathi** UKEAT/0422/07/DA
   (3) **Jesudason v Alder Hey Children's NHS Foundation Trust** [2020] EWCA Civ 73
   (4) **Tiplady v City of Bradford Metropolitan District Council** [2019] EWCA Civ 2180

The Protected Disclosures relied upon

7. As currently set out in her initiating Application ET1, some ambiguity attends the identification of the particular protected disclosures relied upon by the claimant for the purposes of her complaints. Judge Kemp records in his Note of Output issued following the Case Management Discussion of 11th August that in her CMD Agenda return, (a document which does not form part of the

formal pleadings in the case), the claimant makes reference to "*several emails which may possibly be intended to be identified as the applicable protected disclosures.*"

5 8. As indicated above however, the respondent's Application is one that proceeds on the basis of taking the claimant's case at its highest and, for the purposes of the contentions advanced before the Tribunal, the respondent's representative proceeded on the assumption that the claimant had established in fact that she had made a relevant qualifying and protected
10 disclosure.

9. The challenge which is made in respect of the prospects of the section 47B ERA complaint is one directed not at the proponed protected disclosure but rather, at the identified alleged detriments, which are clearly specified by the
15 claimant. The detriments allegedly suffered by the claimant, and founded upon for the purposes of her complaint, are said to be constituted by 2 emails;

(a) the first, sent to the claimant by the respondent's legal
20 representative Mr Rhidian Davies on the 5th of June 2023 at 10:20, which is copied and produced together with its surrounding email chain at pages 80 and 81 of the Hearing bundle.

25 (b) The second email said to constitute detriment is that sent to the claimant by the respondent's legal representative Ms Hazel Craik on 6th June 2023 at 15:45.

10. It is the respondent's contention that the terms of neither of these emails, nor
30 the sending of them to the claimant by the respondent's respective legal representative in answer to emails sent by the claimant, is capable of constituting a detriment for the purposes of section 37B; And that thus, absent a consequential detriment, let it be assumed that the claimant made a relevant protected disclosure, the complaint is one not capable of

succeeding, that is to say, it is a complaint which has no reasonable prospect of success in terms of Rule 37(1)(a) and in consequence, that the Tribunal's discretion to strike out the claim under that section is awakened.

11. It is the respondent's further contention, the Tribunal's discretion having been awakened that it is proportionate in the circumstances to strike the claim out.

12. The challenge to the sufficiency of the alleged detriments founded upon proceeds on 3 separate grounds:-

Immunity and Privilege

(a) Firstly, that the objected to statements within the emails, being statements made in the course of judicial proceedings by one party's representative to another party, are statements which attract absolute immunity and privilege under the law of Scotland and accordingly cannot found a section 47B, or for that matter any other, actionable complaint.

Capacity

(b) Secondly, that the right to complain of having suffered detriment in terms of section 43B of the ERA is one which is conferred upon persons in their capacity as employees/workers working under an employment relationship, whereas the emails were sent to the claimant and received by her, not in the context of any employment relationship but rather, in her capacity as a litigant in adversarial proceedings. Accordingly, let it be assumed that they otherwise fell within the legal definition of a detriment, which is denied by the respondent, they do not give rise on the part of the claimant to Title to bring section 47B proceedings;

Not Detriments

(c) Thirdly, that upon their objective construction and according to the words used their normal English language meaning, each of the emails falls to be seen, in its terms, as falling outwith the recognised definition of "detriment" and thus, a section 47B complaint founded upon them must fail.

13. The terms of the emails in question are set out below for ease of reference:-

Email from Rhidian Davies, Senior Solicitor, Employment Team, Central Legal Office to Pauline Joyce dated 5th June 2023 at 10:20

The email was sent in response to an email sent to Mr Davies, by the claimant, on 3rd June 23 in which the claimant requests that Mr Davies make available to her, of new, copies of Hearing bundles in 2 earlier separate cases which she identifies by their case number, stating that she requires these documents to present as evidence to the Employment Tribunal regarding, defamation and suspension at a Preliminary Hearing fixed for the 26th of June in the instant litigation.

14. The 5th June 2023 email from Mr Davies is in the following terms:-

"*From Rhidian Davies sent 5th June 2023 10:20*
To Pauline Joyce
Subject re: bundles request
Dear Ms Joyce

Thank you for your email.

I will make arrangements for an electronic copy of the previous bundles to be made available to you.

However given that I dispute the relevance of their content to the current claim, if you wish to refer to them at any Hearing then I suggest that you take steps to have copies printed for the witnesses and the Tribunal panel.

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Kind regards,
Rhidian Davies."

The Email of 6th June 2023 15:42 from Hazel Craik, Central Legal Office

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15. The second email founded upon by the claimant, is one sent to her by Hazel Craik's Head of Employment in the Central Legal Office, in her capacity as law agent for the respondent, in response to an email dated 5th June 2023 sent by the claimant to an Administrative Assistant within the Central Legal Office who had on Mr Davies' instructions forwarded to the claimant the requested copy trial bundles relating to the earlier litigations, and in which email the claimant had asked the Administrative Assistant to confirm whether there were any data protection laws which prohibited the claimant from sending the bundles to the media.

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16. The 6th June 2023 email from Hazel Craik which is founded upon, is in the following terms:-

"From Hazel Craik sent 06 2023 15:45
To Pauline Joyce
NSS CLO Employment Admin
Subject re Document Availability on Global Span: You v Forth Valley Health Board (VB1.312)

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Dear Ms Joyce

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Your email to Ms Hendry has come to my attention. Ms Hendry is a member of the administrative support staff for the Employment

Department, and it is not appropriate for you to ask for her view on sharing documentation supplied to you, with the media.

I understand that you initially requested electronic copies of the bundles relating to your previous Tribunal claims raised against Forth Valley Health Board, as you said that you needed them in order to prepare for the current case. Access to copies of the documents were provided to you in order that you could do that. You have now advised that you wish to share these documents with the media; had you indicated that this had been your purpose, we would have had to consider carefully the implications of providing access to the documents from a data protection point of view.

You will have to take your own legal advice about the consequences of sharing the bundle's information for the media, given it includes third party personal data.

My observation is that in sharing third party personal data with the media, you would not be processing the data for purely personal reasons, and will need to do so in compliance with both the UK GDPR and Data Protection Act 2018 and with any obligation of confidentiality which arises from your work with Forth Valley Health Board.

Yours sincerely

Hazel Craik, Head of Employment, Certified Specialist in Essential Business and Leadership Skills, Central Legal Office"

Summary of Submissions on behalf of the Respondent

17. Under reference to the 4 case authorities listed above, Mr James' submissions covered the following:-

(a) that the 2 pieces of correspondence founded upon as constituting detriment were correspondences sent, during the conduct of the current proceedings from the respondent's representatives to the claimant, a party litigant representing herself.

(b) That as such, and as made clear in terms of the case authority referred to, that it is a long established principle of Scots law that such correspondence attracted absolute immunity and privilege and could not found actionable proceedings as the claimant has sought to do.

(c) That the right to complain of having suffered detriment in terms of section 47B of the Employment Rights Act, is a right conferred only on persons in their capacity as an employee or worker working under an employment relationship, and that the emails in question were emails solicited by the claimant, and sent by the respondent's representatives to the claimant, in her capacity, not as an employee of the respondent, but rather as a litigant and thus, were incapable of giving rise to Title to bring a section 47(B) ERA complaint on the part of the claimant.

(d) That objectively construed and, applying to the words their normal English language meaning, the terms of neither email was capable of constituting a detriment; that is to say could be seen to fall outwith the legal definition of detriment articulated in the case authorities and, let it be assumed that the claimant did make a qualifying and protected disclosure, which is not admitted by the respondent but which is accepted for the limited purposes of the Open Preliminary Hearing, there being no consequential detriment suffered by her, her complaint was one which could not succeed.

(e) On each of the above grounds, both jointly and severally, the respondent's representative invited the Tribunal to hold that the claimant's claim was one which enjoyed "*no reasonable prospect of success*", that the Tribunal's Jurisdiction to strike out the claim in terms of Rule 37(1)(a) was awakened and thus, that the first part of the two stage test fell to be regarded as having been satisfied.

18. Mr James submitted further, that in the circumstances presented it was both proportionate and would further the Overriding Objective were the Tribunal to strike out the claims on that ground. The same because this was not an example of a case where the lack of prospects could be improved by the provision of further specification. In the respondent's representative's submission there was nothing that the claimant could do in terms of further specifying or re-presenting her complaint that would address the lack of reasonable prospect of success.

19. In relation to the what bore to be a freestanding complaint of breach of the claimant's Article 9 and Article 10 Human Rights, (breach of her freedom of expression), the respondent's representative submitted that the claimant lacked Title to Present and the Tribunal Jurisdiction to Consider such a complaint.

20. While recognising that the Tribunal, as a legal person, had certain obligations under the Human Rights Act and that from time to time human rights elements might arise in claims which were proceeding under the Tribunal's other jurisdictions, what the claimant purported to give notice of in the instant case was a freestanding complaint of breach of her human rights. Jurisdiction to adjudicate upon such claims was not amongst the jurisdictions with which Parliament had imbued the Employment Tribunal.

21. In the respondent's representative's submission the apparent or purported freestanding complaint of breach of human rights fell to be dismissed for want of jurisdiction.

Submissions of the Claimant

22. Ms Joyce made a number of points in submission. With a view to recording and considering them in their entirety they are set out fully, rather than summarised, in the paragraphs below.

23. Ms Joyce submitted;

(a) that the detriment which she had sustained had occurred to her in her capacity as a worker.

(b) That the emails which she relied for the purposes of detriment fell to be construed as attempts by the respondent's representatives to restrict her access to or use of bundles which she wished to give to the media by way of making a future qualifying and protected disclosure.

(c) That those emails, also and separately, constituted a breach of her human rights freedom of expression.

(d) That solicitors should not use their legal status to prohibit other parties making public interest disclosures.

(e) That she was just exercising her right to go to the media.

(f) That human rights law was incorporated into general English and Scottish law.

(g) That the respondents in the case had a duty to apply human rights and that the solicitors whose correspondence she took issue with were employed effectively by the same respondent as was she.

(h) That in making its decisions, the Tribunal had a duty to follow the principles of human rights law.

(i) That in her consideration, in the terms of their correspondence, the two solicitors fell to be regarded as using their legal powers and status to restrict her rights.

(j) That, Ms Craik fell to be regarded as someone having legal authority over the claimant because she effectively worked for the claimant's employer and she, the claimant, considered that in terms of the identified email Ms Craik, its author, was implying that she, the claimant, could "get into trouble with her job" if she provided the case bundles to the media.

(k) That the two lawyers in question were employed by the Central Legal Office and so they should also follow the respondent's, that is Forth Valley Health Board's, whistleblowing policy.

(l) That the Human Rights Act protects workers rights and freedoms in the public sector and, in her assertion, that the emails amounted to breaches of the claimant's freedom of thought in terms of Articles 9 and 10.

(m) That it was a valid action for her to go the media as the respondent had not relayed her concerns to the media and that a Hearing would be a public Hearing which would be open to the media.

(n) That as a whistleblower she was allowed to go to the media if internal processes were failing.

(o) That she had no confidence in her employer to do the right thing or to publish her concerns in the media.

(p) She considered that in her intended disclosure to the media she would be making an "external disclosure" for the purposes of the Act.

(q) That she was at risk of being further victimised.

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(r) That, in her opinion, any data protection considerations should be regarded as being overridden.

(s) That she was aware that lawyers must maintain their client
10 confidentiality unless there was some criminal aspect to it and that the two solicitors whose emails she asserts caused her detriment had a duty to breach their client confidentiality with Forth Valley Health Board because their client, in Ms Joyce's opinion, had carried out potentially criminal acts.

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Respondent's Representative's Reply

24. By way of exercising a limited right of reply, the respondent's representative drew the Tribunal's attention to paragraph 10 of the Grounds of Resistance
20 attached to form ET3 which confirmed that "Central Legal Office" and the respondent "Forth Valley Health Board" were separate legal entities, viz;

"*10 The respondent engaged Central Legal Office. Central Legal Office is a part of the Common Services Agency, an NHS body*
25 *constituted pursuant to section 10 of the National Health Service (Scotland) Act 1978. The Common Services Agency and the respondent are distinct legal entities. Central Legal Office is not part of the respondent."*

30 25. That the email authored by Ms Craik, said by the claimant to constitute a detriment, was one in which, its terms being objectively construed, Ms Craik made no attempt to restrict the claimant's right of action but rather, in response to an express request made by the claimant, did no more than identify potentially relevant matters which she observed the claimant might

usefully give consideration to when embarking upon her communicated intended course of action.

Discussion and Disposal

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26. In the case of *Singh v Truscott* (No 1 of the authorities presented) the then Inner House in expressing its opinion at paragraph 26 adopted the dicta of Lord President Ingles in *Williamson v Umphrey and Robertson* (1890) 17R905 who said at pages 910-911:-

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> "The absolute privilege accorded to Judges, Counsel and witnesses by the law and practice of both countries is founded on obvious grounds of public policy. It is essential to the ends of justice that persons in such positions should enjoy freedom of speech without fear of consequences, in
> 15 discharging their public duties in the course of a Judicial Inquiry."

His Lordship then went on to explain:-

> "But the motive of the law is not to protect, corrupt or malevolent Judges,
> 20 malicious Advocates or malignant and lying witnesses, but to prevent persons acting honestly in discharging a public function from being harassed afterwards by actions inputting to them dishonesty and malice, and seeking to make them liable in damages."

25 27. In defining and explaining the extent of the privilege, Lord President Ingles relied on English authorities, in particular the case of "Munster v Lamb" [1883] 11QBD588.

28. The continued existence of absolute privilege attaching to those engaged in
30 litigation was specifically referred to by Lord Hoffman in *Taylor v Director of the Serious Fraud Office* [1999] 2AC177 at pages 207-208; and the Court of Appeal, in *Heath v Commissioner of Police of the Metropolis* [2005] ICR329, reaffirmed its continued existence, particularly in the Judgment of Auld LJ

which rejected the suggestion that it should be in any material respect diminished.

29. In *South London and Mawdsley NHS Trust v Mrs S Dathi* His Honour Judge McMullen QC sitting in the Employment Appeal Tribunal, at paragraph 17, quoted and relied upon the restatement of the rules relating to absolute immunity for legal proceedings made by **Devlin LJ in Lincoln v Daniels** [1962] 1QB237 at 258 where he said:-

> "The absolute privilege which covers proceedings in or before a Court of Justice can be divided into three categories. The first category covers all matters that are done *coram judice*. 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 M'Ewen*, in which the House of Lords recognised that the privilege attaching to evidence which a witness gives *coram judice* extended to the precognition or proof of that evidence taken by a solicitor. It is immaterial whether the proof is or is not taken in the course of proceedings. In *Beresford v White*, the privilege was held to attach to what was said in the course of an interview by a solicitor with the person who might or might not be in a position to be a witness on behalf of his client in contemplated proceedings."

30. Again, at paragraph 20 of the Judgment of the EAT Judge McMullen states:-

> "It is common ground in this case that Employment Tribunal proceedings are judicial proceedings, based upon the statement of the law in **Heath v Commissioner of Police for the Metropolis** [2005] IRLR 270."

Auld LJ said this:

> "… there is no basis for the proposition that the absolute immunity rule only attaches to defamatory statements. As the Employment Tribunal well described … and as the Employment Appeal Tribunal also found, it attaches to anything said or done by anybody in the course of judicial proceedings whatever the nature of the claim made in respect of such behaviour or statement, except for suits for malicious prosecution and prosecution for perjury and proceedings for contempt of court. This is because the rule is there, not to protect a person whose conduct in court might prompt such a claim, but to protect the integrity of the judicial process and hence the public interest. Given that rationale for this rule, there can be no logical basis for differentiating between different types of claim in its application."

The speech of Lord Hope in **Darker** was followed including this:

> "This immunity, which is to be regarded as necessary in the interests of the administration of justice and is granted to him as a matter of public policy is shared by all witnesses in regard to the evidence which they give when they are in the witness box. It extends to anything said or done by them in the ordinary course of any proceedings in a court of justice. The same immunity is given to parties, their Advocates, jurors and Judge. They are all immune from any action that may be brought against them on the ground that things said or done by them in the ordinary course of the proceedings were said or done falsely and maliciously and without reasonable cause … the immunity extends also to claims made against witnesses for things said or done by them in the ordinary course of such proceedings on the grounds of negligence."

And again, at paragraph 21 in the EAT:

> "This does not mean that a person who has been discriminated against during the course of legal proceedings is without remedy. The conduct of a party in an Employment Tribunal is relevant to the issue of costs which may

be awarded for unreasonable conduct of proceedings: see Rule 40(3). An award for injury to feelings can be made and it can be increased by an award of aggravated damages, as occurred in the present case. A claim or a response can be struck out on the grounds that the manner in which the proceedings have been conducted has been scandalous, vexatious or unreasonable: Rule 18(7) …"

At paragraph 27 in the EAT Judge McMullen states:

"When referring to document:-

"The disclosure letter is of a slightly different character. It is not directed to the Tribunal and it cannot really be said to be a "pleading" but Mr Dhar accepted that it came into existence for the purposes of giving effect to the CMD. Again, modern litigation requires representatives to collaborate in the collection of documentary evidence to form the bundles for a Hearing more so where directions are given to this effect. A mechanism is available to challenge a refusal to disclose the documents by an application to the Tribunal for an Order. I have to assume that the letter is capable of constituting an act of direct discrimination or of victimisation. In light of Mr Dhar's concession, the point is unarguable. The letter came into existence not only for the purposes of the proceedings but was pursuant to a direct Order of the Tribunal in relation to disclosure and bundle preparation. ….. In any event I hold that the disclosure letter fell within the second category and attracted absolute immunity."

31. In **Jesudason v Alder Hey Children's NHS Foundation Trust** Sir Patrick Elias, as he then was, in defining "detriment" said at paragraph 27:-

"In order to bring a claim under section 47B the worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the viewpoint of the worker. There is a

> detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept is well established in discrimination law and it has the same meaning in whistleblowing cases."

5 He went on to quote and to adopt what was said by Lord Neuberger of Abbotsbury in *Derbyshire v St Helens Metropolitan Borough Council (Equal Opportunities Commission Intervening)* [2007] ICR841, para 67,:-

> "In that connection Brightman LJ said in *Ministry of Defence v Jeremiah*
> 10 [1980] ICR13, 31A that 'a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment'. That observation was cited with approval by Lord Hoffman in *Chief Constable of West Yorkshire Police v Khan* [2001] ICR1065, paragraph 53. More recently it has been cited with approval in
> 15 Your Lordships' in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR337. At paragraph 35, my Noble and Learned Friend, Lord Hope of Craighead, after referring to the observation and describing the test as being one of materiality, also said that an 'unjustified sense of grievance cannot amount to "detriment"'."
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> 28 Some workers may not consider that a particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to
> 25 a detriment. The test is not, therefore, wholly subjective."

32. In *Tiplady v City of Bradford Metropolitan District Council* [2019] EWCA Civ 2180 Underhill LJ, in addressing the issue of capacity adopted the approach taken in earlier decisions that even though it was not possible entirely to
30 assimilate the statutory schemes of protection for whistleblowers and other workers with protected characteristics "*The two situations are nevertheless essentially similar and, other things being equal, one would expect Parliament to have intended to follow the same substantive approach to each*".

33. At paragraph 43 of *Tiplady* Underhill LJ continues, "Adopting that approach, in my view Parliament must be taken to have intended, when using the terminology of detriment in the discrimination legislation and in Part 5 of the 1996 Act, that it should have the same scope. In both continuing at paragraph 45 Underhill LJ states "There remains the question of how exactly a detriment is to be recognised as arising, or not arising, "in the employment field": what are the boundaries of the field? ….. Broadly, the tests suggested by Mr Lewis in the Employment Tribunal, and which is accepted, of asking in what "capacity" the detriment was suffered – or, to put the same thing another way, whether it was suffered by the claimant "as an employee" – seems to me likely to produce the right answer in the generality of cases.

34. Upon a consideration of the above authorities I am satisfied on each of the three severable grounds advanced by the respondent's representative that the complaint given notice of by the claimant in seeking to engage the Tribunal's jurisdiction under section 47B of the Employment Rights Act 1996 is one which enjoys no reasonable prospect of success; viz:-

    (a) The two pieces of correspondence founded upon as constituting detriment enjoy absolute privilege and immunity and cannot and therefore do not found actionable proceedings in the manner in which the claimant seeks to utilize them. Let it be assumed that their content was otherwise than it is and thus potentially falling within the definition of detriment they do not give rise to Title on the part of the claimant to present a section 47B ERA complaint.

    (b) The respondent, on the one hand and the Solicitors Central Legal Office who were the authors of the correspondence are employed are distinct legal entities. The solicitors are not employed by the respondent. Rather the solicitors act in the capacity of legal representatives of the respondent in the instant litigation. It was in that capacity that they each wrote and sent the correspondences in question to the claimant. The

correspondences were correspondences solicited by the claimant and received by her, in the course of the instant litigation, in her capacity as a litigant and not "as an employee" of the respondent. In that capacity and in relation to the correspondences in question the scope of section 47B does not extend to the claimant.

(c) Applying to the wording of the correspondences the normal rules of construction, and according to the words used their normal English language meaning, the emails in question do not fall within the various judicial definitions of detriment. While the claimant may sincerely believe that they fall to be regarded as detrimental, I conclude that a reasonable employee, considering their wording objectively would not so regard them in the circumstances. Separately, it is not reasonable to regard correspondence, written in the course of judicial proceedings and which attaches absolute immunity and privilege, as detrimental. To do so in the face of the immunity attaching to the documents is to exhibit what Lord Hope described in *Shamoon* as an "unjustified sense of grievance" which "cannot amount to 'detriment'".

35. I am accordingly satisfied that the claim enjoys no reasonable prospect of success, that the first part of the two stage process is completed and the Tribunal's Jurisdiction to Strike Out the claim on that ground is awakened.

36. In relation to the exercise of the Tribunal's discretion, I accept the submission made by the respondent's representative that the nature of the deficiency in the pleaded case is one which cannot be cured by the affording of further opportunities to provide specification or particularisation of the claim. The only two detriments given notice of fall to be regarded, on the basis of undisputed facts and in law, as not amounting to detriments. In these circumstances it would be grossly disproportionate and contrary to the Overriding Objective to admit such a claim to probation. While claims before

the Employment Tribunal will rarely be struck out where their success is dependent upon disputed matters of facts before there has been inquiry into those facts, these are not the circumstances pertaining in the instant case. None of the material facts which inform the prospects of success of the claim are in dispute.

37. In these circumstances, I am satisfied that it is both appropriate and proportionate to strike out the claim on the grounds that it has no reasonable prospect of success in terms of Rule 37(1)(a) and I so strike it out.

38. Turning to the apparent freestanding complaint of human rights of expression/communication, while recognising, the application of human rights legislation to the Employment Tribunal in the conduct of proceedings before it, I am satisfied that jurisdiction to consider and determine such a freestanding complaint of breach of human rights is not within the jurisdictions conferred upon the Tribunal by Parliament. I conclude, in the circumstances, that the claimant lacks Title to Present and the Tribunal lacks Jurisdiction to Consider the apparent freestanding complaint of breach of human rights and that the same falls to be, and is hereby, dismissed for want of Jurisdiction.

Employment Judge: **J d'Inverno**
Date of judgment: **22 September 2023**
Date sent to parties: **22 September 2023**

I confirm that this is my Judgment in the case of Joyce v Forth Valley Health Board and that I have signed the Judgment by electronic signature.