



EMPLOYMENT TRIBUNALS

Claimant

Ms E Roberts

v

Respondent

(1) Ms G Black

(2) Mr G Edwards

Heard at: London Central (by video)

On: 26 January 2026

Before: Employment Judge P Klimov (sitting alone)

Appearances:

For the claimant: **Mr A Roberts**, of Counsel

For the respondents: **Mr M Pilgerstorfer KC** of Counsel

RESERVED JUDGMENT

Judicial proceedings immunity applies to the claim. Accordingly, the Tribunal does not have jurisdiction to consider the claim. The claim is dismissed for want of jurisdiction.

Reasons

INTRODUCTION

1. By a claim form, dated 17 March 2025, the claimant brought a complaint of victimisation against the respondents. Before that, the claimant had lodged three other claims against the respondents for unfair dismissal, whistleblowing detriments, various forms of discrimination, and “money” claims. Those three claims have been consolidated and are due to be heard together, starting on 9 March 2026.
2. This fourth claim contains a complaint of victimisation only. It arises from the respondents initiating in December 2024 High Court proceedings against the

claimant for breach of contract and breach of confidence (Claim No. KB-2024-004267), which were resolved by a consent order, sealed on 11 June 2025 (“**the Final Order**”). The respondents resist this claim on the merits and on the grounds of judicial proceedings immunity (“**JPI**”).

3. The alleged acts of victimisation in this claim were pleaded in the claimant’s Particulars of Claim as follows:

a. On 12 July 2024, the Respondent’s instructed BDBF¹ the Respondent’s representatives to issue a Letter Before Action on the Claimant. In an unnecessary and heavy handed manner, the letter was appended to the Claimant’s door, in a transparent envelope, enabling the contents to be publicly viewed.

b. the Claimant received a heavy stream of correspondence from the Respondent’s representatives including the following communications:

- i. 12 July 2024*
- ii. 15 July 2024*
- iii. 18 July 2024*
- iv. 22 July 2023*
- v. 23 July 2024*
- vi. 24 July 2024*
- vii. 25 July 2024*
- viii. 1 August 2024*
- ix. 5 August 2024*
- x. 19 August 2024*
- xi. 30 August 2024*

c. Re-activated pressure and commenced civil proceedings against the Claimant on 17 December 2024 so intentionally subjecting her to emotional and financial strain.

4. The case was listed for a case management preliminary hearing on 2 December 2025. In the run up to the preliminary hearing, the parties had prepared a joint agenda and a draft list of issues. The draft list of issues had initially been prepared by the respondents’ solicitors, and on 26 November 2025 was sent to the claimant’s solicitors for their comments.
5. On 1 December 2025, the claimant’s solicitors responded, stating that “[t]he Claimant largely agrees with the list of issues save for the slight amendments in the attached version”. The slight amendments were with respect to typos and incorrect cross-referencing. However, the claimant made no substantive changes to the draft. The list of the alleged detriments was recorded as follows:

¹ The respondents’ solicitors

Alleged Detriments

4.4 *Did the First Respondent and/or the Second Respondent subject the Claimant to a detriment by (PoC§16):*

4.4.1 *Sending her a letter of claim dated 12 July 2024?*

4.4.2 *Sending her the following correspondence?*

- (a) 12 July 2024 (duplicative allegation of that at 4.4.1)*
- (b) 15 July 2024*
- (c) 18 July 2024*
- (d) 22 July 2024*
- (e) 23 July 2024 (subject to the issue raised at 4.5 below)²*
- (f) 24 July 2024*
- (g) 25 July 2024*
- (h) 1 August 2024*
- (i) 5 August 2024*
- (j) 19 August 2024*
- (k) 30 August 2024*

4.4.3 *Commencing proceedings in the High Court on 17 December 2024?*

6. At the preliminary hearing on 2 December 2025 before EJ Isaacson the list of issues was agreed. The Judge recorded in her orders:

“33. The claimant’s fourth claim is a claim of victimisation. A list of the claim and issues is attached to this order and was agreed between the parties.”

7. The list of the alleged detriments was not changed in any way from the agreed draft submitted for the hearing.
8. EJ Isaacson listed a further preliminary hearing (in public) to consider, *inter alia*, “...whether the claim is barred by operation of the principle of judicial proceedings immunity given that the claimant’s claim of victimisation concerns the respondents corresponding about, and then bringing, proceedings in the High Court...”, and that how it came before me.
9. In addition to the JPI issue, there were several other matters related to the three earlier claims for me to consider at the hearing. There was insufficient time to deal with those. They have now been dealt with by EJ Davidson.
10. Mr Roberts appeared for the claimant and Mr Pilgerstorfer KC for the respondents. I am grateful to both counsel for their detailed and helpful

² The respondents assert that this letter was written on a without prejudice save as to costs basis and privilege has not been waived. Therefore, the claimant cannot rely on it. This issue has now been determined in favour of the respondents by EJ Davidson at the preliminary hearing on 12 February 2026.

submissions, both in their written skeletons and oral. I was referred to various documents in a 632-page bundle of documents the parties submitted for the hearing. There were two authorities bundles before me. The claimant had prepared a witness statement, but Mr Roberts accepted that the claimant's evidence was not relevant for the JPI issue and therefore she was not called to give evidence.

11. Ultimately, the issue before me was whether the doctrine of JPI applied to the claim and therefore the claim stood to be dismissed for want of jurisdiction, in particular, in light of the recent judgment by the Court of Appeal in Rogerson v Erhard-Jensen Ontological/Phenomenological Initiative Limited [2025] EWCA Civ 1547³. This judgment deals with the JPI issue only.

The Law

12. I heard detailed submissions from both parties on the points of law.
13. I do not think I can do better than to refer to the illuminating and detailed exposition of JPI law by EJ Simon Auerbach (as he then was) in the case of Dempsey v Maitland Hudson & Co LLP (2201456/2014) (at [19], [35] – [65]), as it stood at the time of his judgment⁴.
14. In addition to the authorities summarised and analysed in **Dempsey**, the following two subsequent decisions by the Court of Appeal: Chief Constable of Sussex v XGY [2025] EWCA Civ 1230, [2025] HRLR 17 and Rogerson v Erhard-Jensen Ontological/Phenomenological Initiative Ltd [2025] EWCA Civ 1547⁵ were specifically drawn to my attention by the parties.
15. In **XGY**, the appeal concerned the issue of whether the police and the Crown Prosecution Service were immune from a claim in respect of anything said or done in the course of a bail hearing, including the disclosure of a vulnerable person's confidential address to their abusive ex-partner, and if they were so immune under the common law, whether it was also a bar to any claim under the Human Rights Act 1998 ("**HRA**") and Data Protection Act 2018 ("**DPA**").
16. The Court of Appeal reviewed the law on JPI in some detail (at [8] – [29]). At [10] the Court explained that although "*[t]he early cases concerned actions for defamation against advocates and witnesses[.]....In order to prevent the immunity being circumvented or outflanked, however, for many years the immunity has been held to apply to whatever claim was being made against the advocate or witness for things done or spoken in court and however ingeniously such a claim was framed.[.]*" (**emphasis added**).
17. At [17] the Court explained that for the immunity to be effective it:

³ The respondents sought to strike out the claim or a deposit order on other grounds. However, due to the lack of time the respondents' strike out application on the alternative grounds was not considered at the hearing.

⁴ Attached as Annex A to this Judgment for ease of reference.

⁵ I understand that permission to appeal to the Supreme Court is being sought with respect to both decisions.

“must extend beyond the narrow limits of what is said or done in court, [...] but only “where the particular work is so intimately connected with the conduct of the cause in court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing. The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice.” This formulation by McCarthy P in the New Zealand Court of Appeal in *Rees v Sinclair* [1974] 1 N.Z.L.R. 180, 187 was adopted and relied on by the majority of the House of Lords in *Saif Ali v Sydney Mitchell & Co* [1980] A.C. 198 at 215B-D.” (emphasis added)

18. At [30] the Court of Appeal summarised the law as follows:

“30 To summarise:

- i) It is a general principle that every wrong should have a remedy. Nonetheless, it is necessary for the proper administration of justice that advocates, parties, witnesses, judges, and jurors are immune from suit for statements made in court whatever the cause of action, regardless of whether the statement was made maliciously or was irrelevant to the court proceedings. This is known as the core immunity. It is founded on public policy and is intended to encourage freedom of expression and communication in court proceedings in order to protect the proper administration of justice and the interests of justice.
- ii) The core immunity can be extended if the extension is necessary for the proper administration of justice, which is a strict test. There are two established extensions: witnesses and potential witnesses are immune from suit for statements made outside of court with a view to giving evidence. This extends to the preparation of evidence they are likely to give in court proceedings, including their preliminary examination to ascertain what they could prove. And investigators are immune from suit for statements made as part of the process of investigation.
- iii) The police may claim an extended immunity either as potential witnesses or for statements or conduct which can fairly be said to be part of the process of investigating a crime or a possible crime with a view to a prosecution or possible prosecution in respect of the matter being investigated. Investigators are not immune with regard to statements which are wholly extraneous to the investigation.
- iv) In order for the core immunity and extensions to be practicable and effective, it must be foreseeable at the time of its making whether a statement will be immune.
- v) Public policy can change over time and be re-evaluated. When an established immunity is re-evaluated or an extension to an established immunity is contemplated, careful justification is required for a departure from the principle that every wrong should have a remedy. There is an important distinction, however, between that position, and determining whether on its facts, a case falls within an established immunity. To impose a requirement of justification in the latter case, would fundamentally undermine the utility and purpose of the core immunity, and cut across the policy reasons for its existence (on this latter point, see further [65i] below).
- vi) We would add that it was not suggested that there had been any material change in public policy considerations since *Hall and Jones* such as to justify a reconsideration of the scope of the core immunity.
- vii) As a consequence of the re-evaluation in *Hall and Jones*, advocates can now be liable to their clients for the negligent conduct of court proceedings and expert witnesses can be liable for breach of duty to those who retain them. Beyond that, advocates can still claim the core immunity.” (emphasis added)

19. At [65] the Court gave its conclusions as follows:

“65 It follows that in our judgment:

- i) Applications of the core immunity and its established extensions do not need to be justified on a case-by-case basis. As the appellants have argued, it is wrong therefore to elide the requirement to justify categories of immunity with the requirement to justify the actions of a person on the facts of every case. If a claim falls within the scope of the core immunity or its established extensions, the claim must be struck out. To be effective, foreseeability is essential if those involved in the administration of justice are to speak freely. The approach of “justificationism” fundamentally undermines the public policy underlying the existence of the immunity.
- ii) The core immunity is not limited to evidential matters. It is far wider in scope. The core immunity attaches to statements (said or written) made in court. Whether or not a statement is related to evidence, is a limiting factor only in the extension of the core immunity to statements made by potential witnesses outside of court – such statements are only within the scope of the extension if they are made with a view to giving evidence.
- iii) The core immunity and its extensions apply to bail hearings. Bail proceedings are an integral part of proceedings in the criminal court. As the Court of Appeal held in *Gizzonio v Chief Constable of Derbyshire Police* “matters relating to bail were part of the investigatory or preparatory process in criminal proceedings. Absolute immunity therefore applies.” (emphasis added)

20. The Court held that JPI applied both to the police and the CPS and extended to any claims under the HRA and the DPA. To that point the Court said (at [75] – [80]):

- 75 As for the claim under the DPA, Crawford confirms that immunity applies to claims for breach of statutory duty. In addition, since Watson was a claim for breach of confidence, the modern day equivalent of such a cause of action, namely misuse of private information or a claim under the DPA, must also be caught by the core immunity.
- 76 The remaining question is whether the HRA is in some way in a different position to any other statute, such that claims pursuant to its provisions are not affected by the immunity. We do not consider that it is.
- 77 If Parliament had intended the HRA (or the DPA for that matter) to cut across the common law immunity from suit, such an intention would need to be clearly expressed in the Act, or arise by necessary implication: see *R v Secretary of State for the Home Department ex parte Pierson* [1998] A.C. 539 at 573G. There nothing in the wording of the HRA, however, which demonstrates any intention on the part of Parliament to dilute or modify the core common law immunity.
- 78 In *Smart v Forensic Science Service* [2013] EWCA Civ 783, it was held to be arguable that, on the facts of that case, the immunity did not apply; but it is implicit in the judgments of the court that, if the immunity had applied, it would have applied to the claim under the HRA. Further, we note that in *Mazhar v Lord Chancellor* [2019] EWCA Civ 1558, it was held that the HRA did not “abrogate or encroach upon the principle of judicial immunity”. As submitted for the CPS it would be surprising if it nevertheless abrogated or encroached upon the core immunity available to the advocate.
- 79 For all these reasons, we conclude that the immunity, which we have found to exist and to be available to the CPS and the police in this case, applies to all the claims made by XGY.
- 80 However, we would add this. If, in some way, personal data and claims arising from it

were exempt from immunity, the Bar Council's evidence as to the unworkability of this approach in practice is compelling. It is easy to see how criminal proceedings for example, could become mired in technical debates about which strand of personal data could or could not be referred to at any given stage of those proceedings." (emphasis added)

21. The second and most recent decision by the Court of Appeal on the extent of JPI is **Rogerson**. In this case the claimant brought employment tribunal proceedings against his former employer alleging "whistleblowing" post-employment detriment contrary to section 47B of the Employment Rights Act 1996 ("**ERA**"). The alleged detriment was the respondent commencing arbitration proceedings against the claimant in Singapore. The Employment Tribunal (EJ Fowell) held that JPI did not apply. Although accepting that the arbitration was "*a quasi-judicial exercise*" of the kind contemplated by the House of Lords in *Trapp v Mackie* [1979] 1 WLR 377, the Judge held that JPI did not extend "*to the mere bringing of a claim*".
22. The respondent successfully appealed to the EAT. Mrs Justice Heather Williams DBE held that the Judge erred in failing to focus on the way that the detriment was pleaded, namely that the respondent had initiated a groundless arbitration process against the claimant based on false allegations, and that the pleaded detriment, properly analysed, clearly came within the core immunity.
23. The claimant appealed to the Court of Appeal, which overturned the EAT's decision and restored the ET's decision that JPI did not apply to the pleaded detriment. Lady Justice Andrews gave the leading judgment, with which Lady Justice Elisabeth Laing and Lord Justice Males agreed. Males LJ added an additional short judgment on the issue of interpretation of the ERA.
24. Andrews LJ started her analysis by observing (at [3]) that the appeal was against the decision to strike out part of the claim and therefore the claimant's case must be taken at its highest.
25. I pause here to note that in the present case I am dealing with the issue of whether the claimant's claim is barred by JPI as a preliminary issue under Rule 52(1)(b) of Employment Tribunal Procedure Rules 2024, and not whether it should be struck out under Rule 38. Mr Pilgerstorfer highlighted that point. No objections were raised by Mr Rogers. I do not consider anything of substance turns on this. If I find that the claim is barred by JPI, it must be dismissed for that reason. Equally, for the same reason it will have no reasonable prospect of success and is liable to be struck out.
26. At [4] Andrews LJ recorded the respondent's acceptance that "formal communications from [the respondent's] lawyers "*threatening legal proceedings*" against [the claimant] "*can give rise to an actionable detriment*".

The point that Mr Rogers specifically drew to my attention in his oral submissions.

27. At [9] – [10], Andrews LJ concluded that for the purposes of section 47B(1) ERA “[o]n the face of it, “any act” is wide enough to cover the initiation of legal or arbitral proceedings.” She then (at [11] and [12]) said:

11. “... Indeed, apart from dismissal, it is difficult to conceive of an act which is more likely to subject a whistleblower to detriment than the commencement of legal or arbitral proceedings against him or her which are designed to obtain financial recompense for previous protected disclosures and/or to prevent future protected disclosures...”

12. Moreover, it is difficult to see how the Respondent could resist the submission that the commencement of the arbitration was “on the ground of” the protected disclosures (another point that Mr Kemp reserved the right to dispute in due course, should we allow this appeal). Thus, at least on the face of it, Detriment 3 as pleaded satisfies all the requirements of section 47B(1) ERA.” (emphasis added)

28. Under the heading “*Is there any policy reason why Detriment 3 should not be actionable?*”, Andrews LJ said:

13. Especially when viewed in the context of the aforementioned policy of the ERA, the proposition that a worker who is threatened with legal proceedings (e.g. for breach of confidence) because they have made a protected disclosure, can bring a claim in the ET, but if the threat is actually carried out they cannot, and therefore have no remedy, has no rational justification. A disclosure of the relevant type which leaves a whistleblower vulnerable to civil proceedings (whether judicial or arbitral, and whether at home or abroad) cannot be described as “protected” in any meaningful sense.

14. Therefore, on the face of it, Detriment 3 should be actionable. There is nothing in ERA itself to suggest that the commencement of such proceedings should attract immunity from suit. There are, moreover, powerful contra-indications to immunity besides the matters I have already mentioned at [9] to [11] and [13] above. (emphasis added)

29. Under the heading: “*Does JPI cover the commencement of the arbitration proceedings in this case?*” (emphasis added) Andrews LJ, having reviewed the authorities on JPI, including XGY, said:

“45 However, it is clear from XGY and *Singh* that the core immunity does not cover all things done (or omitted to be done) by the parties, advocates, or witnesses in the course of litigation, as demonstrated by the analysis at [26] to [29] of XGY of how the tort of negligence is impacted by the principle of JPI. That passage includes a reminder that the justification unsuccessfully put forward in *Hall v Simons* for maintaining an advocate’s immunity for suit for negligence in respect of conduct of a case in court was not that this conduct was covered by the core immunity, but rather that an analogy could be drawn with it.

46. It follows that where the immunity attaches to something that is “done” in the course of legal proceedings (whether prior to or at the hearing) the act in question must relate in some way to the statement that is the foundation of the cause of action, whatever that cause of action may be. It would encompass, for example, the promulgation of a defamatory statement in pleadings or witness statements; or making reference to confidential information in written or

oral submissions, or the act of providing information for use in proceedings in court.

47. **In the present case, the cause of action is not founded on statements made in the request for arbitration or in the arbitration itself. The act complained of by Mr Rogerson is the act of initiating the arbitral proceedings.** That is what causes the detriment. **That act does not fall within the core immunity,** any more than the act of initiating proceedings in breach of an agreement to arbitrate, or in breach of an exclusive jurisdiction clause, would fall within it. Whilst it is true that the arbitral proceedings are commenced by the sending of a document, namely, a request for arbitration, **statements made in that document are not the acts which give rise to the detriment complained of.**
48. Mr Kemp sought to argue that the particulars of Detriment 3 pleaded by Mr Rogerson demonstrated that on proper analysis his case went wider than a complaint about the commencement of the arbitration. But as XGY establishes, whether JPI applies cannot depend on the facts and circumstances of the individual case. Therefore it cannot depend on the way in which the case has been pleaded. The way in which a claimant chooses to characterise the proceedings (malicious, groundless, etc.) cannot make a difference to the answer to the question whether JPI does or does not apply to the bringing of those proceedings.
49. Heather Williams J attached considerable importance to the way in which the case had been pleaded; she said the pleaded detriment was not simply the commencement of the arbitration but that the Respondent initiated a groundless arbitration process that was based on false allegations. She also said that it was completely artificial to separate out the bringing of the arbitration proceedings from the basis on which they were brought. The nature and content of the proceedings was what Mr Rogerson relied upon as constituting the detriment.
50. Whilst it is true that it would have to be established that the proceedings were brought “on the ground of” the protected disclosures, and that inquiry might involve the ET looking at the content of the request for arbitration or statements of case, the complaint is about the proceedings themselves, and their impact upon Mr Rogerson. Statements made in the proceedings, whether in the request for arbitration or in the statements of case, do no more than evidence the link between the act complained of (commencing the arbitration) and the protected disclosures.
51. A request for arbitration generally contains basic information about the identities and contact details of the parties and their legal representatives, and sufficient information to satisfy the person or body to whom the request is made (here, the ICC) that there is a binding written and signed agreement to arbitrate the dispute – generally, a quotation from the arbitration clause, a copy of which may be annexed to the request. It will also identify the number of arbitrators, how they are to be appointed and by whom, and where the seat of arbitration is to be. The information about the dispute will often be no more detailed than a broad indication of its general nature.
52. The court asked the parties if they were willing to let us see the request for arbitration in this case. Mr Polak, who represented Mr Rogerson on this appeal told us that his client was content that we should see it, but Mr Kemp’s instructions were that the Respondent did not consent. In those circumstances the court could not assume that there was anything in the content of that document that could be regarded as essential to, or even advancing Mr Rogerson’s claim under s.48(1A) ERA.
53. Likewise, the answer to the question whether JPI covers this situation cannot depend on

whether it is part of Mr Rogerson's case that the arbitration was commenced maliciously or in bad faith; malice is not an ingredient of the cause of action under s.48(1A) ERA, as Judge Fowell rightly pointed out.

54. In my judgment none of the justifications for the principle of JPI articulated in the authorities would apply to the act of commencement of an arbitration aimed at stifling protected disclosures or penalising someone for making them. The ET would not be involved in re-litigating the rights or wrongs of the action for breach of confidence. The ET judge hearing Mr Rogerson's claim would have to make up his or her own mind, on the evidence adduced by the parties in the proceedings before the ET, as to whether the allegations were true and whether the disclosures were protected. If the judge was satisfied on both those matters, they would then go on to ask whether the act of commencing the arbitration had been carried out "on the ground of" the protected disclosures and whether the claimant had suffered a detriment in consequence.
55. I can see no reason why it could possibly be regarded as essential to the administration of justice that an employer should be immune from suit under s.48(1A) ERA for commencing litigation or arbitral proceedings against a whistleblower, irrespective of whether the employer considers himself fully justified in doing so. On the contrary, to apply JPI in this context would leave a wrong, recognised by Parliament in s.47(1B) ERA, without the very remedy to which Parliament itself has stated the whistleblower is entitled under s.48(1A). The public policy underlying the protection afforded to whistleblowers strongly indicates that JPI should not attach to the commencement of such proceedings. If it did, it would seriously undermine the protection that Parliament intended to apply." (emphasis added)

30. Lord Justice Males gave a short judgment:

"58. I also agree that the appeal must be allowed for the reasons given by Lady Justice Andrews. The provisions of the Employment Rights Act 1996 demonstrate a clear intention on the part of Parliament to provide a remedy, available in the Employment Tribunal, for a worker who suffers a detriment as a result of making a protected disclosure. For that remedy to be defeated by a claim for judicial proceedings immunity in circumstances such as exist here would be contrary to that clear parliamentary intention."

31. The parties disagree on what in **Rogerson** is *ratio decidendi* and what are *obiter dicta*, and whether it changed the law on JPI from how it stood before that decision.

Analysis and Conclusions

32. The claimant's position is that following **Rogerson** the respondent's contention that JPI applies to the pleaded detriments is misconceived. Mr Roberts' skeleton contains only four paragraphs on this issue⁶. He says that **Rogerson** at [13], [48]-[50] "*confirmed that JPI does not cover the bringing of the proceedings themselves and that claims for detrimental treatment under s 47B ERA (and by extension under s 27 EqA) can be based on such acts*", and in any event "*JPI never encompassed pre-action correspondence*".

⁶ Mr Rogers, of course, amplified his main points in his oral submissions, which I have duly considered and will deal with them later in the judgment.

33. Mr Pilgerstorfer's principal arguments can be summarised as follows:

- (i) **Rogerson** concerned the initiation of a request for arbitration and is not authority in relation to whether the commencement of formal legal proceedings falls within the scope of the immunity. Therefore, any comments related to legal proceedings and litigation in general are strictly *obiter*;
- (ii) The case law clearly established that JPI extends to all pleadings and statements before the court. This is binding on the Tribunal. The Court of Appeal in **Rogerson** did not seek to depart from that.
- (iii) **Rogerson** concerned the scope of the core immunity and whether that extended to a request to commence an arbitration. The Court of Appeal did not consider the third category in *Lincoln v Daniels* [1962] 1 QB 237.
- (iv) If **Rogerson** were to be read as applying to the commencement of a High Court claim in such a way that a distinction is drawn between the contents of the claim and the fact of bringing the claim, that distinction would seriously undermine and outflank the immunity.
- (v) If JPI did not apply to this case it would follow that the Tribunal would have to adjudicate on the rights/wrongs/merits of the claim and defence in the High Court to resolve the claimant's claim of victimisation.
- (vi) The pronouncements made by the Court at paragraphs 55 and 58 were contrary to **Heath**⁷, without the Court saying **Heath** was wrongly decided or offering any other analysis of that decision, and were therefore *per incuriam*.
- (vii) If, however, on the proper analysis the commencement of the High Court proceedings does not fall within the core immunity (category 2 in **Lincoln**⁸) it should fall within category 3 to prevent the core immunity, applicable to *statements* made in the course of the proceedings and to anything said and done before a court, to be outflanked.

⁷ *Heath v Commissioner of Police of the Metropolis* [2005] ICR 329

⁸ *Lincoln v Daniels* [1962] 1 QB 237

34. In reply, Mr Rogers argued that **Rogerson** “torpedoes” the respondent’s case. Whether or not **Rogerson** was wrongly decided is not something this Tribunal can decide. It must apply it. Furthermore, **Rogerson**, gives proper interpretation to the previous authorities on JPI, which is binding on this Tribunal. The *per incuriam* argument is unsustainable because it is clear from the decision (at [20]) that all relevant authorities were cited to the Court. It is clear from the Court’s analysis, including the Court drawing on public policy considerations, that the Court made no distinction between arbitration and litigation. In fact, at [24] the Court dismissed the respondent’s counsel’s suggestion “*that parties should be free to initiate proceedings without the fear of being sued for doing so*” as “*a novel proposition, which derives no support from the authorities*” and as being “*incorrect as a matter of principle*”.
35. Mr Rogers also argued that in light of **Rogerson** the statement in **Singh**⁹ (at [65]) that “*[t]he initiation and service of process fall squarely within the second of Devlin LJ’s three categories*” was no longer good law.
36. On the point of artificiality in distinguishing between *the fact* of commencing litigation and *statements* made in any document which initiates such litigation, Mr Rogers argued that the Court of Appeal in **Rogerson** specifically disagreed with the EAT on this issue.
37. Mr Rogers, however, accepted that if such distinction were to be drawn, the claimant would only be able to recover non-pecuniary loss (such as injury to feelings) arising from *the fact* of the initiation of the proceedings against her (e.g. her initial shock of being sued), but not any non-pecuniary loss arising from what was being alleged against her in the proceedings. He, however, did not accept that the same causative division of losses applied to financial losses, arising from the claimant’s defence of the claim, but without offering a clear justification for applying different causation principles to pecuniary and non-pecuniary losses.
38. I do not find that there is any obvious rationale for that. If “the wrong” to be compensated is “the fact” of commencing litigation, but not statements/allegations made as part of that litigation, logically, one cannot claim compensation for financial losses, arising from rebutting/defending such statements/allegations, but only for financial losses, arising from being summoned to answer the claim (whatever that claim might be). There are obvious difficulties with respect to apportionment of losses and causation. However, it is not something I need to resolve to determine the central issue before me.

⁹ Singh v Reading Borough Council [2013] 1 WLR 3052

39. Additionally, Mr Rogers emphasised that the analysis should be by reference to whether “core immunity” (category 2) applied to the commencement of the High Court proceedings, and category 3 (“outflanking”) was not engaged.
40. In his short reply, Mr Pilgerstorfer emphasised that **Rogerson** did not overrule any previous case law on JPI and its true *ratio* was limited to a request for arbitration not falling within “core immunity”, and contended that everything else in the judgment was *obiter*. Mr Pilgerstorfer highlighted the practical difficulty arising from drawing a bright line between *the fact* of doing something and *the substance* of that fact.
41. I think it would be convenient to deal with the issue before me in the following order.
42. First, I need to decide what the exact detriments are that the claimant complains about. It seems to me that in deciding whether or not a particular detriment falls within or outside the ambit of JPI, one needs to be crystal clear on what the detriment in question is. In the present case it is of further importance, because in the course of the hearing Mr Rogers sought to shift the position from the formulations of the alleged detriments in the agreed list of issues to how they were formulated in the claimant’s Particulars of Claim.
43. I will then consider whether the alleged detriments fall under JPI on the law as it stood before the Court of Appeal’s decision in **Rogerson**.
44. Finally, I will consider whether the position is now different in light of the decision in **Rogerson**.

Alleged Detriments

45. As discussed above (see paragraphs 3 and 5 above) there is a certain mismatch between how the detriments were pleaded in the Particulars of Claim and their formulation in the agreed list of issues. I raised that issue with the parties at the start of the hearing. Mr Rogers argued that the formulation in the Particulars of Claim should take precedence.
46. In that regard he said that the alleged detriment (a) was not only the fact of serving on 12 July 2024 the letter before action on the Claimant, but also the heavy-handed manner, in which it was done (attaching it to the claimant’s front door in a transparent envelope).
47. With respect to the second alleged detriment (b) it was not only the fact of sending these letters but also the frequency in which they were sent to the claimant (“*a heavy stream of correspondence*”). Mr Rogers, however, accepted that there was nothing about those letters themselves or their

content that could be said to put them outside the pre-action conduct of what eventually became the High Court proceedings.

48. Mr Pilgerstorfer summarised these letters at paragraph 45 of his skeleton. The letters were in the bundle. Having reviewed them, I agree with Mr Pilgerstorfer's submission (not challenged by Mr Rogers) that all these letters were written in accordance with the applicable pre-action protocols and formed part of the initiation of the High Court proceedings.
49. Finally, Mr Rogers confirmed that detriment (c) was the commencement by the respondent of proceedings in the High Court on 17 December 2024, and the references to "*Re-activated pressure*" and to "*intentionally subjecting [the claimant] to emotional and financial strain*" in how that detriment was pleaded in the Particulars of Claim were not of any significance for the purpose of the issue before me.
50. I find that it is too late for the claimant to seek to row back on the agreed list of issues. The Court of Appeal decision in *Moustache v Chelsea and Westminster Hospital NHS Foundation Trust* [2025] EWCA Civ 185 (at [40], [41]) puts this beyond any doubt. The claimant was represented by solicitors, when they specifically confirmed her agreement to the list of issue (subject to minor corrections in cross-referencing) before the preliminary hearing. She was represented by Counsel at the preliminary hearing when the list of issues was fully agreed. That was recorded in the case management orders of EJ Isaacsson, sent to the parties on 2 December 2025.
51. At no time before this hearing (over a year after later) did the claimant (who continued to be legally represented) ever say that anything in the list of issues was wrong or incomplete. This issue was not even raised by Mr Rogers himself at this hearing. His attempt to expand the nature of the alleged detriments came in response to my question. That, with all due respect, was opportunistic.
52. I find that in the circumstances the claimant is not entitled to go back on her explicit agreement on the list of issues. Therefore, I will analyse the issue of JPI by reference to the detriments as they are formulated in the agreed list of issues.
53. In any event, if the detrimental acts (as recorded in the list of issues) fall within JPI, they cannot fall outside JPI by reason of the manner, in which such acts were done (excepting malice, or abuse of process – which is not alleged by the claimant). All authorities on JPI, including **Rogerson** (at [48]) speak with one voice on this issue.
54. Furthermore, on a closer examination of the correspondence the claimant complains about, it is hard to see on what basis the claimant could reasonably complain about the "*heavy stream*" of correspondence, where, except for the letter before action of 12 July 2024 (which is pleaded as a separate detriment) and the letter of 5 August 2024 (chasing the claimant's representatives for a response to the respondents' solicitors' letter of 1 August 2024) all other letters

were sent in response to her representatives' letters to the respondents' solicitors. In that respect, the "frequency" of the respondents' solicitors' correspondence was driven by the frequency of the correspondence from the claimant's representatives.

55. I also observe that judging by the contents of the respondents' solicitors' letters (and I have not seen the claimant's representatives' letters) a lot of that correspondence was generated because of the claimant's then representatives not quite being able to grasp the pre-action protocol process they were meant to follow; them mixing up the High Court proceedings with the Employment Tribunal proceedings; them not being clear whether they represent the claimant in relation to both sets of proceedings.

Do the alleged detriments fall within JPI on "pre-Rogerson" law?

56. I find that the answer to this question is a firm yes. It is clear from **Singh** and **Dathi**¹⁰ that statutory claims of victimisation do not enjoy any special exception from JPI.

57. **Singh** is a clear authority that the initiation of legal proceedings squarely falls within the core immunity (at [65] & [66]). In **XGY** the Court of Appeal (at [17]) confirms that.

58. All three categories of detriments the claimant complains about are part and parcel of the respondents initiating legal proceedings against her. The sending of these letters was, to quote the Court of Appeal in **XGY** (at [17]) "*particular work*" which was "*so intimately connected with the conduct of the cause in court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing*".

59. The fact that the sending of the letters predates the filing of the High Court claim has a direct and intrinsic connection with the requirements of the Civil Procedure Rules Practice Direction – Pre-action Conduct and Protocols and the pre-action protocol for Media and Communications claims, which the respondents were required to follow before filing the claim. Therefore, sending of the letters cannot sensibly be regarded as matters falling outside the proceedings.

60. In any event, even if it could be argued that the sending of these letters (or some of them) fall outside the conduct of the proceedings (and as noted earlier, Mr Rogers did not argue such a case), JPI should be still extended to the sending of such letters under category 3 - "*in order to protect those who are to participate in the proceedings from a flank attack*" (per Delvin LJ in **Lincoln**).

¹⁰ South London & Maudsley NHS Trust v Dathi [2008] IRLR 350

61. In short, I find that before the decision in **Rogerson** all the alleged detriments would have been squarely within JPI, and on that basis the claimant's claim would have stood to be dismissed.

Should the outcome be different in light of Rogerson?

62. As Mr Pilgerstorfer rightly pointed out, for me to answer this question I need to decide what is *ratio decidendi* and what is *obiter* in **Rogerson**.

63. It seems to me that the starting point must be what Lady Justice Andrews said at [46]: *It follows that where the immunity attaches to something that is "done" in the course of legal proceedings (whether prior to or at the hearing) the act in question must relate in some way to the statement that is the foundation of the cause of action, whatever that cause of action may be.*

64. On my reading, this means that for JPI to attach to an act done in the course of legal proceedings (commencing legal proceedings, sending pre-action letters, etc.) that act must relate "*in some way*" to a statement (statement of case, content of pre-action correspondence) which statement must be what the cause of action is founded on.

65. Sending pre-action letters and filing a claim form in the High Court are acts, which are plainly, not only "in some way" but directly, related to the statements made in those documents. There is no other way in which "the statements" could be brought to the defendant's attention than by the claimant sending them to the defendant or filing a claim form with particulars in the court and serving it on the defendant.

66. This analysis fully accords with how various courts saw that before **Rogerson**. See, for example, **Lincoln** (at 257 and 260), **Singh** (at [66]), **Dahti** (at [26]), and **XGY** (at [17]).

67. As to the concession made by the respondent's counsel in **Rogerson** that the act of sending communications threatening legal proceedings can give rise to an actionable detriment (see paragraph 26 above). Firstly, in light of the concession made, the Court did not need to decide this issue and therefore it could not form part of the *ratio decidendi* of the judgment. Secondly, "can give rise to an actionable detriment" (*emphasis added*) is not the same as will give rise to an actionable detriment. Thirdly, the reference to "*threatening*" legal proceedings implies that legal proceedings will be used oppressively as an instrument of achieving an improper purpose and therefore may fall within the recognised exceptions (the torts of malicious prosecution of civil proceedings and abuse of process, or as in **Singh** or **Darker**¹¹).

68. In any event, just because an act can give rise to an actionable detriment does not mean that JPI cannot attach to such acts. The whole point of JPI is that it gives protection to an otherwise actionable wrong.

¹¹ Darker v Chief Constable of West Midlands Police [2001] 1 AC 435

69. In short, I do not accept Mr Rogers' submission that "*JPI never encompassed pre-action correspondence*", and on my reading of **Rogerson**, it does not say that either.
70. The Court of Appeal in **Rogerson** then held at [47] that in the case before them the cause of action (subjecting the claimant to a detriment) "*was not founded on statements made in the request for arbitration or in arbitration itself*", but in "*the act of initiating the arbitral proceedings*".
71. Consequently, for that act of initiating the arbitral proceedings to fall within the ambit of JPI it needed to be "in some way" related to the statement that is the foundation of the cause of action, namely the sending of a request for arbitration. The Court then found that due to the specific nature of that document (a request for arbitration) and because of the respondent's refusal to disclose it to the Court, the Court could not "*assume*" that there was anything in the content of that document that could be said to be related in some way to the statement that is the foundation of the cause of action.
72. In other words, the Court found that on those specific facts before it, the respondent had not, on the evidence it chose to adduce, established that the act of sending a request for arbitration was "in some way" related to any statement that was the foundation of the cause of action.
73. And that, in my view, is the true *ratio decidendi* of that decision.
74. The case before me is very different. The respondents sent to the claimant several letters in the run up to issuing their claim in the High Court. The letters contained detailed allegations against the claimant, which later turned into the pleaded claim against her in the High Court. Detailed particulars of claim were served on the claimant as part of the respondents' commencing proceedings in the High Court on 17 December 2024.
75. Unlike the request for arbitration in **Rogerson**, which content was not shown to the Court of Appeal, all "acts" which are the foundation of the cause of action in this claim (alleged detriments) had plenty of "statements" in them. Therefore, applying what I consider to be the true *ratio* of **Rogerson**, the acts of sending these documents to the claimant and commencing proceedings in the High Court did relate to the statements in those documents, which lie at the foundation of the claimant's complaint of victimisation.
76. Furthermore, unlike in **Rogerson**, where the Court of Appeal approached the question on the premise that the act of commencement of arbitration was "*aimed at stifling protected disclosure or penalising someone for making them*" (at [54]) and that such acts, "*which are designed to obtain financial recompense for previous protected disclosures and/or to prevent future protected disclosures*" (at [11]) (*emphasis added*) clearly fall with the meaning of detriment under s.47B(1) ERA, in the present case the claimant does not allege that the respondents acted with such aim or design.

77. On the contrary, it appears that the claimant has accepted the legitimacy of the respondents' demands by agreeing to the Final Order, on the terms largely corresponding with the respondents' demands, including agreeing to pay their legal costs of the High Court proceedings.
78. Therefore, quite apart from stifling any complaints by the claimant or designing to get back at her, it is the respondents, who find themselves being retaliated against for enforcing their rights through the High Court proceedings, by the claimant first acceding to their demands, and then suing the respondents in these Tribunal proceedings for making these demands on her, which she (at least impliedly) accepted as legitimate.
79. Of course, it could be argued that what **Rogerson** (at [46]) says is that JPI can never attach to any anything "done", no matter how directly and closely that act is connected to a statement, which is protected by JPI, if the cause of action is not founded on that statement. I, however, do not think that this would be the correct reading of the judgment.
80. Firstly, such reading would drive a coach and horses through the core immunity attached to witnesses giving evidence. On such analysis a claim, for example, that a witness subjected the claimant to a detriment by agreeing to give evidence against the claimant in legal proceedings would fall outside JPI. That is because in that formulation what the witness said in his/her statement would not be the foundation of the cause of action. It would be the act of agreeing to testify.
81. Secondly, if that were what the Court of Appeal meant, there would not have been any reason for the Court to ask to see the arbitration request. That is because whatever statements were made in that request would have been irrelevant, as the cause of action was founded on the act of initiating the arbitral proceedings and not any statements in the request.
82. Thirdly, if the act of initiating legal proceedings cannot fall within JPI if the cause of action is not founded upon any statement related to that act, I cannot see any principled reason why any subsequent steps in legal proceedings (e.g. applying for an injunction, seeking security for costs, etc.) should enjoy JPI. That, in turn, means that from "*anything ... done*" in the course of litigation the position is reversed to "*nothing done*" in the course of litigation (except the content of statements itself) as falling within JPI. That plainly cannot be right.
83. Fourthly, applying such strict limits on JPI may entail such unintended and undesirable consequences as, for example, solicitors, acting on behalf of a client/employer being at risk of a claim¹² for taking normal steps in starting and pursuing proceedings. On that interpretation they would not enjoy JPI, because they would be taking such procedural steps, and hence doing "acts", but themselves would not be making any statements relating to such acts. This too plainly cannot be correct. This would also run contrary to what the Court of

¹² as an agent of the employer (under s.47B(1A)(b)).

Appeal in **Rogerson** accepted (at [38]) as the correct rationale for JPI, that claims cannot be brought against persons who merely discharge their duties.

84. Finally, if that were the correct interpretation of the *Dicta* in [46], Andrews LJ would not have needed to list (at [25] – [30]) specific exceptions to things “done” in the course of litigation, to which JPI does not apply. All such specific exceptions would have been swept away by the general rule that “nothing done” in the course of proceedings falls within JPI if the action is founded on that act and not on any statement.

85. Furthermore, such position would be wholly inconsistent with the strict and tightly defined parameters of the tort of malicious prosecution of civil proceedings, recognised as existing in English law by the Privy Council in *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2014] AC 366 and the Supreme Court in *Willers v Joyce* [2016] UKSC 43¹³.

86. In **Crawford** Lady Hale (agreeing with the majority view) said (at [81]):

“It is always tempting to pray in aid what Sir Thomas Bingham MR referred to as “the rule of public policy which has first claim on the loyalty of the law: that wrongs should be remedied” (*X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, at 663). But by itself that wise dictum does not tell us what the law should define as a wrong. Some conduct is wrongful whether or not it causes any damage – that is the essence of the tort or torts of trespass; other conduct is only wrongful if it causes particular types of damage – that was the essence of the action on the case; but not all conduct which causes such damage is wrongful. The tort or torts of wrongfully bringing legal proceedings are actions on the case and therefore can only lie if there is damage of the kinds specified in *Savile v Roberts* in 1698. But that is not enough. Instigating legal proceedings in good faith and with reasonable cause, even if they fail and even if they do damage in the *Savile v Roberts* sense, is not wrongful. Even maliciously instigating legal proceedings is not always, or even often, wrongful. So how is the wrong done by instituting legal proceedings to be defined? (emphasis added)”

87. Lord Kerr (also in the majority) said (at [109], [110]):

109. “..... Establishing the various rudiments of the tort of malicious prosecution is no easy task. Two particular elements constitute significant challenge by way of proof. It has to be shown that there was no reasonable or probable cause for the launch of the proceedings. This requires the proof of a negative proposition, normally among the most difficult of evidential requirements. Secondly, malice must be established. A good working definition of what is required for proof of malice in the criminal context is to be found in *A v NSW* [2007] HCA 10; 230 CLR 500, at para 91:

“What is clear is that, to constitute malice, the dominant purpose of the prosecutor must be a purpose *other* than the proper invocation of the criminal law - an ‘illegitimate or oblique motive’. That improper purpose must be the sole or dominant purpose actuating the prosecutor”.

110. There is no reason that proof of malice in the civil context should be any less stringent. Together these requirements present a formidable hurdle for anyone contemplating the launch of a claim for malicious prosecution. In my view, no convincing case has been made that these substantial requirements will not act as a deterrent to frivolous claims.” (emphasis added)

¹³ It is notable that in both cases their Lordships were divided on the principal issue of the existence of such a tort (3:2 and 5:4 respectively).

Public policy argument

88. Mr Rogers placed strong emphasis on the pronouncements by Andrews LJ (at [55]) and Males LJ (at [58]) in **Rogerson** that for the public policy reasons JPI should not apply to commencement of litigation, because that would deny whistleblowers a remedy, which Parliament said they were entitled to.
89. I, however, consider these remarks as *obiter dicta*. For the reasons explained above, I consider that the true *ratio* of **Rogerson** is limited to a request for arbitration, due to its specific nature, falling outside things “done” in the course of judicial proceedings.
90. Importantly, the Court of Appeal did not say that any previous authorities, where it was held that JPI applied to statutory complaints of sex discrimination (**Heath**), victimisation (**Singh** and **Dathi**), claims under the Protection from Harassment Act 1997 (*Crawford v Jenkins* [2014] EWCA Civ 1035; [2016] Q.B. 231), the DPA and HRA (**XGY**), were wrongly decided. In all those cases public policy arguments were raised as the reason why JPI should not apply to such claims but were roundly rejected by the courts.
91. I agree with EJ Auerbach’s (as he then was) observation in **Dempsey** (at [92]) that there is nothing peculiar, in policy terms, which calls for a different approach with respect to “whistleblowing” detriment claims.
92. The fact that, as Andrews LJ observed (at [14]) that “[t]here is nothing in ERA itself to suggest that the commencement of such proceedings¹⁴ should attract immunity from suit” does not mean that claims made under the ERA are exempt from the normal principles of JPI. The EqA, the DPA, the Protection from Harassment Act 1997, and the HRA equally do not say that, yet the case law establishes that claims brought under those statutes could be barred by JPI.
93. Furthermore, in practical terms such approach would be unworkable. That is because very often employees rely on the same communication as a protected disclosure and as a protected act and allege the same act or omission by their employer as a whistleblowing detriment and as an act of victimisation.
94. In such circumstances (if the alleged detrimental act is the initiation of litigation against the employee) it would be inconsistent and unprincipled if the employee would have a remedy for this act as a whistleblowing detriment, but not for the very same act as an act of victimisation. Such outcome would be difficult to reconcile with the established principles of construction of statutes (“*..giving effect to what Parliament may reasonably be supposed to have intended and attributing to Parliament a rational scheme*” per Lord Hoffman in *Lawson v Serco* [2006] UKHL 3, [2006] ICR 250 (at [23])).
95. More generally, although the Court of Appeal in **Rogerson** held (at [28]) that “*there is no blanket rule that the initiation of civil proceedings can never be a*

¹⁴ “*such proceedings*” I understand is referring to “*legal proceedings (e.g. for breach of confidence) because they have made a protected disclosure*” in [13]

civil wrong”, the analysis offered in support of that statement (at [25] – [30]) shows that, absence malice or some ulterior motivation being the key ingredient of the cause of action, the common law does not treat the bringing of a claim as an actionable wrong (at [27]). That is not surprising and fully consistent with all previous authorities.

96. Accordingly, if at common law a person (absent malice or ulterior motivation) commits no wrong in suing another person, it is hard to find a rational explanation why the very same act would amount to committing “statutory torts” under the Employment Right Act 1996 or the Equality Act 2010.

97. Mr Rogers submits that the purpose of JPI is to safeguard freedom of expression for participants in litigation. I think that it is a too narrow a view of the purpose of JPI. Although I accept that the authorities (for example, **Taylor**¹⁵ at [208 E]) say that JPI is “*designed to encourage freedom of speech and communication in judicial proceedings...*”, in my view, the principal purpose of JPI is to protect the integrity of the judicial process as a whole (see **Heath** at [17]). If JPI was only about safeguarding freedom of speech, the qualified privilege available to all would seem to be sufficient, and there would be no need to have a separate and absolute category of JPI.

98. Broadly, it is in the public interest that everyone within the state’s jurisdiction resolve their disputes through the state-established judicial bodies, following the state-supervised judicial process. JPI establishes and supports what may be described as a “safety litigation ring” for everyone to use for that purpose. Everyone should know upfront that, if they bring their dispute into that “ring”, they cannot be later penalised for that, by being sued for doing what the state tells them they should do when they cannot resolve their dispute privately.

99. If, however, they do so maliciously or “*for a predominant purpose other than that for which [the civil proceedings] were designed*”¹⁶, they cannot rely on the safety of “the litigation ring”, because by doing so they abuse its purpose, thus undermining its safety and integrity.

100. In **Rogerson**, Andrews LJ explains (at [11]) that the commencement of legal proceedings “*which are designed*” to obtain financial recompense for previous protected disclosure and/or “*to prevent*” future protected disclosures is undoubtedly subjecting the whistleblower to a detriment, and (at [54]) that the justification for the principle of JPI would not apply to the act of commencing proceedings “*aimed at stifling protected disclosures or penalising someone for making them*”.

101. That, in my view, is consistent with the previous authorities, where such acts as putting pressure on witnesses to give false evidence (**Singh**) and conspiring to fabricate evidence (**Darker**¹⁷) were held to fall outside JPI. These

¹⁵ **Taylor v SFO** [1999] 2 AC 177

¹⁶ Per Lord Sumption in **Crawford** at [149]

are all examples of a party abusing the safety of the “litigation ring” and thus undermining the integrity of the entire judicial system.

102. Therefore, allowing the “abuser” to do so with impunity will not only be contrary to natural justice, that by itself will further undermine the integrity of the judicial process, making it prone to further abuse, which in turn may lead to erosion of respect and trust in the state-sponsored judicial system.

103. Equally, where such abuse is not present, the system that demands that it is used by everyone to resolve their disputes by following a process that it dictates, later turns against a person for availing him/herself of that system and following the dictated process, will itself be undermining its own integrity and causing loss of trust and respect.

104. This, however, does not mean that a person on the receiving end of litigation is left with no protection. As was observed in **Dathi** (at [21]), the costs regime and strike out powers of the court provide such protection.

105. In the present case, if the claimant considered that the respondents initiated an abusive or otherwise plainly unmeritorious High Court claim against her, it was open to her to seek to have it struck out¹⁸ and have a costs order on an indemnity basis made against the respondents. As noted above, she took the opposite approach by essentially accepting the respondents’ claims.

106. The difficulty, of course, is how to identify upfront who is “an abuser” and who is “an honest user” of the judicial system. **XGY** establishes that the application of JPI cannot be dependent on particular facts of a case. The Court of Appeal said (at [65]): “...it is wrong therefore to elide the requirement to justify categories of immunity with the requirement to justify the actions of a person on the facts of every case. If a claim falls within the scope of the core immunity or its established extensions, the claim must be struck out”.

107. In **Rogerson** (at [48]), Andrews LJ accepted that, and (at [53]) went further to say that whether or not malice or bad faith in commencing arbitral proceedings is alleged cannot determine whether JPI applies¹⁹. In other words, it appears that an enquiry into merits and demerits of a claim is not permissible as a means of establishing whether a party is “an abuser” or “an honest user”.

108. Furthermore, for the purposes of the case before me, to decide whether the respondents are “abusers” or “honest users” (and indeed for any future Tribunal, if it were to come to consider the claimant’s victimisation claim on its merits), the Tribunal would need to examine what motivated the respondents in bringing the High Court claim against the claimant.

¹⁸ See CPR 3.4(2)

¹⁹ Andrews LJ agreed with EJ Fowell that malice is not an ingredient of the cause of action under s.48(1A) ERA. I must, however, observe that malice is not an ingredient for the causes of action under s.27 EqA, or under the Prevention from Harassment Act 1997, or under the DPA, or under the HRA, and yet the Court of Appeal in **Darker, Singh** and **XGY** held that such claims fell within the ambits of JPI.

109. If the claimant's alleged protected acts consciously or subconsciously motivated the respondents in a more than trivial way in commencing the High Court proceedings against her, the test of causation would be satisfied (see *Nagarajan v London Regional Transport* [1999] IRLR 572, HL, *Igen Ltd v Wong* 2005 ICR 931, CA.).
110. As the Court of Appeal in **Rogerson** acknowledged (at [50]) this might involve looking at the content of statements of case as the relevant evidence in examining causation. That in turn means that the Tribunal would need to examine (at least to some extent) the merits of the High Court litigation, which not only lies beyond its jurisdiction, but in this case would also undermine the principle of finality of litigation by re-opening the decision promulgated through the Final Order sealed by the Court.
111. I must confess that I am finding it rather difficult to reconcile the notion that JPI cannot depend on particular facts and how the detriment/cause of action is pleaded, and on the other hand the existence of the recognised exceptions for malicious prosecution, abuse of process, and the exceptions established in **Darker** and **Singh**.
112. It seems to me that it is not possible to answer the question whether JPI applies in abstract or absolute terms. It applies or does not apply to "something". Therefore, to answer that question one needs to carefully examine what that "something" is, which in turn means examining the pleaded cause of action, and, to a certain degree, relevant facts, on which the cause of action is founded. However, opening such an enquiry in and of itself circumvents the absolute nature of JPI.
113. That said, to decide the issue before me, I do not need to resolve this intricate question.
114. For the reasons explained above, I find that on the authorities as they stood before **Rogerson** the claimant's claim is barred by JPI, and applying the true *ratio* of **Rogerson** the position remained unchanged.
115. In other words, on its true reading **Rogerson** is of no assistance to the claimant in these proceedings, and contrary to Mr Roberts' submissions, it did not "torpedo" the respondents' case.
116. It follows that I find that the claimant's claim is barred by JPI and stand to be dismissed for that reason.

Employment Judge Klimov

20 February 2026

Sent to the parties on:

20 February 2026

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For the Tribunals Office