EMPLOYMENT TRIBUNALS

Claimant: Mr U Saeed

Respondent: The Chief Constable of West Yorkshire Police

Heard at: Leeds **On:** 14 December 2020

Before: Employment Judge Knowles

Representation
Claimant: Mr Basu, Queens Counsel
Respondent: Mr Jones, Counsel

RESERVED JUDGMENT ON A PRELIMINARY ISSUE

The judgment of the employment tribunal is that:

1. The Claimant's claim of victimisation under the second claim (1801428/2020) is not well founded and is dismissed because it relies entirely upon matters that are privileged from production under the without prejudice rule.

2. The Claimant's remaining claims shall be consolidated and heard together.

3. A telephone preliminary hearing for case management shall be listed to consider the next steps in bringing the Claimant's claims to a final hearing.

RESERVED REASONS

Issues

1. This preliminary hearing was listed following an audio private preliminary hearing before Employment Judge Shepherd on 14 August 2020 having heard representations from the parties concerning the Claimant's second claims of victimisation and disability discrimination.

2. The claim of victimisation arises from discussions between counsel for each party on 17 January 2020 which took place whilst the Employment Tribunal was

reading case papers before the parties were invited into the full hearing. The hearing had in fact commenced 16 January 2020 but the parties were not required to attend until 17 January 2020, the first day being a reading day. The start of the hearing on 17 January 2020 was delayed owing to medical matters relating to the Claimant.

3. The issues for me to determine today are:

    a. Whether or not the actions of counsel for the Respondent on 17 January 2020 can amount to an act of victimisation by the Respondent.
    b. Whether or not the Claimant's claims should be consolidated.

Evidence

4. The parties produced a joint bundle of documents which amounted to 34 pages. The joint bundle includes the witness statements from each witness.

5. The Claimant produced a skeleton argument, 12 pages, within a document containing 345 pages in total including authorities replied upon.

6. The Respondent produced a skeleton argument, 9 pages.

7. I heard evidence on behalf of the Claimant from Mr Adam Willoughby, counsel who acted for the Claimant on 17 January 2020.

8. I heard evidence on behalf of the Respondent from:
    a. Ms Olivia Checa-Dover of counsel who acted for the Respondent on 17 January 2020.
    b. Mrs Victoria Clegg, the Respondent's solicitor.

9. The hearing of the Claimant and Respondent's case was completed on 14 December 2020 however I had insufficient time to receive closing submissions from the parties.

10. The case was adjourned part-heard with the parties ordered to produce written closing submissions on or before 11 January 2021. I also requested that Mr Willoughby's handwritten notes were transcribed and sent to me. Both parties complied with those directions.

11. These are my reserved judgment and reserved reasons on the preliminary issues.

12. The parties delivered written submissions on 11 January 2021 and this judgment was concluded 2 March 2021. I apologise to the parties for the delay in promulgation. When this matter was adjourned part-heard for written submissions to be delivered we were not in national lockdown, schools were not closed and primary school age children were not at home being schooled by their parents. The change in those circumstances caused by the present lockdown and the impact that has had upon my time to give this case the consideration it deserves are my explanations for the delay.

Findings of fact

13. I make the following findings of fact on the balance of probabilities.

14. On 30 May 2020 the Claimant issued proceedings under case number 1802775/2019 ("the first claim") bringing claims of race and religion or belief discrimination. The Respondent defended the claims. The matter was listed for a final hearing 16 to 31 January 2020, the first day being designated as a reading day. That hearing in any event was vacated due to the Claimant's ill-health. The parties representatives had attended Leeds Employment Tribunal on 17 January 2020.

15. On 3 March 2020 the Claimant issued proceedings under case number 1801428/2020 ("the second claim") bringing claims of disability discrimination and victimisation.

16. In relation to the claim of victimisation, the Claimant's grounds of complaint recite the following:

> *"25. On or around 17 January 2020 the Claimant and his representatives attended the Leeds Employment Tribunal for the final hearing of the First Claim.*
>
> *26. In the course of a conversation between Counsel for the Claimant and Counsel for the Respondent, Counsel for the Respondent told Counsel for the Claimant that she was instructed to obtain adverse findings on the Claimant's credibility. In particular, she stated: "I am going to seek findings of adverse credibility, that he's not credible and has lied which will affect his credibility".*
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> *27. The Respondent's Counsel further explained that she has to "be careful" how she pitches cases for the Respondent against serving officers because as soon as a finding is made that they have lied they "cannot go near evidence in the course of carrying out their duties" for the Respondent. The Respondent's Counsel then stated: "If the Tribunal finds he lied, he will not be able to handle evidence, he won't be allowed in the chain of evidence". The Respondent's Counsel then stated that in such circumstances the Claimant "will not be operational".*
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> *28. In the circumstances, the Respondent intimated, through its Counsel, that the Claimant would not be an operational Police Officer in the event the adverse findings in respect of the Claimant's credibility, which were sought by the Respondent, were made.*
>
> *29. The representations made were false in that if such adverse findings were made against the Claimant's credibility, the Claimant would have faced an investigation by the Respondent and would have had the opportunity to put forward his own explanation of the same before a decision would be taken as to whether or not he is allowed to have any involvement in the chain of evidence and thus be operational or not. In other words, it was not a foregone conclusion, as represented, that the Claimant would not be operational in the event the Tribunal made adverse findings against his credibility. The Claimant would potentially still be operational in that he would be able to handle evidence in the event adverse findings were made against his credibility."*

17. The claim is pleaded by the Claimant, later in the grounds of complaint, as follows:

"Victimisation

38. Further or in the alternative, the Respondent's representation made through its Counsel to the Claimant was detrimental treatment because the representation that the Claimant would, upon an adverse finding against his credibility being made, be considered not operational, caused undue worry and stress to the Claimant. The representation was not correct in that it was not a foregone conclusion that upon adverse findings against the Claimant's credibility being made, he would not be operational by virtue of an inability to handle evidence.

39. The representation was made at the commencement of the hearing of the First Claim: The Claimant avers that the representation was made because he brought proceedings under the Equality Act 2010.

40. The Claimant, in the circumstances, avers the Respondent subjected him to a detriment because he did a protected act, contrary to s. 27 of the Equality Act 2010."

18. The Respondent has entered a response defending the second claim.

19. I heard evidence from Mr Willoughby. A copy of his witness statement is contained in the bundle of documents (1-4).

20. Mr Willoughby is a barrister who specialises in employment and sports law. He was called to the Bar of England and Wales in 2011.

21. If the facts on 17 January 2020 he states the following in his witness statement. I will copy the whole substantive part of his evidence as it is not lengthy:

"5. The parties had held Without Prejudice discussions on 16 January 2020 through Ms Checa-Dover and I. Given the Claimant had to attend hospital on 17 January 2020, the parties continued their Without Prejudice discussions that morning during which the Tribunal continued its reading. I therefore accept that much of our discussion on the morning of 17 January 2020 was part of an on-going Without Prejudice dialogue. The details of our settlement discussions are not relevant to the current claim.

6. Shortly before my client returned to the Tribunal from his hospital appointment, myself and Ms Checa-Dover engaged in what was to be the final discussion as it related to a potential settlement, during which it was clear that a resolution was not going to be possible.

7. Ms Checa-Dover and I held what I refer to above as the 'final discussion' in the Claimant's waiting room which, at the time, was vacant (the Claimant, my Instructing Solicitor, the Claimant's Police Federation Representative and I had based ourselves in one of the private conference rooms off the main atrium of the Tribunal hearing suite). Ms Checa-Dover told me that it was "not possible" for her client to agree to one of the matters the Claimant had put forward as a term of any settlement. Ms Checa-Dover told me it was something "the Force simply cannot agree to". I recall stating "It's a red line. It's clear we're not going to settle this, we'll proceed to trial". The particular matter over which we were negotiating was a red line for the Claimant. He

had lefi me with clear instructions that any settlement would have to include the matter which, according to Ms Checa-Dover, the Respondent could not agree to.

8. I had indicated that I was going back to see my client and I was clear that our discussions relating to settlement had ended. By my words, it would have been clear to Ms Checa-Dover that: 1) The matter was a red line for my client; 2) We were not going to settle; and 3) the Claimant would proceed to trial. My words were unequivocal. I walked to the door of the Claimant's waiting room and had begun to open the same. I said "see you in there", meaning the Tribunal hearing room.

9. Ms Checa-Dover then said that she wanted to let me know that she was instructed to obtain adverse findings on Mr Saeed's credibility. Ms Checa-Dover stated: "I am going to seek findings of adverse credibility, that he's not credible and has lied which will affect his credibility".

10. I asked what she meant. She said that she has to "be careful" how she "pitches" cases for West Yorkshire Police against serving officers because "as soon as a finding is made that they have lied they cannot go near evidence in the course of carrying out their duties ". She further said: "If the Tribunal finds he lied, he will not be able to handle evidence, he won 't be allowed in the chain of custody". She said that in such circumstances Mr Saeed, "will not be operational".

11. I had concerns about the accuracy of what she was saying. Having conducted Police cases before, what she was saying did not ring true. I was concerned that an adverse finding against Mr Saeed's credibility would not consequently lead to him not being allowed to handle evidence and thus not be operational. I asked her to explain what she meant. I recall having closed the door to the Claimant's waiting room and walking back to sit at the table in the centre of the room at this point. Ms Checa-Dover was also sat at that table. She said that the Police "would have to inform the defence team that an officer has handled evidence who has a credibility issue". She then stated that the Claimant "would become ineffective as a Police officer". I said to her "I'm not sure that's right" and told her I would see her in the hearing room.

12. I was writing notes during my discussion with Ms Checa-Dover and these are produced at page [ ] of the disclosure bundle.

13. I returned to the conference room in which my Instructing Solicitor and the client's Federation Representative were waiting. I initially relayed what had been said to them and when Mr Saeed returned from his hospital appointment, we discussed the matter further.

14. Acutely aware that the Claimant had just attended hospital, I carefully relayed what had been said and reassured Mr Saeed that I did not think Ms Checa-Dover was right that an adverse finding of credibility would then lead to him not being allowed near a chain of custody and thus become "ineffective" or "not operational".

15. Having discussed the matter with the Police Federation representative and my Instructing Solicitor beforehand, we formed the view that the Police, in circumstances where an adverse finding as to credibility was made, would

then apply an internal policy to consider the matter on its facts and circumstances. It would not thus be the case that "as soon as a finding is made that they have lied they cannot go near evidence" and they would become "ineffective as a Police officer".

16. In fact, the Police consider the matter internally and an officer might well be able to continue to be operational and allowed to act in a chain of custody of evidence even if there was any such finding.

17. I had no reason to doubt that what Ms Checa-Dover had said was part of her instruction and not, as is now claimed, Ms Checa-Dover acting on her own volition.

18. I am also clear about what was stated as her intention. Counsel was clear that she was intending to seek an adverse finding as to the Claimant's credibility if the matter was to proceed to trial. At the time of making the statements set out above, it was clear to both Ms Checa-Dover and that settlement had not been reached nor was it going to be reached given the Respondent was unable to agree to What was a "red line" for the Claimant. Settlement discussions had ended. This was not part of any Without Prejudice discussion relating to settlement terms: This was a statement of her intention if the Claimant was to continue with his claim.

19. Given the seriousness of this intention, I had a duty to disclose this to my client and to take his instructions. At the time, Mr Saeed was not very well at all. He had experienced loss of vision in both eyes. I understand this to be the condition known as CRS. He had just attended hospital in respect of this condition and was clearly struggling with this and other symptoms impacting on his mental health, including stress, depression, and anxiety. I was careful to reassure the Claimant that I considered what Ms Checa-Dover had said to be wrong and my Instructing Solicitor and I talked the Claimant through the correct protocols the Force would need to apply if adverse findings were made against the Claimant's credibility."

22. In answer to supplementary questions Mr Willoughby stated that he is very sure of the accuracy of his statement, that he remembers the case well, that it was unusual because his client had to attend hospital and that Ms Checa-Dover's comments were unusual because of the forceful way she said them. He referred to his handwritten notes (11) and stated that they were taken during speaking to Ms Checa-Dover. He stated that crosses and circles on his notes are action points. He stated that he had written to "check" that the Claimant would be made "not operational". He stated that from "RT + Doc" in his notes is when he returned to speak to his instructing solicitor.

23. In answer to questions in cross examination, he accepted that on 16 January 2020, the day before they attended Leeds Employment Tribunal, that he and Ms Checa-Dover had been engaged in settlement discussions. He accepted that they were genuine settlement discussions. Asked about his email (5) to Ms Checa-Dover he confirmed that by stating "continue discussions" he meant their without prejudice discussions. He confirmed that he intended to continue them on 17 January at the Employment Tribunal. There had been a sticking point on 16 January concerning Mr Saeed's request for a promotion to Sergeant, and Ms Checa-Dover was checking the Respondent's position. He confirmed that his client went to hospital before attending the Employment Tribunal on 17 January,

and that arrived soon after he had his "final discussion" with Ms Checa-Dover, a little before lunchtime, and when the Claimant did arrive the parties went into tribunal and applied for an adjournment of the hearing.

24. He stated that the conversation we are concerned about was their third conversation that morning. He accepted that after the hearing proceeded on 20th January after the weekend, that towards the end of the hearing the Claimant position was stated as the parties were to try to settle the claim; that he felt that in time there was a possibility that the Respondent may be prepared to confirm authority to promote the Claimant as part of the settlement. He accepted that he did not suggest to the Employment Tribunal that negotiations had broken down and stated that the Claimant still desired a settlement. He accepted that on 17 January the position stated to the Employment Tribunal was that in the Claimant's absence fruitful settlement discussions could continue. It was put to him that what he told the Judge on 17 January was contrary to his statement that without prejudice conversations had closed, but he reiterated his position that he hoped that the question over authority to promote could be resolved. He accepted that the door to settlement could be opened at any time. But he drew a distinction in terms of his conversation with Ms Checa-Dover to the effect that for the purposes of that conversation the Respondent could not agree to the settlement proposal and that they were proceeding with the hearing.

25. Mr Willoughby was asked whether or not he was hedging his bets, but stated he would not put it like that. He was asked whether or not his statement that we will proceed with the hearing may be interpreted as brinkmanship and he accepted that that happens. He accepted that he had entered the room to continue without prejudice discussions. He accepted that Ms Checa-Dover had been sat at the table and stated that he initially joined her at the table then got up to leave. He stated that the conversation lasted 5 minutes. He stated that he accepted that neither of them said the discussion was without prejudice however that was implied from their discussion of terms of settlement. He accepted that the risks of litigation were often discussed but stated that didn't happen in this conversation. He accepted that representatives like to express opinion about how a case might play out, and that this was something they might routinely do. He said his conversation with Ms Checa-Dover was friendly but he would not describe it as informal or glib. He stated that they discussed terms of settlement, and that they had previously discussed litigation risks for both sides and he felt it was important to settle, the Claimant was still working for the Respondent. He stated that in their "final discussion" they did not discuss litigation risks. He stated that in their earlier discussion he had suggested it would be good to settle and wrap up all claims which could include potential claims the Claimant had concerning disability discrimination relating to his eye condition and stress. He accepted that in their "final discussion" there had been a genuine attempt to settle "up to that point".

26. Mr Willoughby accepted that his notes were not complete. Asked why we do not have the complete note, Mr Willoughby stated that it was his decision only to send the page (11). Asked if a single page could be taken out of context he stated that the page before is the terms of settlement. He denied this could give a different perception, stating that the dispute arrives at the top of the page and the rest of the note details what was said. He stated there was nothing unusual in disclosing only one page of his notes.

27. Mr Willoughby stated that Ms Checa-Dover did state to him that she was instructed to seek adverse findings as to the Claimant's credibility. It was put to

him that his only note on page 11 was “not operational”, and that he did not record “instructed”. He accepted that, stating it was said at the point he began walking back, then he began making notes.

28. Mr Willoughby stated that he drafted the ET1 for the second claim around 1 March 2020, and accepted that that was the first point at which the Claimant asserted that the Respondent said it was so “instructed”. He stated his workload varied, working on 4 advices, with 3 cases to prepare at present. He was asked if this was the first time he said “instructed”, 6 weeks later, and he replied that he drafted an earlier advisory note to his client after the meeting which was used to draft the grounds of complaint. He stated that was drafted either on the day the hearing concluded or the day after that. He disputed attributing the term only to his note on page 11, stating that he had a clear recollection as well. Asked why he did not include in quotes in the ET3 that Ms Checa-Dover said “instructed”. He stated that was simply his drafting. He stated she said “she wanted me know to let me know she was instructed to seek adverse findings”, he turned around, she said that the Claimant had lied.

29. Mr Willoughby was asked how it would have been evident that settlement discussions had ended and he said because he said it was a red line for the Claimant, I will see you in there, it is clear we wont be able to settle.

30. It was put to Mr Willoughby that “see you in there” might just mean you are going back in, Mr Willoughby disputed that and said it was clear to her that the issue was a red line. He agreed they were going back in anyway, but said he had told her it is clear we are not going to settle. It was put to Mr Willoughby that it doesn’t naturally flow from stating a red line that settlement discussions had ended, parties may be reading parameters, but Mr Willoughby replied that it would have been clear, the Claimant wanted a promotion and it was clear they were not going to settle and that they would proceed. He stated that it was clear it was a red line before that discussion, it had been mentioned in the second discussion that day. He disputed that this would be interpreted as brinkmanship, but accepted that sometimes bluff is required. He stated that given he had said we are clearly not going to settle, proceed to trial, it was a matter for her. He accepted that shortly afterwards the parties were discussing judicial mediation with the Judge, but added that the chronology had changed, there had been an adjournment and there would be more time so they showed willing for judicial mediation. Mr Willoughby refused to accept that his words could have been interpreted another way, although he said he accepted the premise, or that they were equivocal. He reiterated he did not accept that his words were interpreted as equivocal in this case or brinkmanship, suggesting that was clear to Ms Checa-Dover. Asked why he cherry picked words in his note, and why there was no full record, and he stated that the sentence made sense and he has a clear recollection.

31. Mr Willoughby was asked about the difference between his notes, quoting “chain of custody”, compared to paragraph 27 in the ET1 for the second claim in which he quotes her as saying “chain of evidence”, and he answered that these are two separate quotes. Mr Willoughby was referred to paragraph 14 of his statement where he quotes “chain of custody”, but he referred to paragraph 15 stating “cannot go near the evidence”. He said again that they were separate quotes. In answering questions Mr Willoughby drew a clear distinction between his quotes of “custody” and “evidence” and explained that she said “cannot go near the evidence” and that wont be allowed in the chain is a reference to “evidence”. He was questioned further on this because his note states “chain of custody”, not

chain of evidence, but his answer was that the basis of the claim is evidence. Mr Willoughby appeared reluctant to explain or engage with the conflict between his references to "chain of evidence" in paragraph 27 of the ET1 for the second claim, yet the notes on page 11 refer to "chain of custody". He said in paragraph 14 he is not quoting Ms Checa-Dover, and that "custody" was his word to describe the handling of evidence. I note however that he does attribute and quote Ms Checa-Dover as having said "chain of custody" in paragraph 10 of his witness statement.

32. Mr Willoughby stated that he had carefully relayed his conversation to the Claimant. He was asked why then the Claimant, in his complaint to the BSB on page 29, had said that he would be dismissed for dishonesty. Mr Willoughby denied having relayed that. He was asked why the Claimant had put in the complaint to the BSB that these events all took place during without prejudice discussions. Mr Willoughby stated that the Claimant was mistaken, and that that was not what he had said to him. He stated that he accepted that the Claimant stated that these were without prejudice discussions but suggested that he did not accept that the Claimant understood the consequences.

33. It was put to Mr Willoughby that Ms Checa-Dover never said she was instructed to pursue adverse findings on credibility, but Mr Willoughby refused to accept he could be mistaken and said he could only speak to their conversation. He accepted that there would be adverse consequences for the Claimant if there was an adverse finding as to credibility. He drew a distinction in answering questions between Ms Checa-Dover suggesting that adverse findings would mean he would be ineffective as an officer, suggesting that was only a possible outcome.

34. Mr Willoughby was asked about how it could be considered to be a threat if he knew it to be wrong. Mr Willoughby stated he had a duty to disclose it to his client , and that Ms Checa-Dover would reasonably know that. He was asked why he did not push back on the point with Ms Checa-Dover and he replied that he wanted to confer with his instructing solicitor and the federation representative. He refused to accept that he did not push back because it was par for the course.

35. Mr Willoughby denied he had similarly threatened Ms Checa-Dover with disability discrimination proceedings if the matter were not settled. He said he simply advised her that if the case settled such matters could be wrapped up in the settlement. He denied using the words attributed to him by Ms Checa-Dover in her witness statement.

36. In answer to questions from me, Mr Willoughby accepted that if there were adverse findings as to the Claimant's credibility that may impact his involvement in the chain of evidence, he accepted that was a worst-case possible outcome. He said he object to it being presented as automatic because the police would consider that on its merits. I asked Mr Willoughby whether Ms Checa-Dover's comments were couched in terms of these "type of cases" as opposed to specific to this one and he replied that he recorded her saying not operational so it was not couched. Mr Willoughby accepted that it was open to the Respondent to continue without prejudice discussions but said that nothing else was said to open up without prejudice discussions. I asked him whether or not it was possible that Ms Checa-Dover did not consider that the without prejudice discussions had closed and he replied that she gave no indication that she did not consider them closed. Mr Willoughby told me that their discussions on 16 January 2020 had included litigation risks but credibility was not discussed. He accepted however that there were conflicts in the evidence but stated that these could be mistakes rather than

lies. He stated Ms Checa-Dover stated that she had to be careful how she pitches these cases. He said he did not recall Ms Checa-Dover the remaining comments in paragraph 13 of her statement but that she did say as soon as there is a finding he lied he cannot go near the evidence.

37. In answer to questions in re-examination Mr Willoughby stated that there was no stark difference in the evidence, the greatest was an interpretation of emails, there were no "gotcha points". He stated that the Claimant has since gained a promotion to Sergeant.

38. I heard evidence from Ms Checa-Dover. A copy of her witness statement is contained in the bundle of documents (5-8).

39. Ms Checa-Dover is a barrister and has practised since 2007. She sits as a Deputy District Judge and as a Recorder.

40. In her witness statement, again reproduced here because it is not lengthy, she states the following:

16 January 2020

3. On 16 January 2020, Mr. Willoughby contacted me by telephone in Chambers. He was keen to settle and said his client was also. He was new to the case.

4. I said we had tried to resolve the claim at a joint settlement meeting and had found the Claimant's expectations to be unrealistic. For example, the Respondent was not going to delete "PEN entries" relating to the Claimant's treatment of women.

5. Mr. Willoughby listed what the Claimant wanted and I rang my instructing solicitor, Mrs Victoria Clegg, to relay the information. Mr. Willoughby chased me during the day for an answer but we were unable to accede to the Claimant's requests; they were not as straight forward as he thought. For example, the Claimant wanted to be substantively promoted to sergeant but he had not completed his action plan.

17 January 2020

6. Mr. Willoughby remained keen to resolve the claim. I awoke to see that he had sent me the following e-mail late on 16.1.20:

From:Adam Willoughby
Date: Thursday, 16 January 2020 at 23:39

To: Olivia Checa-Dover
Subject: Re: Saeed v CCWYP | Without Prejudice

Hi Olivia,

I'm sorry for the late reply and hour this email is sent at. My emails have delayed coming through for some reason.

I have a provisional updated list of witnesses I intend to call but I need to check it with my client tomorrow morning and will update you accordingly. I had news this evening that a particular witness the claimant had intended to call has some difficulty attending due to commitments at work.

By way of forewarning I understand that the claimant has had some deterioration with his eye condition and has had cause to attend his optician today. I understand that the optician has made an urgent referral to specialist to assess him at the earliest opportunity which is tomorrow, 17 January at 11.15. I have been provided with the optician's report and scan images taken today which I will provide to you. I may therefore be that upon taking further instructions in the morning, a later start is sought so that he can attend with the specialist. I will of course update you in due course.

In any event, I will be at Tribunal from 9am and we can continue our discussion then. I don't think we are miles apart.

See you tomorrow.

Yours,

Adam

7. When we arrived at the Tribunal building, without prejudice discussions carried on between Mr. Willoughby and me.

8. Due to the Claimant stating he was too unwell to proceed with the hearing, and the Employment Judge wanting evidence of the same, there was a great deal of waiting. Mr. Willoughby thought we could use this time to try and find an agreement. The Claimant was not always present in the building and, in any event, my discussions were always with
Mr. Willoughby on his own.

9. The discussions were informal, friendly and, at times, glib in the usual way counsel speak to each other. We discussed the risks of litigation for both sides - this is all normal.

10. Mr. Willoughby warned me that if we did not settle now the Claimant would be bringing a disability discrimination claim, but would not if we were able to resolve it. I took this threat to be a normal part of without prejudice settlement discussions. He also shared his view of the Claimant's expectations - this is all a normal part of counsel-to-counsel discussions.

11. During one of these discussions, when Mr. Willoughby and I were alone in the Claimant's waiting room, we explored the nature of the evidence in dispute. I was seated at my laptop and he was at times walking and at times seated opposite me.

12. I said to Mr. Willoughby that the problem with these cases when the officer is still in post is, of course, the effect an adverse judicial finding has. I regularly act in police misconduct hearings, and previously practised in crime, and I had thought what I was saying was uncontroversial, assuming that this would also have been obvious to Mt. Willoughby.

13. I said that I was careful never to put to a witness that something is a "lie" when it could be a mistake and that much of what the Claimant alleged was probably his genuine but mistaken perception. However, there were a few matters which he just can't be mistaken about. He's telling the truth or he's lying. If he is found to have lied by a Tribunal, realistically he's not going to be allowed in the evidential chain.

14. This was a conversation between two counsel, whom I thought both would have understood the gravity of a finding that a police officer lied in legal proceedings. In any event, I was sharing my view of the case as counsel frequently do. I must be clear — I was not told to say this by anyone. I never told Mr. Willoughby that I was acting on instruction because I wasn't.

15. I never said this was West Yorkshire Police policy. I never said he would be non-operational straight away. I never said he would be deprived of a misconduct hearing. It's a given that he would have gone through the misconduct process with an investigation, severity assessment etc., pursuant to the applicable regulations. I was speaking to fellow counsel, not a litigant in person.

16. I never said I had been told to call the Claimant a liar. I told him that when I prepared my cross-examination I am always careful to ensure my pitch is fair. Here, having done that exercise, it was regrettable that there are some things the Claimant just can't be mistaken about. How counsel prepares cross-examination is a matter for them, not their lay or professional client.

17. This was a friendly, without prejudice, conversation between counsel, talking about the ramifications of running as opposed to settling.

Thereafter

18. On 21 October 2020, I received a letter from the Bar Standards Board ("BSB") informing me that the Claimant had made a complaint about me. The letter notified me that the case had been closed but this notification was the first I knew of the report having been made.

19. Within the section "detail of your report" the Claimant wrote the following:

"Whilst in discussion around resolutions to avoid the commencement of full proceedings, some "without prejudice" discussions took place between counsels (sic). During these discussions Olivia Checa-Dover..."

20. It appears, therefore, that the Claimant also understood the discussions his counsel and I were having in private to have been "without prejudice" in nature.

41. Ms Checa-Dover was not asked any supplementary questions.

42. In answer to questions in cross examination, Ms Checa-Dover was asked about the negotiations she had placed into her notes and stated that her notes were fluid, prepared throughout the talks and where her thoughts as well as what was said. She agreed there had been a discussions about the City and Guilds instruction and the Claimant's promotion, both with her instructing solicitor and with Mr Willoughby. She accepted that she was not writing everything down. The reference on page 20 about being a temporary sergeant involved a sticking point

over pay, as a temporary sergeant is not paid as a sergeant. She accepted that application of the UPP (unsatisfactory performance and attendance procedures) was a bar to substantive promotion. She discussed CI Winter and capacity to settle with her instructing solicitor and Mr Willoughby. There were discreet conversations with Mr Willoughby about pay, recorded at the bottom of page 22, followed by the discussion under the heading capacity to settle and then an agenda was recorded. The notes are a mixture of what Mr Willoughby said to her and what she said to him. The notes are topic led not time led and may be out of sequence. She referred to the headings of backdating, pay, ability to ring-fence funds and the MBA being settlement discussions on pages 22 and 23. He stated that she had asked Mr Willoughby to confirm what the backdating of pay issue was but it turned out that pay would not be affected. She stated that the other headings were not settlement discussions. She stated that the notes on page 23 are her record of what Mr Willoughby said. She agreed that page 24 referred to negotiations, in the hearing. She stated that page 23 referred in indented text to what she learnt from Mr Willoughby and page 24 contained her noted from the hearing. Asked about what page 19 was, and whether they were notes from the hearing she stated that those notes were from discussions with Mr Willoughby.

43. Ms Checa-Dover stated that her notes will not help with the relevant part of the discussion, she does not have notes of that. She stated that page 19 was in fact a mixture of her discussion with Mr Willoughby and what was said in tribunal. She accepted that that was not about settlement. Her note of "I can't even think about it" was said to be Mr Willoughby having difficulty getting instructions. Asked about the notes under "Notes for trial" (page 21) Ms Checa-Dover stated that the were privileged discussions with those instructing her and were not without prejudice discussions. They continue until the point referring to victimisation. On page 22, from "North East" to "213" were a sharing of opinions, matters which were discussed, then the lower third of page 22 are notes of what were actually discussed.

44. Ms Checa-Dover stated that she first became aware of Mr Willoughby's account and contentions when she opened his witness statement the week before last. She stated that she knew of the claim, which came the day before the telephone hearing on the first claim, the 11th March hearing. She stated it wa 2 months after the January hearing, she didn't understand the nature of the claim, but they agreed to withdraw from the case and Mr Willoughby told her it was no criticism of me.

45. Ms Checa-Dover agreed that it was vital to stick to instructions. She stated that she was sharing an opinion, sharing a view in an informal way with a barrister. In terms of the material part, it was fine for Mr Willoughby to correct her. She accepted that she had no instructions to seek adverse findings. There were parts of evidence which were diametrically opposed, and the tribunal would have to decide. She stated she was not instructed to seek adverse findings nor was that her approach. She did not have instructions to tell Mr Willoughby she would seek adverse credibility findings nor did she do so. She stated that she was not instructed to say that the Claimant would not be operational, nor did she say that. She agreed she had good reason not to question the Claimant's integrity because the Claimant is a serving policeman. She stated it is about precision, if it can be a mistake it should be put as one. She accepted she had not been positively instructed not to seek adverse credibility findings. She was asked if it was open to her to seek adverse findings and she stated that was not what she intended. She sated she never said or intended to say to the panel that they had to find this.

Asked if it was open to her she stated it was open to her to say I invite you to prefer. She disputed it was open to her to say the Claimant was a liar, she replied it was not about lying. She denied she would argue that a witness was lying simply because she could. She stated that she was aware of a conversation between the Chief Constable and the Claimant but did not know the details. It was put to her that the Chief Constable would not deal with the Claimant in an aggressive way, but Ms Checa-Dover stated the Respondent would adopt a friendly caring approach given that the Claimant was still serving.

46. Asked if everything discussed between Counsel is likely to be relayed to the client she disagreed, stating that they would share opinions most of which would not be relayed. Asked if she was duty bound to give a good account of the conversation, she stated of all relevant matters. Ms Checa-Dover stated that if they shared everything the whole system would go to pot. She agreed points might be prefaced with "I've no instructions but". She accepted nothing was prefaced to Mr Willoughby in that way in their discussions. She stated that Mr Willoughby was aware that the Claimant would not be at the hearing on 17 January. She stated that she was aware the Claimant was told to see a specialist. She stated that she had more than 3 discussions with Mr Willoughby in the tribunal waiting room. She stated that they discussed the Claimant's promotion, as well as having discussed it before then. She denied she said it was not possible, and stated it looked like it would happen but pay was the sticking issue. She denied saying the Respondent cannot agree, stating that the discussions had not got to that stage. She was stating there were practical difficulties. She denied saying impossible, stating that this was not what they were discussing. She stated that Mr Willoughby was saying he could not be clear about pay. She stated that she conveyed there could not be a problem with pay, but Mr Willoughby was unable to obtain instructions over what the problem was. Ms Checa-Dover denied telling Mr Willoughby that this was a red-line, she said he is wrong, she did not think that, they went into tribunal still desiring settlement. Ms Checa-Dover disputed Mr Willoughby's contention that had the Claimant been there, the claim would have proceeded to hearing. She referred to the case not being ready, a list of issues not being settled and to discussions about settlement and judicial mediation. She stated that her instructing solicitor's notes on page 12 were of the hearing on Monday 20 January 2020. Ms Checa-Dover denied that Mr Willoughby said that the Claimant was going to start the hearing, she denied he was trying to leave and came back when she said something to him, and denied he walked out saying see you in court. She states that they were having a normal friendly conversation. It was put to her that the discussion was not informal or glib, she replied that there were formal requirements but the tone was informal and friendly and glib. She denied having said she was instructed to seek adverse findings or that the Claimant was not credible and had lied. Asked whether there was no truth in Mr Willoughby's claims she stated that she was saying that there were problems with these cases and took Mr Willoughby through the few matters that she felt the witness could not be mistaken about. She described Mr Willoughby's account as totally wrong. She denied having issued a mincing threat. She stated it was nothing like that, they spoke in normal tone and it was obvious she was sharing that aspect of these cases. She stated she shared things like that all the time. She denied this was different to chit chat, and denied she was trying to get a message across. She stated that suggestion astounded her, she was sharing it in a way that counsel do.

47. Ms Checa-Dover denied having referred to the chain of custody, stating instead that she referred to the evidential chain. She stated she has never referred to the chain of custody. He accepted saying to Mr Willoughby if there are adverse

findings there are problems in the evidential chain. She accepted it would be a disaster, that one would not be operational in the sense that they would either be suspended or given something serving another purpose. She accepted that she said the force would have to inform the defence team, and Mr Willoughby said he didn't understand, so she explained that. She denied saying that an officer would be ineffective, she stated that she explained the issue is in the evidential chain. She stated that she did not recall Mr Willoughby writing in his notebook. She stated at the time she had her laptop open on the cross examination page. She stated she had a clear recollection of this, and that there was only one conversation in the larger room. She stated she was not saying that Mr Willoughby was not telling the truth, but she can say what happened and it is regrettable they do not recall it in the same way. She accepted that she had drafted the response to the first claim and had not pleaded that the allegations were false and in bad faith. It was put to her that this was not a lying case and Ms Checa-Dover answered that the Respondent's position was that some of what the Claimant had said was demonstrably wrong. Ms Checa-Dover denied that she knew those comments would be relayed to the Claimant when he was not in a suitable frame of mind. Ms Checa-Dover denied that what she said was a threat, she said it was nothing like that and she stated she was at pains to explain how careful she was. She denied it was a "mafia threat", stating that their conversation was friendly, there was no sinister presentation, there was no criticism of her at the next hearing and that as far as she was concerned the majority of this is a misunderstanding.

48. In answer to questions from me Ms Checa-Dover stated that she never stated that the Claimant would not be operational, or would be ineffective, but she did say that on some topics he couldn't be mistaken. She stated that the Claimant was at risk of an adverse finding on credibility, the nature of the difference was so stark, and that troubled her. She stated that her notes did not refer to those points, he instead had her cross examination notes in front of her and they discussed the few occasions where those real risks arose.

49. Ms Checa-Dover was not asked any questions in cross examination.

50. I heard evidence from Ms Clegg. A copy of her witness statement is contained in the bundle of documents (9-10).

51. Ms Clegg is a solicitor employed by the Respondent who has conduct of the Claimant's two claims for the Respondent. In her statement, she states that she did not instruct Ms Checa-Dover to obtain adverse findings on the Claimant's credibility, question his integrity or suggest that he would not be considered operational.

52. Mrs Clegg was not asked any supplementary questions. In answer to questions in cross examination she denied any specific knowledge of the Chief Constable's conversation with the Claimant. She agreed the Chief Constable had spoken to her, she was asked to provide an explanation of the position in tribunal. She was not aware that the Chief Constable had said he would like to see the Claimant promoted. She denied having instructions to seek adverse findings against the Claimant, to question his integrity, his credibility or honesty. She accepted those matters may cause difficulties in the evidential chain. She denied there was any policy concerning credibility issues for serving officers, stating that each case would be considered on its merits. She accepted there was a reluctance especially in the employment tribunal because the employment relationship would be harmed. She stated that if Ms Checa-Dover had asked for approval of a

credibility attack she would have had to take instructions and would want very clear instructions to authorise that. She stated that she did not tell Ms Checa-Dover to do that; they did not discuss it at all. She stated it had never happened before in her 21 years acting for the Respondent, or the 12 of those in which she had been handling employment claims. She could recall a case where an officer withdrew a case over that risk.

53. I had no questions for Mrs Clegg nor was there any re-examination.

54. The joint bundle of documents contains the witness statements for those who appeared at this hearing. In terms of other documents, the bundle contains:

a. A page of Mr Willoughby's notes 17 January 2020 (page 11).
b. Mrs Clegg's notes 17 and 20 January 2020 (pages 12-17).
c. An email Ms Townsend (Claimant's representative) to Mrs Clegg 16 January 2020 chasing instructions on settlement (page 18).
d. Ms Checa-Dover's notes 17 and 20 January 2020 (pages 19-25).
e. The Claimant's complaint to the BSB 25 April 2020 (pages 26-34).

55. Mr Willoughby's page of notes from 17 January 2020 is brief and an agreed transcript was provided to me as follows:

Can't get there on the promotion –

No authority and not on merit

(*) Trial on return from hosp as red line for US

--

Seek findings of adverse credibility + lied

- If so…as soon as find lied cannot go near evidence and not therefore operational to carrying out duties
- Lie : cannot handle ev = not allowed in chain of custody
- Will make US "not operational" (Check)

Police inform defence – if handled evidence that credibility issue so ineffective as PO

(??) – tactic to force US?

<u>RT & Doc</u>

- Internal matter – see Police policy on it
- Not right that not operational

(*) Inform US on return and of correct position

56. Ms Checa-Dover's disclosed notes are more lengthy and I do not copy them here. I note that Ms Checa-Dover has conceded that her notes do not cover the core issues of dispute between her and Mr Willoughby, she has made no notes of the relevant discussion at all.

57. I do not import Mrs Clegg's notes either as they are lengthy and not relevant other than to the extent they have been referred to in evidence above.

58. Nothing turns on the email between Ms Townsend and Mrs Clegg. It support the fact that without prejudice discussions were taking place 16 January 2020 but both parties agree that was the case.

59. Ms Checa-Dover and Mr Willoughby do not agree upon the content of the core conversation which the Claimant relies upon in his particulars of his second claim concerning victimisation.

60. There are no obvious reasons to prefer the evidence of one of them above the other. Both appear to be credible witnesses. Neither has been accused by the other of lying to me.

61. It is for me to determine the facts as they appear to me on the balance of probabilities. Whilst I can comment on who's evidence I preferred, it is not the case that one must be giving an accurate account and the other an inaccurate account.

62. It is open to me to make a finding that neither of them has satisfied me that what they state they said is on the balance of probabilities what was actually said.

63. It is the case that people can struggle to recollect events and that memory is fallible and can be unreliable.

64. There are inconsistencies in the evidence which I have heard and neither account can be fully correct.

65. I have taken into account the fact that Mr Willoughby has notes which are contemporaneous, taken as he had a discussion with Ms Checa-Dover.

66. I have taken into account the fact that Ms Checa-Dover's notes do not contain any note of the particular part of the conversation she had with Mr Willoughby which is the subject matter of the Claimant's second claim.

67. I have taken into account that Mr Willoughby's notes are a single page and that a full set of his notes has not been disclosed. That does place a limitation as to the context of the discussion which is recorded.

68. I do not consider Mr Willoughby's notes perfect, and I am open to the possibility that Mr Willoughby may well not have written everything down correctly.

69. In particular there is a note stating "not allowed in chain of custody" but neither witness appears to be able to explain that. Ms Checa-Dover states that she did not say that at all, instead stating that she only referred to the "evidential chain".

70. Mr Willoughby is adamant that his notes and his recollection are correct about that point. Whilst he states that is the case with considerable confidence, I have also taken into account that he may have more confidence in his notes and memory than can be justified. I refer in particular to Mr Willoughby's answers in cross examination to questions concerning paragraph 27 in the ET1 for the second claim, versus his evidence at paragraphs 14 and 15 in his witness statement, versus his contemporaneous notes at page 11 in the bundle of documents. I found this evidence quite inadequate.

71. I have taken into account that although reliant on memory alone, Ms Checa-Dover's account did withstand scrutiny during cross examination.

72. I noted that Mr Willoughby states that he recounted his conversation to his instructing solicitor, the police federation representative and to the Claimant but none of them have appeared to give evidence concerning their account.

73. I noted that Mr Willoughby states that the ET1 in the second claim was drafted by him utilising a more detailed file note that he prepared for his instructing solicitor, which he states was prepared very soon after the meeting, either on the same day or the day after. I note that this has not been produced in evidence.

74. It is unusual given that both Mr Willoughby and Ms Checa-Dover find the prospect of one of them not being believed by me quite serious that the discovery exercise in this case is not as complete as it could have been.

75. I have noted what the Claimant recited in his complaint to the BSB (25 April 2020) and note that there are material differences between that account and what Mr Willoughby states he recited to the Claimant. In the note he refers to the threat of dismissal and the wording he uses around that are at odds with Mr Willoughby's account now but are also at odds with the matters he recited in the ET1 in the second claim (3 March 2020) which was drafted and submitted on the Claimant's behalf before the Claimant's complaint to the BSB.

76. I have noted that in the ET1 to the second claim the Claimant's reference to Ms Checa-Dover having preceded the conversation with the words "I am instructed to seek" does not appear within qutoes.

77. I have noted that in Mr Willoughby's notes on page 11 he has not recorded anything about what Mrs Checa-Dover said about what instructions she had received from the Respondent.

78. I have considered the representations received from both sides concerning the evidence which I heard.

79. Although I have some reservations about the quality and accuracy of the notes which Mr Willoughby made contained at page 11 in the bundle of documents I do conclude that on the balance of probabilities those notes were taken because those comments, or something close to them, were made to him by Ms Checa-Dover and that is why he wrote them down in his note book.

80. I do not accept that on the balance of probabilities Ms Checa-Dover stated that she was "Instructed to" seek findings of adverse credibility. That is not recorded and in the light of my other reservations set out above I do not find that the recollection of Mr Willoughby are sufficient for me to conclude on the balance of probabilities that those words were said at the time they were in that discussion.

81. Having considered the evidence and the submissions from both parties in the round, in my conclusion on the balance of probabilities a conversation took place in which Mrs Checa-Dover said to Mr Willoughby:

a. That she would seek adverse findings as to credibility, that he had lied.

b. That she was careful never to put to a witness that something is a lie when it could be a mistake and that much of what the Claimant alleged was probably his genuine but mistaken perception.
c. However, there were a few matters which he just can't be mistaken about. He's telling the truth or he's lying. If he is found to have lied by a Tribunal, realistically he's not going to be allowed in the evidential chain.
d. That will make the Claimant not operational, if the Police inform the defence that he handled evidence and of that credibility issue.
e. He would therefore be ineffective as a Police Officer.

82. I do not conclude that either Mr Willoughby or Ms Checa-Dover are lying, have lied or are liars. There is no evidence that either of them has lied.

83. In my conclusion they both have an imperfect recollection of what precisely was said between them on 17 January 2020 but in the round it is more likely than not that the conversation contained the comments set out above.

Submissions

84. Both parties have contributed a volume of case law which I will set out below under the heading "The Law" rather than repeat in summarising their core submissions.

Claimant's submissions

85. In addition to his skeleton argument, to which I pay careful regard, the Claimant produced written closing submissions.

86. I am grateful for the reminders set out on the evaluation of disputed evidence and of oral testimony together with the value of contemporaneous notes.

87. The core substantive submission on behalf of the Claimant is as follows:

> *50. The first question is whether what was said was part of "negotiations genuinely aimed at settlement":-*
>
> *(i) if not – the without prejudice rule does not apply at all;*
>
> *(ii) here, the negotiations had ended with a polite 'walk-out' by Mr. Willoughby, who said that terms could not be agreed and red lines could not be crossed:- "It's a red line. It's clear we're not going to settle this, we'll proceed to trial"*
>
> *(iii) his walk-out was interrupted, as he opened the door to leave the room, saying "see you in there", by the words which Ms. Checa-Dover next spoke;*
>
> *(iv) the negotiations had ceased and what followed was not an offer or a further negotiation or invitation to resume. It was not part of "negotiations genuinely aimed at settlement" but "a threat if an offer is not accepted".*

51. The second question only arises if what was said was part of "negotiations genuinely aimed at settlement":-

(i) was it unambiguous? – yes, it was admirably clear, even if being along the lines of "that's a nice career you've got there – it'd be a shame if anything happened to it …";

(ii) did it constitute impropriety? This was not the sort of case in which it could credibly be said that there was a serious chance of Sgt Saeed (or anyone else) being found to be a liar – especially given that Ms. Checa-Dover now accepts that she actually had no intention of making any such suggestion about Sgt Saeed. One of the few stark disputes2 of fact on the pleadings concerned whether Inspector Mick Preston had pointed to his forearm and told the Claimant that he was "more of an ethnic minority" than was the Claimant. There were no other witnesses to that conversation. Even if there was a serious chance of anyone being found to be a liar – it applied equally to both sides, with any consequences applying accordingly;

(iii) the Respondent's position was not to obtain adverse findings on the Claimant's credibility, to question his integrity or to suggest that he would not be considered operational and this was an improper threat to try to bring him back to the negotiating table by make him fear for his career, operational status and position if he continued with his claim;

(iv) Ms. Checa-Dover knew that Mr. Willoughby was duty-bound to report their conversation to his lay client – whatever she now says. She was not telling Mr. Willoughby something which she thought he already knew but (1) which she had no instructions to go through with and (2) had not included within her prepared cross examination;

(v) she knew that the Claimant was – at that moment – at, or returning from attending, a hospital appointment about deterioration of his eyesight and that he said that he suffered from anxiety and depression;

(vi) this threat was not just ill-advised or cruel in the circumstances, it was improper.

52. There is no immunity from suit here. The Darker core immunity only applies to things said in the course of proceedings in a court of justice. The words complained of were said outside the tribunal when it was not sitting. Even if an immunity existed, whilst it might immunise counsel, it would not help her client on whose behalf she was acting.

53. The question set for this preliminary hearing is (correctly) whether actions of counsel for the Respondent on 17th January 2020 "can amount to an act of victimisation" and not whether they did or did not (see §1 of the Order made at the previous PH). The Claimant respectfully submits that the plain answer is that counsel's actions can amount to an act of victimisation. The Respondent has not pleaded either the s.27(3) defence or the assertion that its previous counsel's actions were because of the Claimant's conduct of his first claim. It is unclear whether it will seek permission to amend its responses now but, if they do seek, and are permitted, to amend, these issues will be for a full hearing.

54. The Claimant asks that the two claims be listed to be heard together.

CONCLUSION

55. The Claimant submits that:-

(i) the words spoken on 17th January 2020 by Ms. Olivia Checa-Dover, counsel for the Respondent, to Mr. Adam Willoughby, counsel for the Claimant, were not the subject of the 'without prejudice' privilege whether because negotiations had been terminated by the imposition of 'red lines' and a 'walk-out' or because her words constituted unambiguous impropriety, being at least capable of amounting to an act of victimisation;

(ii) counsel's words spoken in that conversation are not "immune from suit as made in the course of proceedings" (see §3 of the notes to the Case Management Summary from the previous PH) – counsel is not sued and, in any event, the core immunity described in Darker applies to words spoken in a court of justice;

(iii) Ms. Checa-Dover's words "can amount to an act of victimisation" (see §1 of the Order made at the previous PH); and

(iv) the Claimant respectfully asks that the two claims be heard together.

Respondent's submissions

88. I have fully noted the Respondent's submissions as to the background to this matter, their key extracts from the evidence and their summary of the applicable law.

89. The Respondent the submits the following in terms of the application of those submissions in this case:

Without prejudice communications

42. Oral communications made during a dispute between the parties, which are made for the purpose of settling the dispute, and which are expressed or are by implication made 'without prejudice', cannot generally be admitted in evidence.

43. The critical question for the ET as to admissibility is where to draw the line between the public policy of encouraging parties to resolve disputes without litigation, and wrongly preventing one or other party from putting their case at its best in litigation.

44. [Counsel for the Claimant] is his Skeleton Argument at paragraph 22 for C, succinctly and properly outlines the law for the benefit of the ET.

45. This is a balancing exercise for the ET. There can be no doubt that that parties entered the claimant's waiting room for the 'final' discussion for the purpose of continuing negotiations that were genuinely aimed at settlement. That is an agreed fact.

Unambiguous impropriety

46. That leaves the ET with the question of whether or not OCD's actions could amount to unambiguous impropriety as per the case of Unilever plc v Procter & Gamble Co. [2000] 1 WLR 2436 CA at p.2444F. The without prejudice rule will not apply "if the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety"". There is no suggestion in the present case of either perjury or blackmail.

47. C's case is put that OCD threatened or promised to attack a Police Officer's credibility so that he will have to be excluded from the evidential chain and rendered non-operational and thus ineffective as a Police Officer. That is plainly not the case here nor how the evidence played out in the ET.

48. At worst for R, OCD's actions were ambiguous when the evidence is considered in the round, as was that of AW. In addition, there was nothing, even on AW's evidence that could be construed as improper.

49. A finding of unambiguous impropriety as sought by C has profound professional consequences for OCD. It could well spell the end of her career as Barrister and as sitting as a member of the judiciary. The stakes for OCD could not be higher. R submits that OCD's conduct falls far short of anything amounting to unambiguous impropriety and instead, her actions on either party's case were entirely normal in context. As alluded to above in respect of AW's evidence and the concept of brinkmanship, if the ET were to accept AW's version of the conversation between him and OCD, OCD's actions may also be construed as brinkmanship.

50. It is somewhat odd that it does not appear to have dawned on AW the professional consequences potentially both to himself and OCD. At the Preliminary Hearing held on 11 March 2020, AW appeared blissfully unaware that both Counsel would need to withdraw from the present case. The word odd has been carefully selected because it must be the case that experienced Counsel would have known yet appeared not to, that the alleged wrongdoing of fellow Counsel may have profound professional implications for them both.

51. This is not a case where R does not defend the making of a threat to C. Even if the ET were to accept AW's evidence, the comments attributed to OCD may be viewed as a statement of the obvious. The same cannot be construed as a threat. There would obviously be profound consequences for any professional whose integrity is of the upmost importance to his role. OCD knew that, she told the ET that. Furthermore, OCD told the ET as above that an adverse finding as to C's credibility would in fact be problematic to both sides, albeit for different reasons. It flies in the face of common sense and reason that knowing that, she would seek to "threaten or promise to attack" C.

52. It is also submitted that regard should be had to whether or not the observations of OCD were justified. Her evidence has been clear throughout, there were matters of evidence that C simply could not have been mistaken about. OCD was pressed in cross-examination on this point.

She was able to give cogent evidence and a specific example of why she believed that her assertion was correct. She pointed to the dichotomy in evidence between C and PS Patrick.

53. It is submitted that a dangerous precedent would be set if Counsel were not able to speak freely and candidly to one another. It would certainly not accord with the public policy or promoting settlement between the parties.

54. Without prejudice discussions between Counsel commenced on 16 January 2020 with the sole purpose of settling the dispute between the parties. The discussions continued on the morning of 17 January 2020, it was therefore implicit, if not expressed, that such discussions were conducted on a without prejudice basis. Discussion surrounded the litigation risk to both sides and the entirely usual promotion of settlement by trying to find some common ground between the parties so that an amicable settlement could be achieved.

55. It was AW who sought to advance continued settlement discussions on the morning of 17 January 2020 as he had done the day before. "Counsel for the Claimant explained to the Tribunal that the parties had been in settlement discussions and could usefully use the time to continue those discussions. The hearing was adjourned pending the Claimant's return from his appointment." (p.9 para.4).

56. OCD's comments (even on C's own case) may reasonably be interpreted as a statement of the obvious. "This was a conversation between two counsel, whom I thought both would have understood the gravity of a finding that a police officer lied in legal proceedings…" (p.7 para.14).

57. It is a risk for any party to proceedings that an adverse judicial finding may be made. That is, in its' purest form, the risk of litigation. It therefore must follow, that in the event of an individual's integrity being called into question, where integrity of the highest standards is the foremost qualification of that persons professional standing, an adverse judicial finding may have profound professional consequences.

58. Analysis of litigation risk is a key component of any settlement discussion.

59. It is submitted that the material Counsel-to-Counsel discussion between AW and OCD was conducted entirely either expressly or implicitly on a without prejudice basis and is therefore privileged.

Vicarious liability

60. Section 109(2) Equality Act 2010 provides that employers and principals can be held liable for the discriminatory acts of their agents.

61. In Kemeh v Ministry of Defence [2014] EWCA Civ 91, Elias LJ held that liability for an agent's discriminatory acts is governed by common law principles. In utilising the term 'agency' in anti-discrimination legislation, Parliament must have intended that it would have its ordinary common law meaning, rather than being susceptible to some wider interpretation.

62. The Kemah approach was followed in UNITE the Union v Nailard [2018] EWCA Civ 1203 (the Court of Appeal upholding the earlier decision of the EAT at [2016] IRLR 906). Accepting that, as per Elias LJ in Kemeh, s.109(2) Equality Act 2010 would only apply where "the agent discriminates in the course of carrying out the functions he is authorised to do".

63. There is a material difference in the evidence given by AW and OCD in that AW alleges OCD informed him that she was acting on instructions. That is not the case nor is it accepted by R that OCD said that. OCD was not acting on R's instructions; this is confirmed by the evidence of VC. The question must then be considered in the context of OCD's implied authority as Counsel for R.

64. It is trite that Counsel Ms Checa-Dover was engaged under the terms of The Standard Contractual Terms for the Supply of Legal Services by Barristers to Authorised Persons 2012 – (Updated for the GDPR in 2018) as referred to in Rule rC30.9c of the BSB Handbook. Clause 8.1 provides:

"8.1 The Barrister will exercise reasonable skill and care in providing the Services. The Barrister acknowledges the existence of a duty of care owed to the Lay Client at common law, subject to his professional obligations to the Court and under the Code."

65. It cannot be said that OCD was acting with authority either actual or implied in either threatening or promising to attack C's credibility. Indeed, the same defies common sense. There is perhaps no better example of this than C's reliance on the personal support of R by reference to text messages received.

66. In Catholic Child Welfare Society v Various Claimants (FC) [2012] UKSC 56, the Supreme Court held that a religious order was vicariously liable for sexual abuse committed by its brothers while teaching at a school. This was despite the fact that the institute did not manage the school and the brothers were not employees of the institute. The Supreme Court held that there was a two-stage test to imposing vicarious liability. Firstly, whether the relationship between the institute and the teaching brothers was sufficiently akin to that of employer and employee to impose vicarious liability. Secondly, whether the institute had placed the brothers in a position so as to further the institute's own interests which increased the risk of abuse. The court found both aspects of the test satisfied and accordingly imposed vicarious liability on the institute for the brothers' actions.

67. OCD was not instructed by R to seek adverse findings as to C's credibility. "…I must be clear - I was not told to say this by anyone. I never told Mr. Willoughby that I was acting on instruction because I wasn't." (p.7 para.14).

68. VC states "I did not instruct Ms Checa-Dover to obtain adverse findings on the Claimant's credibility, question his integrity or suggest that he would not be considered operational." (p.9 para.5).

69. Ms Checa-Dover was acting in accordance with regulatory framework, her duty to both her professional and lay clients and the ET. Within that framework, she was in business on her own account. However, she was not instructed by WYP to seek adverse findings in respect of C's credibility that may have a profound adverse impact on his ability to perform his duties as a Police Sergeant. It cannot be said that either the relationship between Ms Checa-Dover and WYP or her acting of her own volition satisfies the two-stage test outlined in Catholic Child Welfare Society.

70. As per the dicta of Lady Hale in Barclays Bank Plc v Various Claimants [2020] UKSC 13:

"Two elements have to be shown before one person can be made vicariously liable for the torts committed by another. The first is a relationship between the two persons which makes it proper for the law to make the one pay for the fault of the other. Historically, and leaving aside relationships such as agency and partnership, that was limited to the relationship between employer and employee, but that has now been somewhat broadened. That is the subject matter of this case. The second is the connection between that relationship and the tortfeasor's wrongdoing. Historically, the tort had to be committed in the course or within the scope of the tortfeasor's employment, but that too has now been somewhat broadened. That is the subject matter of the Morrison's [[2020] UKSC 12, [2020] IRLR 472] case."

71. As to what is to be taken from common law vicarious liability cases, Lady Hale warned in Barclays Bank Plc at [29]:

"Until these recent developments it was largely assumed that a person would be an employee for all purposes – employment law, tax, social security and vicarious liability. Recent developments have broken that link, which may be of benefit to people harmed by the torts of those working in the "gig" economy. It would be tempting to align the law of vicarious liability with employment law in a different way….. But it would be going too far down the road to tidiness for this court to align the common law concept of vicarious liability, developed for one set of reasons, with the statutory concept of "worker" developed for quite a different set of reasons."

72. The Court of Appeal applied the test laid down in Catholic Child Welfare Society and considered that the structures of the workplace were such that many operations intrinsic to a business will routinely be performed by independent contractors, for whom vicarious liability can be imposed where it is 'fair, just and reasonable' so to do. Overturning that decision and finding no vicarious liability, the Supreme Court considered that the doctor carrying out the assessments on behalf of the bank was doing so in the context of carrying on business on his own account as a medical practitioner with a portfolio of clients, one of whom was the bank. Prima facie, that is squarely analogous to the relationship between OCD and R.

73. In WM Morrison Supermarkets plc v Various Claimants [2020] UKSC 12, the Supreme Court concluded that the supermarket chain Morrisons, should not be held responsible for the actions of a disgruntled employee who wrongfully and purposely uploaded the personal data of almost

100,000 other employees on a publicly accessible file sharing website. The decision focussed on the fact that at time of the disclosure the employee had been carrying out a personal vendetta against Morrisons and was not engaged in furthering the course of the company's business. The decision in Morrisons could be seen as being at odds with earlier decisions. The SC considered that the disgruntled Morrisons employee was going beyond his authorised activities (which included passing payroll data to external auditors) such that he was pursuing a personal vendetta and was not engaged in Morrisons' business.

74. If the ET were minded to make a finding of unambiguous impropriety against OCD, it must therefore follow that R cannot be held responsible for her actions.

75. The conduct of OCD complained of, on any reasonable interpretation, was not because of C's protected act. Her comments relate to the manner in which C was pursuing his claims.

76. C is not protected under the provisions of s.27 Equality Act 2010 if the detriment is due to the manner of performing the protected act rather than the protected act itself as in the case of HM Prison Service v Ibimidun UKEAT/07/DA.

77. In Ibimidun, the dismissal of the employee was found to have related not to his bringing of tribunal proceedings complaining of race discrimination but to the way in which he pursued those proceedings, including unreasonable allegations, with a view to harassing his employer to settlement. As the reason for the dismissal was the manner of performing the protected act rather than the protected act itself, this did not amount to victimisation. Such an approach is consistent with the 'reason why' test laid down by the House of Lords in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285.

78. In the case of Bird v Sylvester [2008] IRLR 232, the claimant sought to pursue a victimisation claim against both her employer and her employer's solicitor in respect of their conduct of earlier proceedings. The claim against the solicitor, Mr Sylvester, alleged that the solicitor had aided the employer's unlawful discrimination in writing a costs' warning letter and then making (ultimately unsuccessfully) an application for costs. The victimisation claim was, however, struck out, with the Court of Appeal warning that it would be "…very difficult to see how a solicitor who confines himself to giving objective legal advice in good faith as to the proper protection of his client's interests, and acts strictly upon his client's instructions, could be at risk of an adverse finding".

79. There is no case law of which I am aware that specifically relates to Counsel and whether or not Courts and Tribunals have been willing to pierce the veil of vicarious liability. DB suggests it would be absurd if "barristers do not fall within the scope of s.109(2) and (3) EQA 2010..". Respectfully, I disagree. The ET is bound by the principles of agency in common law for the purposes of which, the ET has been directed in particular to the cases of Kenmah and Barclays Bank. Those principles apply equally whether considered in the context of Barristers, Solicitors, Doctors or any other professional advisors.

ET APPROACH

80. The Employment Tribunal (ET) will need to determine:

i. The content of the material discussion between Ms Olivia Checa-Dover (Counsel for WYP) and Mr Adam Willoughby (Counsel for C);

ii. Whether or not the entire discussion in question is subject to privilege; and

iii. If not, at what point did without prejudice discussions between Counsel cease.

81. If the ET determines that the discussion between Counsel on 17 January 2020 was conducted on a without prejudice basis either expressly or implicitly and are therefore privileged, C's claim for victimisation fails. The ET is respectfully encouraged to consider this element of the case of the outset.

82. If the ET address the question of AW's proverbial 'red line' and whether or not it was open to R to believe the without prejudice discussions were continuing, then the ET can largely dispense with the need to forensically analyse the evidence given by AW and OCD. The final conversation was privileged unless the ET is satisfied that on AW's evidence, OCD is guilty of inambiguous impropriety. R submits again that even on AW's own evidence, OCD's conduct falls far short of this mark.

83. However, if the ET considers that the material aspect of the discussions that took place between Counsel on 17 January 2020 were not privileged, the ET will be required to consider to what extent R may be vicariously liable for the alleged actions and conduct of OCD. For the reasons outlined above, R is not liable for the actions or conduct of OCD.

CASE MANAGEMENT (GENERAL)

84. The final matter to be addressed in the issue of general case management and the consolidation of C's claims against R.

85. R objects to the consolidation of claims. C's original claim is prepared and ready for hearing subject to alternative Counsel being instructed by the parties. The present claim raises different issues including further preliminary matters as to whether or not C was in fact a disabled person at the relevant time within the meaning of s.6 EQA 2010. Further, there will be different witness evidence required and a requirement for expert evidence on the question of C's alleged injuries.

86. For these reasons, R requests that the first claim be listed as soon as possible to be heard. A hearing length of 9 days is required. Further, the present claim be listed for a further Preliminary Hearing in accordance with the overriding objective to ensure the proper and effective case management of this claim to enable justice to prevail.

The Law

Without prejudice

90. Learned Counsel for the Claimant puts the law concerning the without prejudice rule as follows.

> *22. In his speech in the Judicial Committee of the House of Lords at p.1299D of Rush & Tomkins v GLC [1989] AC 1280, Lord Griffiths said this about the rule:-*
>
> *“The "without prejudice" rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver LJ in Cutts v Head [1984] Ch. 290, 306:*
>
> *"That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should … be encouraged fully and frankly to put their cards on the table.... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability."*
>
> *The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence "without prejudice" to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase "without prejudice" and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission. I cannot therefore agree with the Court of Appeal that the problem in the present case should be resolved by a linguistic approach to the meaning of the phrase "without prejudice." I believe that the question has to be looked at more broadly and resolved by balancing two different public interests namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation.*
>
> *…*
>
> *The court will not permit the phrase to be used to … to suppress a threat if an offer is not accepted: see Kitcat v. Sharp (1882) 48 L.T. 64.” [emphasis added]*
>
> *…*

Even if the tribunal were of the view that Ms. Checa-Dover's words were part of "negotiations genuinely aimed at settlement", the without prejudice rule will not apply "if the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety"" (Unilever plc v Procter & Gamble Co. [2000] 1 WLR 2436, CA, at p.2444F)."

91. Counsel for the Respondent puts the legal position as follows.

8. Oral communications made during a dispute between the parties, which are made for the purpose of settling the dispute, and which are expressed or are by implication made 'without prejudice', cannot generally be admitted in evidence.

9. The critical question for the ET as to admissibility is where to draw the line between the public policy of encouraging parties to resolve disputes without litigation, and wrongly preventing one or other party from putting their case at its best in litigation.

…

13. It is a risk for any party to proceedings that an adverse judicial finding may be made. That is, in its' purest form, the risk of litigation. It therefore must follow, that in the event of an individual's integrity being called into question, where integrity of the highest standards is the foremost qualification of that persons professional standing, an adverse judicial finding may have profound professional consequences.

Judicial proceedings immunity

92. Learned Counsel for the Claimant puts the law concerning judicial proceedings immunity as follows.

27. It is assumed that the issue referred to at §3 of the notes to the tribunal's Case Management Summary – concerning whether "things said in the circumstances are … immune from suit as made in the course of proceedings" is a reference to the concept of judicial proceedings immunity ("JPI") .

28. The JPI principle was described as "the core immunity" at the start of the speech of Lord Hope of Craighead in Darker v Chief Constable of the West Midlands Police [2001] 1 AC 435, HL, at 445H – 446C:-

"My Lords, when a police officer comes to court to give evidence he has the benefit of an absolute immunity. This immunity, which is 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 proceeding in a court of justice. The same immunity is given to the parties,

their advocates, jurors and the judge. They are all immune from any action that may be brought against them on the ground that things said or done by them in the ordinary course of the proceedings were said or done falsely and maliciously and without reasonable and probable cause: Dawkins v Lord Rokeby (1873) LR 8 QB 255, 264, per Kelly CB. The immunity extends also to claims made against witnesses for things said or done by them in the ordinary course of such proceedings on the ground of negligence.

No challenge is made in this case to what may conveniently be described as the core immunity." [emphasis added]

29. In order for the words spoken to the protected by JPI, must be spoken in a "court of justice". Even then, there are limits barristers and solicitors can be sued for what they negligently say in court (Hall v Simons), as can expert witnesses (see Jones v Kaney [2011] 2 AC 398, UKSC).

30. Beyond the potential risks of a negligence claim, a barrister is not entirely free to say what she pleases, even before a court or tribunal. She may be subject to public criticism by the court or tribunal. He may be made the subject of a wasted costs order or reported by the court or tribunal, or by others, to the Bar Standards Board.

31. JPI does not cover that which is said other than in the course of proceedings – including, potentially, in the statements of case (or 'pleadings'). It does not cover what is said during settlement negotiations which may be 'at the door of the court', the day before the hearing, or indeed many months before any hearing is even listed."

93. Counsel for the Respondent does not engage with "judicial proceedings immunity" in the skeleton argument or in the written submissions which I have received.

Whether the words spoken by counsel can amount to an act of victimisation

94. Counsel for the Claimant puts this issue into its legal context as follows.

32. S.109 of the Equality Act 2010 provides:-

"Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(a) from doing that thing, or

(b) from doing anything of that description. …" [emphasis added]

33. The principal will be liable wherever the agent discriminates in the course of carrying out the functions he is authorised to do, whether the acts in question were specifically authorised or not – see §19 of the judgment of Underhill LJ, with whom Moylan LJ agreed, in Unite the Union v Nailard [2019] ICR 28, CA.

34. Counsel instructed to appear at hearings are clothed with the authority to conduct their clients' case at that hearing as well as to conduct negotiations outside the hearing.

35. There is never any need to enquire whether counsel has authority make any submissions, cross examine any witness, or to seek to settle the claim in negotiation with her opponent. That is why barristers will often say, "I haven't any instructions on [x/y/z] but [a/b/c]". They say that because, otherwise, they will be taken to be saying a/b/c on behalf of their client.

36. "All persons including minors and other persons with limited or no capacity to contract on their own behalf, but excluding the profoundly insane, are competent to act or contract as agents" – see §2-011 of Bowstead & Reynolds on Agency (21st Ed).

37. The Respondent is a corporation sole and, while he could, in theory, attend the tribunal in person and conduct his own case and negotiate with a claimant officer, he will invariably do so through others.

38. §2-001 of Bowstead & Reynolds says this about how agency works:-

"(1) The relationship of principal and agent may be constituted—

(a) by the conferring of authority by the principal on the agent, which may be express, or implied from the conduct or situation of the parties1;

(b) retrospectively, by subsequent ratification by the principal of acts done on his behalf.

(2) A person may be liable under the doctrine of apparent authority in respect of another who is not his agent at all; or may be estopped as against a third party from denying the existence of an agency relationship."

39. There need not be any contract between principal and agent. Any contract may well be silent on the question of agency especially, as with lawyers, where the whole point of the contract is to provide for the lawyer to act on behalf of the litigation.

40. When counsel acting for a client at a hearing approaches her opponent in order to discuss settlement, she is doing so with at least the implied authority of her client. Her opponent need not ask (and invariably will not ask) whether she is doing so with the instructions of her client. Sometimes, if a barrister wishes to 'sound out' his opponent in relation to settlement, then he may approach her and say that he is "speaking without instructions but, would

your client be interested in [x] if I were able to get my client's instructions to offer it?"

…

95. Counsel for the Respondent puts the position as follows:

Vicarious liability

19. Section 109(2) Equality Act 2010 provides that employers and principals can be held liable for the discriminatory acts of their agents.

20. In Kemeh v Ministry of Defence [2014] EWCA Civ 91, Elias LJ held that liability for an agent's discriminatory acts is governed by common law principles. In utilising the term 'agency' in anti-discrimination legislation, Parliament must have intended that it would have its ordinary common law meaning, rather than being susceptible to some wider interpretation.

21. The Kemah approach was followed in UNITE the Union v Nailard [2018] EWCA Civ 1203 (the Court of Appeal upholding the earlier decision of the EAT at [2016] IRLR 906). Accepting that, as per Elias LJ in Kemeh, s.109(2) Equality Act 2010 would only apply where "the agent discriminates in the course of carrying out the functions he is authorised to do".

22. In Catholic Child Welfare Society v Various Claimants (FC) [2012] UKSC 56, the Supreme Court held that a religious order was vicariously liable for sexual abuse committed by its brothers while teaching at a school. This was despite the fact that the institute did not manage the school and the brothers were not employees of the institute. The Supreme Court held that there was a two-stage test to imposing vicarious liability. Firstly, whether the relationship between the institute and the teaching brothers was sufficiently akin to that of employer and employee to impose vicarious liability. Secondly, whether the institute had placed the brothers in a position so as to further the institute's own interests which increased the risk of abuse. The court found both aspects of the test satisfied and accordingly imposed vicarious liability on the institute for the brothers' actions.

23. Ms Checa-Dover was acting in accordance with regulatory framework, her duty to both her professional and lay clients and the ET. Within that framework, she was in business on her own account. However, she was not instructed by WYP to seek adverse findings in respect of C's credibility that may have a profound adverse impact on his ability to perform his duties as a Police Sergeant. It cannot be said that either the relationship between Ms Checa-Dover and WYP or her acting of her own volition satisfies the two-stage test outlined in Catholic Child Welfare Society.

24. As per the dicta of Lady Hale in Barclays Bank Plc v Various Claimants [2020] UKSC 13:

"Two elements have to be shown before one person can be made vicariously liable for the torts committed by another. The first is a relationship between the two persons which makes it proper for the law to make the one pay for the fault of the other. Historically, and leaving aside relationships such as agency and partnership, that was limited to the

relationship between employer and employee, but that has now been somewhat broadened. That is the subject matter of this case. The second is the connection between that relationship and the tortfeasor's wrongdoing. Historically, the tort had to be committed in the course or within the scope of the tortfeasor's employment, but that too has now been somewhat broadened. That is the subject matter of the Morrison's [[2020] UKSC 12, [2020] IRLR 472] case."

25. As to what is to be taken from common law vicarious liability cases, Lady Hale warned in Barclays Bank Plc at [29]:

"Until these recent developments it was largely assumed that a person would be an employee for all purposes – employment law, tax, social security and vicarious liability. Recent developments have broken that link, which may be of benefit to people harmed by the torts of those working in the "gig" economy. It would be tempting to align the law of vicarious liability with employment law in a different way….. But it would be going too far down the road to tidiness for this court to align the common law concept of vicarious liability, developed for one set of reasons, with the statutory concept of "worker" developed for quite a different set of reasons."

26. The Court of Appeal applied the test laid down in Catholic Child Welfare Society and considered that the structures of the workplace were such that many operations intrinsic to a business will routinely be performed by independent contractors, for whom vicarious liability can be imposed where it is 'fair, just and reasonable' so to do. Overturning that decision and finding no vicarious liability, the Supreme Court considered that the doctor carrying out the assessments on behalf of the bank was doing so in the context of carrying on business on his own account as a medical practitioner with a portfolio of clients, one of whom was the bank. Prima facie, that is akin to the relationship between Ms Checa-Dover and WYP.

Causation

27. The conduct of Ms Checa-Dover complained of was not because of C's protected act. Her comments (on any reasonable interpretation) relate to the manner in which C was pursuing his claims.

28. C is not protected under the provisions of s.27 Equality Act 2010 if the detriment is due to the manner of performing the protected act rather than the protected act itself as in the case of HM Prison Service v Ibimidun UKEAT/07/DA.

29. In Ibimidun, the dismissal of the employee was found to have related not to his bringing of tribunal proceedings complaining of race discrimination but to the way in which he pursued those proceedings, including unreasonable allegations, with a view to harassing his employer to settlement. As the reason for the dismissal was the manner of performing the protected act rather than the protected act itself, this did not amount to victimisation. Such an approach is consistent with the 'reason why' test laid down by the House of Lords in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285.

30. In the case of Bird v Sylvester [2008] IRLR 232, the claimant sought to pursue a victimisation claim against both her employer and her employer's solicitor in respect of their conduct of earlier proceedings. The claim against the solicitor, Mr Sylvester, alleged that the solicitor had aided the employer's unlawful discrimination in writing a costs' warning letter and then making (ultimately unsuccessfully) an application for costs. The victimisation claim was, however, struck out, with the Court of Appeal warning that it would be

"…very difficult to see how a solicitor who confines himself to giving objective legal advice in good faith as to the proper protection of his client's interests, and acts strictly upon his client's instructions, could be at risk of an adverse finding".

Conclusions

What was the content of the relevant discussion between Mr Willoughby and Ms Checa-Dover on 17 January 2020?

96. As set out in my findings of fact, in my conclusion on the balance of probabilities a conversation took place in which Mrs Checa-Dover said to Mr Willoughby:

a. That she would seek adverse findings as to credibility, that he had lied.
b. That she was careful never to put to a witness that something is a lie when it could be a mistake and that much of what the Claimant alleged was probably his genuine but mistaken perception.
c. However, there were a few matters which he just can't be mistaken about. He's telling the truth or he's lying. If he is found to have lied by a Tribunal, realistically he's not going to be allowed in the evidential chain.
d. That will make the Claimant not operational, if the Police inform the defence that he handled evidence and of that credibility issue.
e. He would therefore be ineffective as a Police Officer.

Was that conversation part of a without prejudice conversation?

97. I find Mr Willoughby's evidence that without prejudice discussions had concluded, and therefore that nothing which followed were part of without prejudice discussions, quite absurd.

98. He states that through saying to Ms Checa-Dover that "It's a red line, It's clear we're not going to settle this, we'll proceed to trial, see you in in there" he left Ms Checa-Dover in no doubt at all that without prejudice discussions were at an end.

99. That from his perspective without prejudice discussions were concluded may well have been his true feelings at the time and he was entitled to hold them.

100. However, his belief that he may unilaterally conclude without prejudice discussions is mistaken. Who really has the last word? A party to litigation may make representations without prejudice at any time and whether or not the other party has stated they consider the without prejudice discussions to be at an end (which I note Mr Willoughby had not expressly done so, rather he had expressed and opinion as to the likelihood of a deal at that point in time).

101. Without prejudice communications frequently arrive unsolicited and in circumstances where they were never sought in the first place. There is nothing to stop a party, in principle, seeking and continuing to seek settlement of an issue with another party who does not share that ambition or desire.

102. Mr Willoughby says it was clear that the discussions were at an end because of what he said and because he was walking out of the door. However, he returned to the table at which Ms Checa-Dover was sitting. Why? If the without prejudice discussions were at an end, as he suggests, why did he act contrary to that position by returning to sit with her? He does not suggest that he clarified with Ms Checa-Dover whether or not what followed in their discussions was on or off record, or was part of their settlement discussions as opposed to preparation for the beginning of the hearing. Why does he not state to her that he is no longer talking off record in without prejudice discussions and everything that follows is on record and not without prejudice? It would be forgiving to suggest that Mr Willoughby was acting upon assumptions. However his interpretation of event in retrospect is in my conclusion significantly wanting.

103. In my conclusion the situation concerning the "clear" end of without prejudice discussions may well have been within his thoughts but they would not have been clear to anyone else based upon his actions.

104. Mr Willoughby and Ms Checa-Dover were in that room to discuss settlement of this case on a without prejudice basis.

105. They did so. The Claimant's position that Mr Willoughby had concluded the without prejudice discussions earlier than the discussion which is the subject matter of this dispute is not well founded.

Was the conversation genuinely aimed at settlement?

106. Mr Willoughby has accepted in evidence that the point that Mrs Checa-Dover made to him was a risk to the Claimant in litigation.

107. It is normal in without prejudice discussions to discuss litigation risk.

108. When pressed on this point Mr Willoughby states that it is the way in which this was presented as a fait accompli that he objects to.

109. Mr Willoughby appears to have brought the discussion to its peak at that point, concluding with "see you in there".

110. A retort which was brief and missed some interim procedural points does not in my mind seem in any way incompatible with the principles of a discussion genuinely aimed at settlement.

111. Mr Willoughby's evidence is that he was at that point walking out of the door. A brief worst-case expression does not appear out of the ambit of how these discussions might progress.

112. Mr Willoughby did choose to turn around and sit back at the table and listen to what Ms Checa-Dover had to say.

113. He appears not to have been equipped to answer Ms Checa-Dover's assertion that the Claimant would not be operational or effective. This is a matter he recorded as something he needed to "(check)". Had he been so equipped, the discussion may well have not concluded in being interpreted as the fait accompli that he complains about. Part of the fiat accompli is that he was unable to robustly put the matter into its true procedural place.

114. Ms Checa-Dover did distinguish between accusing someone of lying and putting to them matters about which they must be mistaken, and the care she would take. It would nonetheless be a litigation risk that a tribunal might, possibly, listen to the evidence and find something stronger in term of the conflict upon the evidence.

115. I take into account that they may have made findings about the Respondent's witnesses as to the strength of their evidence or indeed their credibility.

116. Finally, noting the importance of contemporaneous notes, I highlight how Mr Willoughby noted the matter the matter at the time. His note records "(??) – tactic to force US?".

117. These discussions were nothing more than that; tactical discussions concerning litigation risks.

118. They were pointing out litigation risks, albeit at an extreme edge but nonetheless accepted to be real risks, genuinely aimed at settlement.

Were Ms Checa-Dover's comments an unambiguous impropriety or a threat?

119. In my conclusion the exception to privilege which arises in consequence of an unambiguous impropriety is not engaged on the facts of this case.

120. I consider the exception to be somewhat a high watermark.

121. The public interest in the without prejudice rule is very great, to be sacrificed in truly exceptional and needy circumstances only.

122. Ms Checa-Dover's position, however blunt or robust, could not be described as improper in the sense that it may lead to perjury. She made a point which Mr Willoughby concedes was a litigation risk to the Claimant.

123. It is not an abuse of the privilege to tell the truth. Ms Checa-Dover could not be accused of having said anything other than what was the truth; that the Claimant risked adverse credibility findings in the litigation, that he had lied.

124. The merit of that assertion is a matter that Mr Willoughby could, as experienced counsel for the Claimant, have well handled. But he appears to have countered it only to note that it was a point he should "(check)".

125. I doubt that counsel experienced in handling the point Ms Checa-Dover made would have left that conversation with such interpretation of what she was saying because they would have been capable of placing an argument put "at its height" or describing a "worst-case" in its realistic and balanced place.

126. ***Savings and Investment Bank Ltd v Fincken - [2004] 1 All ER 1125*** applied.

127. I do not consider that what Ms Checa-Dover said to the Claimant was a threat. She stated, as was recorded by Mr Willoughby in his notes, that that she would "seek" adverse finding as to credibility and that the Claimant had lied.

128. Ms Checa-Dover did not make a statement that the Claimant would be hurt or harmed in not settling the litigation. She simply stated what she would, through her cross examination, seek.

129. The comment is no different to the comment Mr Willoughby made earlier in the discussions to Ms Checa-Dover, that if the matter were not settled then the Claimant would bring a claim of disability discrimination against the Respondent.

130. That is similarly not a threat because it is not a statement that the Respondent will be hurt or harmed in not settling the litigation. It is not a statement that the Respondent "will be" hurt or harmed, it is simply a statement that a claim may be made which could possibly have that outcome.

131. I heard references in cross examination and in written submissions to "mafia threats". But a statement of what might happen in one's ordinary recourse to legal proceedings is simply not, by any measure, akin to a "mafia threat".

132. One of the cases referred to me by the parties (***Unilever***), although the paragraph is not quoted by them, appears to me apt to mention at this point. "At a meeting of that sort the discussions between the parties' representatives may contain a mixture of admissions and half-admissions against a party's interest, more or less confident assertions of a party's case, offers, counter-offers, and statements (which might be characterised as threats or as thinking aloud) about future plans and possibilities."

133. In my conclusion Ms Checa-Dover's comments to Mr Willoughby on 17 January 2020 were neither an unambiguous impropriety nor a threat.

Judicial proceedings immunity

134. I concur with the submissions of the Claimant's Learned Counsel that judicial proceedings immunity is not engaged because the relevant conversation between Ms Checa-Dover and Mr Willoughby were said outside the tribunal. That would not prevent the Claimant raising the matters if the Claimant was not already prevented from raising the matters due to the them being legally privileged under the without prejudice rule.

135. I note that the Respondent has not specifically disputed the Claimant's submissions on this point.

Can words spoken by Counsel amount to victimisation by the Respondent?

136. I concur with the submissions of the Claimant's Learned Counsel that they may amount to victimisation in certain circumstances and that the law of agency may or may not provide an escape for Counsel's instructing party. That would be a matter to proceed to a full hearing, if the Claimant was not prevented from raising

the matters due to the them being legally privileged under the without prejudice rule.

The impact of my conclusions on the Claimant's second claim

137. The conversation between Mr Willoughby and Ms Checa-Dover cannot be relied upon by the Claimant to claim that he was victimised contrary to Section 27 of the Equality Act 2010.

138. The Claimant' claim of victimisation under the second claim is for that reason not well founded and fails.

139. The remainder of the Claimant's claims under the second claim, discrimination related to his protected characteristic of disability, are not affected by this preliminary judgment; they shall proceed.

140. Those remaining claims under the second claim should be consolidated with the first claim and I order that these claims are consolidated.

141. I have read the representations of both parties as to the benefits and risks of consolidation but in the round given that the Claimant is describing an ongoing employment history consolidating the claims would mean that the context of the Claimant's considerable employment record does not have to be examined twice.

Employment Judge Knowles

Date 2 March 2021