Neutral Citation Number: [2005] EWHC 481 (QB)

Case No: HQ 04X01347

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 March 2005

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

- -

Between :

KEITH CROSSLAND	**Claimant**
- and -	
WILKINSON HARDWARE STORES LTD	**Defendant**

- -
- -

The Claimant in person
Alexandra Marzec (instructed by Browne Jacobson **LLP**) for the Defendant

Hearing dates: 23rd & 24th February 2005

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE TUGENDHAT

Mr Justice Tugendhat :

INTRODUCTION

1. The Defendant carries on business selling hardware through numerous large stores. The Claimant was employed by them as a store manager from 2 March 1999 to 26 September 2003. From 6 December 1999 he was Store Manager at the Abergavenny Branch.

2. He made an application to the Employment Tribunal dated 26 November 2003 complaining of breach of contract and unfair dismissal by the Defendant. The details of the complaint he recorded on that form were:

> "I was forced to sign a compromise agreement, and left the company on 26-9-03. Last January 03 I lodged a grievance against my regional manager after receiving an unjustifiable letter about my work that was based on a flawed investigation. After stage one of the grievance procedure I was suspended for more than 2 months on the back of an investigation that was flawed, malicious, reckless and exaggerated. Finally all charges were dropped but I was further harassed, and undermined. On 1st Sept 03 it was implied that if I did not sign the mutual agreement and leave I would be dismissed. When I left in Sept 03 only stage one of three stages of the grievance procedure had been heard. The company in pursuit of my dismissal broke numerous policies and procedures, made up false accusations, exaggerated other evidence, undermined my position, until they finally got their dismissal".

3. On 2 February 2004 that application was struck out. In giving his decision the Chairman of the tribunal noted that the Claimant had received independent advice, that he had received a consideration of £1,788.56 in lieu of notice and £16,800 by way of ex gratia payment. He held that there was no undue influence or duress. In a review decision dated 5 July 2004, after hearing evidence, he held that the document had been properly signed and repeated the finding on duress and undue influence made on 2 February.

4. Meanwhile on 1 March 2004 the Claimant issued a claim form in these proceedings. He alleges the Defendant is first, vicariously liable for the actions of certain employees in defaming him from 1st March 2003 onwards and, second, "under the tort of employer liability Wilkinsons have a duty to protect its employees from harassment, bullying and/or victimisation. The Defendant failed in that duty". A one page Particulars of Claim was dated the same day. New particulars were submitted on 2 April 2004. On 1 July 2004 those were struck out by order of Gray J. He gave permission to serve substitute particulars within 21 days, and the Claimant was ordered to pay £7,132.50 in respect of costs. He has said that he is unable to pay this sum. The particulars before me now are the Re-re-re-Amended version. They are dated 21 January 2005 and run to 15 pages single spaced. The Defence was served on 7 October 2005. The Claimant has also issued proceedings against the Defendant under the Data Protection Act 1998. I am not concerned with those proceedings.

THE APPLICATIONS AND THE ACTION

5. There are before me a number of applications:

   i) by notice dated 20 January 2005 under CPR Part 24 for summary judgment in favour of the Defendant on the Claimant's claims for libel and slander, alternatively that those claims be struck out, on the grounds that (a) in relation to some of the publications, he has no real prospect of proving publication, and, (b) in relation to others, the defences of qualified privilege and/or consent are bound to succeed;

   ii) by notice dated 20 January 2005 under CPR Part 24 for summary judgment in favour of the Defendant on the Claimant's claims for damages for malicious falsehood, alternatively that those claims be struck out on the grounds that he has no real prospect of proving malice against the publishers of the alleged malicious falsehood, and/or that the defences of consent and/or limitation are bound to succeed;

   iii) by notice dated 20 January 2005 under CPR Part 24 for summary judgment in favour of the Defendant on the Claimant's claim for damages for harassment, alternatively that that claim be struck out, on the grounds that he has disclosed no cause of action in harassment and/or he has no real prospect of proving that the individuals alleged to have harassed him did in fact pursue a course of conduct which amounted to harassment;

   iv) at the hearing (with my permission given without opposition from the Claimant), a new ground for striking out under CPR Part 3.4 and to support the summary judgment application under CPR Part 24 in relation to the malicious falsehood, namely that there is no arguable basis for the allegation that the publications of the words complained of were calculated to cause pecuniary loss to the Claimant;

   v) at the hearing (with my permission given without opposition from the Claimant), that this action is an abuse of process and should be struck out under CPR Part 3.4 on the basis of the decision of the Court of Appeal on 3 Februrary 2005 in *Dow Jones v Jameel* [2005] EWCA Civ 75.

   vi) By notice dated 4 February 2005, to amend the Defence.

6. The libel and malicious falsehood claims are for the most part based on words set out in a document called the Abergavenny Store Review ("ASR"). This is a document dated 6 March 2003, written by two managers of the Defendant, Mr Myers and Mr O'Reilly, and published by them to a third manager of the Defendant, Mr Yeates. As its title suggests, the ASR was a review of the workings of the store by management of the Defendant. Other publishees alleged are a Mr Gaskell, the Claimant's union representative at a meeting on 20 March 2003, a publication by Mr Yeates to another manager of the Defendant, Mr Bankes, and other managers of the Defendant, Ms Revuelta, Mr Hood, Ms Pearson, Ms Swan and Mr Glover. The Claimant does not dispute that the occasions of these publications were all ones of qualified privilege for

the purposes of the libel claim. Thus the claims in libel and malicious falsehood can succeed only on proof of malice.

7. The claims in slander are in respect of words allegedly spoken at meetings on 13 and 20 March 2003 by Mr Yeates. The publishees are Mr Gaskell again, and a Mr Hyde (Manager of Kidderminster) and a Mr Begyinah (Manager at Stourbridge) who was each present at one of the meetings (which were part of the company grievance procedure) at the request of the Claimant in the role of witnesses. The discussion at the meeting was the ASR and complaints received by the Defendant from members of staff at the store. Again it is accepted that the occasion was one of qualified privilege, so that the claim can succeed only proof of malice.

8. The claim in harassment relates to substantially the same events. Allegations are made against:

   i) Mr Yeates, in relation to his conduct of the grievance procedure and the suspension of the Claimant and the appointment of other staff

   ii) Mr Dawson, on a similar basis to Mr Yeates

   iii) Mr Myers and Mr O'Reilly, for writing the ASR and publishing it to Mr Yeates

   iv) The Managing Director, for not passing on to the Claimant congratulations from a customer dated 15 May 2003

   v) Mr Bankes, for his role in the grievance procedure, and for the use of exaggerated grievances "to harass the Claimant to sign a compromise agreement";

   vi) Ms Revuelta, for her role in the handling of grievances against and by the Claimant.

CPR PART 24

9. Ms Marzec for the Defendants submits that in the absence of any application for trial by jury, the court should approach the application under CPR Part 24 as follows. No application has been made for trial by jury, and for reasons that will become apparent, there would have been little prospect of it succeeding if it had been made. There are too many documents in this case that would require prolonged examination which could not be conveniently carried out with a jury. I accept that the correct approach to this case is under CPR Part 24.2, which provides.

> "The court may give summary judgment against a Claimant …
> on the whole of the claim or on a particular issue if-
>
> (a) it considers that
>
> (i) the claimant has no real prospect of succeeding on the claim
> or issue; …

> (b) there is no other compelling reason why the case or issue should be disposed of at trial".

10. What these words mean was stated in *Swain v Hillman* [2001] 1 All ER 91, 92 and 94-5, where Lord Woolf MR said (with approval of the House of Lords in *Three Rivers DC vBank of England (No 3)* [2003] 2 AC 1 at p260 Lord Hope of Craighead):

> "Under r 24.2, the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words 'no real prospect of being successful or succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, …, they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success….
>
> It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objectives contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and, I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know this as soon as possible ... Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. …, the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily." "

11. In *Three Rivers* Lord Hope said this:

> "94 For the reasons which I have just given, I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is--what is to be the scope of that inquiry?
>
> 95 I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where

> the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment."

12. In *S v Newham LBC* [1998] EMLR 583 the Court of Appeal was concerned with a libel action against a local authority by a former employee. At p593 Lord Woolf MR said this:

> "Situations where the necessary malice can be established are likely to be rare. Mr Shaw recognised the force of this, but contends that the Authority is not concerned so much with the risk of an action succeeding, but with the expense and hassle which it will be caused by an action even when the action is unsuccessful. Today this danger can and should be substantially reduced by court management of litigation. Where it appears doubtful that a plaintiff is going to be able to satisfy the onus which is upon him to prove malice, the court, mindful of the position of the defendant, should be prepared to require the plaintiff to deliver witness statements at an early stage of the proceedings so that the court can form an assessment as to whether the plaintiff has any prospect of successfully establishing malice. If the court is satisfied that the plaintiff has no prospect of success and is also satisfied there is no other reason why the action should be allowed to proceed then the action should be dismissed."

13. The Claimant has submitted witness statements, which also include submissions for the hearing before me. I have read these. I have also read the witness statements of the individuals' whose conduct is complained of in the action. I have done this not for the purpose of deciding whether they are true or not. I could not do that on this procedure. I have looked at them to see if there is anything in them which might support the Claimant's case, or from which he might expect to obtain something to his advantage in cross-examination. Ms Marzec also took me through a number of documents which include, or form the context for, the words complained of in this action. All of these are materials upon which I can decide whether the Claimant has a real prospect of success.

14. CPR Part 1.1(1) provides that the overriding objective is that court deals with cases justly. CPR 1.1(2) provides:

> "Dealing with a case justly includes, so far as is practicable –
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate –
>
> (i) to the amount of money involved;
>
> (ii) to the importance of the case;
>
> (iii) to the complexity of the issues; and
>
> (iv) to the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously and fairly; and
>
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

15. In approaching this question I have to bear in mind that I have not been asked to give a separate ruling on the meanings of the words complained of. The meanings pleaded for the alleged libels are pleaded in para 5(1)-(v) of the Particulars of Claim. They are in substance that the Claimant is guilty of dishonesty, fiddling or sharp practice, or at least professional incompetence. The same meanings are attributed to the slanders, together with a further meaning that he is guilty of bullying the store staff.

16. Nor have I been asked to strike out any of the alleged malicious falsehoods on the footing that they are not statements of fact at all, although Ms Marzec has submitted that they are largely statements of opinion, or of matters to be investigated and explained by the Claimant, rather than statements to be understood as of existing facts.

17. In my judgment it is not possible to isolate malice from meaning (in libel and slander) and falsity (in malicious falsehood). It is a common pleading technique for a claimant to pitch a meaning high and then say that the defendant did not or could not have believed that high meaning, and so is malicious: see *H v Chief Constable of Hampshire* [2003] EWCA Civ 102 at [56] and [63] where it was said that the court should be ready to find that the words complained of mean what they say and no more.

18. All the proceedings issued by the Claimant have been drafted and conducted in person. It is not surprising that the Claimant has had some difficulty in framing his case. If he were legally represented I have little doubt that his statement of case would not be in the form it is now, and that if it were in that form, the Defendant would be making applications in addition to the ones they are making.

19. Context is everything in a case such as this. This is a case where there is a very small publication, and where the publishers and publishees are all alleged to have been purporting to carry out their management functions, albeit, it is said, the publishers

acted maliciously. For the purposes of Part 24 it seems to me that I should look at the matter as a whole in assessing the prospects of success. I should not take a technical approach.

THE MAIN FACTS OF THE CASE

20. In December 2002, Mr Dawson, the Regional Manager and the Claimant's line manager, received two complaints against the Claimant by members of his staff, one of whom was his deputy manager, Alison Griffiths. The allegations were of inappropriate behaviour towards the staff, including to Richard Doyle who is a relative of Ms Griffiths. Ms Revuelta, one of the Defendant's human resources managers, was instructed on 13 December to attend the Abergavenny store "to decide whether there is any credence to this before proceeding".

21. On 16 December 2002 she attended the store with a colleague Ms Quinn and interviewed nine members of staff. In her note of that meeting she recommended that there be discussion with the Claimant about his management style, but no disciplinary action. The following day Ms Revuelta, together with Mr Dawson, had a meeting with the Claimant to discuss the complaints.

22. On 23 December 2002 Mr Dawson wrote the Claimant a letter confirming the content of the meeting. The letter recorded criticisms made by members of his staff about the Claimant's manner towards them, and about adherence to company's systems and procedures at the store. It was recorded that the grievance by Mr Doyle was not going to be pursued by him, and that both the Claimant and Ms Griffiths were "committed to attempting to resolve [their] working relationship issues". Mr Dawson asked the Claimant to refrain from using inappropriate language, to focus on team working and communication skills, and to ask for assistance if he needed it from Mr Dawson or Ms Quinn. The letter concluded: "I sincerely hope we are able to resolve these issues at Abergavenny, however your failure to meet the company's standards with regard to the above may result in disciplinary action".

23. On 30 December 2002 the Claimant wrote a six page letter to Mr Hood, the Personnel Manager, copying it to Mr Dawson, Ms Quinn, Ms Revuelta and Mr Gaskell. The letter was a formal submission of a grievance on two points: "The first deals with the flawed and inequitable manner of the recent HO investigation in my store. The second is that because of the flawed nature of this investigation, my Assistant Manager, Alison Griffith, was able to exploit it to further her fallacious claims". He questioned Ms Griffiths' integrity, her motives and her fitness for her job, saying that she "intimidated, lied, manipulated and badgered the staff".

24. On 20 January 2003 he wrote again, with a copy to Mr Gaskell, setting out over 19 pages his complaints about Mr Dawson's letter dated 23rd December 2002 and personal attacks on Mr Dawson, such as: "This letter dated 23rd December, from Phil, has been pre-written. There is an arrogance and imprecision to the way all of this has been handled". There is a section of the letter headed "Phil's Prejudice and Hypocrisy". He also complained of the cost to him of travelling 72 miles each day back and forth to work with no financial aid. He wrote that he did want to be transferred away from the store to a bigger store nearer where he lived. He claimed to

have "the best set of stock results the company have ever seen". He referred to an incident approximately four months after his appointment to Abergavenny, so sometime in early 2000, when he had been taken out of the store for three months. He said that: "The methods used to investigate complaints against me at that time were more horrific than on this more recent occasion, and should be struck from my record".

25. Paul Myers, the Senior Stock and Systems Manager, and Tony O'Reilly, Regional Manager for North West Region, were requested to produce the ASR and to send it to Mr Yeates, who was investigating the Claimant's grievance. It reads as follows (the paragraphs are numbered by me and annotated to show which are pleaded as libels, which as Malicious Falsehoods, which as both, and which are not complained of at all):

> "To: Steve Yeates
>
> From: P. Myers, T. O'Reilly
>
> Date: 6th march 2003
>
> Ref: Abergavenny Store Review
>
> 1. Please find below our summary points of the visit. These have been classed under key headings, showing only a top line viewpoint, however this includes some detail as a way of explaining/showing the current performance. We believe a more detailed check would show more of the following traits:
>
> Administration
>
> 2. All office layouts are not too standard. [MF]
> 3. Old forms, folders not labelled, old labels, wrong information on notice boards, wrong contents pages, additional information that is not needed, folders being created for own information/usage i.e. cards, incoming mail log. Missing a lot of information that should be in the folders.
>
> 4. Destroyed/reductions not posted on the system on a weekend i.e. Saturday or Sunday. Only actioned 5 days a week. [MF]
>
> 5. Damaged on delivery system not used. [MF]
>
> 6. Delivery discrepancy procedure (standard is not delivery checks with exception of high value/volume lines on occasions) – Store actions a delivery check every day. [MF and libel]
> 7. The following S9s have been submitted by the store
> Over a 16 day period in January - £1800
> February - £1600
> Over a 6 day period in March - £1200 [MF and libel]
>
> 8. S9 Credits up to week 52 (DC information0 shows £21,000, £400 week. This is the 15th highest for DC2.

As the stock take result is only 0.28%, £310, this is a large credit that will influence that figure. [MF and libel]

9. Reductions and Destroyed are the 2nd and third highest on the region and could reflect in an improved stock take result. Cannot ascertain however, if this is planned or that they just write off a lot to sell quicker. [libel]

10. Admin Sup. Work plan/checklist not being used.

RSD procedures not followed consistently, minimal checking back to resolve problems. Some problems not logged at all.

Section leader folders out of date – May 01 for layout checks e.t.c.

Till folders not to standard

Cash Office

Cash office error zero, for weeks 1-3. Figures are not shown if a cashier and the office are out. Figures are amended to zero office error.

11. Balance sheet – paper copy being used. [MF]

12. Random cash office audit not actioned 2 per month. Three for last year.

Security

13. No apparent tagging operation. A member of the morning team is meant to do this during the morning after the store has opened. No evidence of this. Most of the store is untagged except some key lines i.e. razor blades, switches e.t.c.
Goods stolen list still used, but is discontinued. [MF]

Stock Control

14. 3 staff scan zeros. Has to be done for 8 a.m. – unclear why. [MF]
15. Core fill figures manipulated as one item of stock brought down to falsify error and show a better percentage. [libel]
16. Company system is not followed. Store system is centred around stock management and achievement of good figures as opposed to good availability.

Core filling is actioned in the morning and continues throughout the morning and through lunchtime.
There is no scan and pick procedure, staff use various old methods to put stock out i.e. paper list.

Counting is not prepared to standard i.e. positions listed on count sheets. Store plans are not to standard ref. Counting.
Counting folders are not to standard.

No promotion lists actioned.

Warehouse control – standard spec has been changed to accommodate Managers ideas i.e. room for sweets, fixturing e.t.c. are used for different things i.e. garden fertilisers, with fixturing being in the main warehouse on the racking. [MF]
17. Warehouse segregated section labels are not used.
Picture of Manager and staff on night out hanging on racking in warehouse.

Layout folders have no company labels and checks have not been completed since May 01.

18. At stock take various non standard procedures were used:

Brown paper in crates with pre-counts.
Staff scheduled in to count.
All stock in warehouse place on shop floor somewhere to improve GISNOS figure.
New lines put on shop floor to improve GISNOS figure. [MF]

Legal/HASAW

19. Products are placed on shelving at the bottom of the stairs, labelled "staff bargains", these are reduced items. Not company standard.

Staff searches and signing in books are not labelled to standard.

RF checks – store appears to only action one check per product, should be scan label and product, i.e. 2 checks.
Store shows very high errors i.e. 100-500 errors a week. These are caused by scan labels being printed for various products that are on the shop floor.

For the recent stock take 800 scan labels were printed as a lot of stock was brought to the shop floor, so it would not show as GISNOS in the warehouse. This stock was placed at the front of the store, on end units where there was a gap and on canopies.

Equipment checklist for this year could not be found.
Health and Safety checklists were not being actioned. [MF]
20. No record of November 2002 Health and safety audit.

Training packages are missing from the training box folder, seq. 8, 9, and 10. Manager signature was only on one training record page, Assistant Manager on some only.

Shop floor

Generally full sections around shop floor.
21. 60/40 split very poor.
Off section availability very poor. [MF]

22. Section standards – major housekeeping and cleanliness issues.
Old temporary scan labels from November, some missing, some turned over, tickets missing.

Communication

No admin sup meetings evident.
Security guard meeting, none since Jan 02.
Section leader meeting none since 13.9.01
Stock Sup none since 11.9.01.
Till Sup none since 13.9.01
No Assistant Manager meetings evident.
23. Team brief inconsistent. [MF]
24. Stock file controller meetings inconsistent.

Retail Strategy File

Only branch manager handover document inside.

Branch Operation

Operational checklist not filled in since 17.7.2000. No other records of jobs list.

Business Plan

This years not filled in apart from stock loss and stock sections.
Last years not available.

Sickness Control

Card system not used.
No calendar evident.
No monitoring in business plan.

Promotion

No depth to promotion plans.
No promotion audit evident.
25. Out of stocks method of working inconsistent.
A large amount of empty dump bins with tickets on them. [MF]

26. T and D

No T and D priorities in the business plan.

No record of appraisal planner for year.
Succession plan out of date.
Open learning inconsistent.
T and D audit over 2 years old in file. None since then.
27. No evidence of Manager/Ast. Manager appraisals. [MF]

28. Wage Management

No evidence of planning of yearly and quarterly wage budgets.
29. No monitoring in business plan. [MF]
30. 4 weeks schedule in place, however merging of all teams very apparent, no defined method of working.
31. No evidence of current operational analysis.
No evidence of cost breakdown of branch operation.
No evidence of company BP monitoring. [MF]

Management Control

32. No set routines, store appears completely disorganised. [Libel]
33. The standard company work plans for all positions are not used.
34. Jobs are created and given out to all staff daily, irrelevant of quality of person or performance level. [MF]

35. Manager has created own forms on his computer and has incorporated these into the store operation. All not company standard. These are listed below:

Checkout wage spend – training room
Core fill wage spend – training room
Evening wage spend – training room
BP Targeting – training room
Core fill work plans – training room and admin office
Rf Log sheet – clipboard admin office
Incoming mail log – admin folder
Cashier weekly performance – tearoom
Cashier checklists – tills
Daily cashier performance monitor – tills
Cashier schedule monitor – tills
Sku lists of price only lines to aid scan rate – till folders
Head cashier checklist – notice board

36. Handwritten signs across service areas, showing instructions. [MF]

37. A huge amount of old information, untidy folders, offices e.t.c.

Desk drawers, filing cabinets in Managers office totally disorganised e.g. numerous application forms found pre xmas, not interviewed, no comments on them.

> Out of date files found in drawers and cabinets.
>
> Confidential letters found in drawers opened.
>
> Stock found in filing cabinets.
>
> 38. Both Manager and Asst. Manager desks are broken. [MF]
>
> 39 There is a coat in tearoom that was part of a customer claim for damages, which they received. The have had their money and we have the coat. Keith has made the decision to auction the coat to the highest bidder. Whilst this is not the correct decision, we need to know that the money is rang back into the till, as this is Wilkinson property. [Libel]
>
> 40. No records of staff turnover, or sickness held. [MF]
>
> 41. No records of Regional Manager or S and S visits. No letters, no feedback, however various memo's found across parts of the store from Phil and Yvette.
>
> 42. 'Statement of Future Events' letter found to all staff. [MF]
>
> Night team went home early last week at 9 o'clock but were paid until 10. [MF]"

26. There are 48 allegations of falsity. They are not easy to follow. For example, as to the auctioning of the coat (para 39 above, para 13A(i) of the Particulars of Claim) it is pleaded that "The Claimant received permission from the HO customer service department to auction the coat". As to the Delivery discrepancy (para 6 abov, para 13A(ii) of the Particulars) it is pleaded: "Contradicts the systems manual. It is false. Further they are not actioned every day". As to the value of credit (para 8 above, para 13A(iii) of the Particulars) it is pleaded: "The figure for the period in question, in connection with the 0.28% stock result, was not £400 per week, but £340". It is not necessary to recite them all.

27. Part of the difficulty in understanding the case is that the parties are to some extent speaking a private language, the language used in the management of the Defendant's business. And the document is in very succinct form, no doubt easily understood by those to whom it was addressed, but less easy for an outsider. A trial judge having to reach a decision on all 48 points of alleged falsity in the ASR would have learn the language, and the procedures described or referred to, and decide what was really being said in the ASR, and, if it was a statement of fact, whether it was true or false. The Claimant is in substance saying that he understands the Defendant's systems and procedures better than the Defendant's senior management.

28. The ASR contains the words complained of in the libel claim and most of the words complained of in the malicious falsehood claim. They are marked [MF] in the citation above. But there are other words complained of, as stated below.

29. There was a formal grievance meeting on 13 March 2004 held by Mr Yeates and attended by Mr Gaskell, the Claimant, and Mr Beginyah. The whole of it was recorded and transcribed on to 27 pages of text. Mr Yeates explained at the start that

he had investigated the Claimant's grievance. He said he had got an independent team of people to go into the store and interview staff. He had arranged for Ms Griffiths to be interviewed and he had interviewed three independent managers and Mr Dawson himself.

30. There is a slander allegation added by the most recent amendment to para 8(ix) of the Particulars of Claim (which is the point which is said to be outside the limitation period). It is based on a few lines from page 9 of the transcript. In that passage the Claimant himself recites an allegation he says was made by Mr Dawson, to the effect that ten people had claimed that he, the Claimant, had intimidated them. Mr Yeates simply responded "They did". That is the alleged slander.

31. The meeting ends with a passage spoken by Mr Yeates on which the Claimant relies in support of his allegation of malice. It reads: "I think out of it we got to sit down with you and Phil and build the relationship back up because I think there is a bitter taste in a lot of people's mouths with all this…"

32. Immediately before that the Claimant is recorded as saying to Mr Yeates: "… thank you for taking so much time and effort into the grievance. It seems like a lot of points have come out of it and I am happy as it stands at the moment with the result of it".

33. On 18 March 2003 Mr Yeates wrote to the Claimant a seven page letter, copying it to Mr Gaskell, to confirm the decision of the grievance hearing. He agreed that the investigation in December had not been conducted fairly and that the letter of 23 December would be removed, due to the standard of the investigation. As to the incident three years before, he said that "All discipline letters are removed by the agreed policy". There is a passage on the sixth page which is complained as a malicious falsehood. It reads:

> "I confirmed Phil Dawson has no intention of moving you to Bridgend store we have a management review process which is carried out on a quarterly basis and you have not been part of any moves. I also confirmed again for managers to move from one store to another you have to be achieving approximately 80% in the areas of financial performance standards and demonstrating key management skills".

34. The falsity of this passage is pleaded as follows:

> "The Claimant was considered for promotion to the Bridgend Store. His promotion was blocked because of malicious falsehoods of the investigation…"

35. On 20 March a further meeting was held by Mr Yeates, attended by the same persons, save that it was Mr Hyde who was the witness on this occasion. He is described as the witness for Mr Yeates. The transcript covers 14 pages. A few lines are complained of as slanders by Mr Yeates. In these passages Mr Yeates picks up some points made in the ASR. The Claimant is recorded as saying that that is fine, but he needs time to reply to it. The points in the ASR repeated by Mr Yeates and which are said to be slanders include the following words, which give the substance of the words complained of in each instance:

i) "most of the store is untagged… which is not standard and doesn't add up to our stock loss figures at the end of the day, the two seem to not go hand in hand"

ii) "… 800 scan labels have been printed off as stock was brought to the shop floor and you know and I know that is just cheating the figures for the stock take the Gisnos [Goods in Store not on Shelf] report and again it is not company standard that we take everything out of the warehouse and put it on the shop floor on the day of the stock take"

iii) "… no set routines, store appears completely disorganised…"

iv) "… the staff are sort of scared and they don't want to come forward and they are being mismanaged and they seem as if they are being bullied into a lot of things they do …. The systems and procedures that are not being followed in the store".

36. On p13 and 14 of the transcript Mr Yeates is recorded as suspending the Claimant on full pay for one week until the following Thursday, for non-adherence to company systems and procedures and inappropriate management of team members.

37. On 9th and 23rd April there were further meetings, this time presided over by Mr Bankes, the Retail Operations Controller. His witness at the first meeting was Mr Tompkinson, Branch Manager of Hanley. Mr Gaskill was witness and representative for the Claimant. The purpose of the meeting was stated to be to follow through the formal investigation into alleged inappropriate behaviour towards staff, inappropriate management of staff, and alleged non-adherence to company policies and systems of the Claimant. The transcript covers 43 pages. At the meeting of 23rd April Mr Hood attended. Mr Bankes decided to take no further action against the Claimant following the investigation into his store operation and management skills.

38. On 26 April 2003 the Claimant wrote to Mr Hood, thanking him for attending the meeting on 23rd April. The letter covers five pages. He thanks Mr Bankes and Mr Hood for listening to him. On 9th May 2003 he e-mailed to Mr Hood and ends "Once again I should like to express my thanks to you and Chris in the role that you played in bringing this episode to, what I believe will be, a satisfactory conclusion".

39. On 14th May 2003 Mr Bankes wrote to the Claimant confirming the meeting of 23 April. He then expressed some "concerns… to deal with in order for a similar situation not to transpire once again". The letter recorded that a new Assistant Manager had been appointed to replace Ms Griffiths. The expression of three of these concerns is relied on as malicious falsehoods:

i) "My investigation has clearly indicated that the core problem that sits behind your performance is the breakdown of your relationship with your regional manager. As discussed, it is imperative that you take your responsibility towards developing a positive working relationship with both Phil Dawson and Yvette Quinn";

ii) "You raised concerns that it would only be a matter of time before these team members raised their grievances again and that the company would again look

to investigate you. I confirmed that if you dealt with them consistently and in the correct and proper manner expected, that you had nothing to fear".

iii) "The discussion regarding the achievement of management skills raised a discrepancy between you and the company's perception of the key areas of responsibility for a store manager … My investigation raised concerns over the consistent application of policy, systems and procedures … "

40. The respects in which these statements are alleged to be false are not easy to follow. The pleaded case includes the following:

i) "The inference is that the Claimant's performance is poor. The breakdown of the relations with his Regional Manager is inferred as being the Claimant's fault. The letter infers the Claimant does not have a good relationship with Yvette, yet it was always excellent with her…"

ii) "Chris Bankes states that grievances were raised. This is not true: statements were taken; there is a great deal of difference. Grievances were not raised…."

iii) "… the false allegation that the Claimant is not following policy, systems and procedures to the required standard. The inference is that Phil and Yvette, his two superiors do not trust him. This is not true. The Claimant was the subject of a vendetta because he had submitted a grievance".

41. On 18th May 2003 the Claimant wrote an eight page reply to Mr Bankes, copying it to Mr Hood and Mr Gaskell. He says "This letter does not make me feel safe". The heading of the letter states that he retains his right to appeal subject to the outcome of discussion over this letter, which he calls a draft.

42. On 30th May 2003 Mr Bankes replied briefly stating that his decision was to leave his letter of 14th May unchanged.

43. On 12 June 2003 Mr Hood wrote to the Claimant a letter in friendly terms. He ended "Following our meeting I feel you and the company can now concentrate on developing Abergavenny store to its full potential, an aim you have consistently stated you want".

44. In early June eight members of the Claimant's staff submitted a statement that they wished "to take a grievance out against [the Claimant] for his attitude and aggressive behaviour towards ourselves and other members of staff".

45. On 14th August 2003 there was a meeting between the Claimant and Ms Revuelta the transcript of which covers six pages. The Claimant's Union Convenor, Keith Espin, was present for the Claimant. Mr Gaskell was by now representing the employees who had signed the note in early June. Ms Revuelta proposed what became the Compromise Agreement of 1st September 2003.

46. The Compromise Agreement is stated to be in full and final settlement of specified claims. Those claims include "any complaint of unfair or wrongful dismissal", and "any complaint of breach of contract however arising".

47. On 10th September 2003 and 28th October 2003 the Claimant wrote respectively to Ms Revuelta and Mr Hood in friendly terms.

MALICE

48. The Claimants' case on malice is in substance that there are so many false charges that have been made against him that it is to be inferred that they must have been made dishonestly or recklessly. Although he states that he has met Mr Myers on a number of occasions in the past, and he has obviously known his line manager and others who are named, he gives no particulars of any past history of any relationship which he says supports the case in malice. He also relies on what he says are breaches of procedure in the investigation of his grievance. As appears from the facts I set out, there has been some recognition on the Defendants' side that there have been breaches of procedure by them. Referring to Mr Myers, Mr O'Reilly, Mr Dawson and Ms Revuelta, the Claimant states that "they are all intelligent executives who knew the allegations set out in the ASR were malicious falsehoods, and published and used the document in a concerted attempt to get rid of the Claimant". Substantially the same case is made against Mr Bankes and Mr Yeates.

49. There is no doubt that the making by a defendant of a false allegation against a claimant can be evidence from which malice can be inferred in some cases. But Ms Marzec naturally refers to the classic statement by Lord Diplock in *Horrocks v Lowe* [1975] AC 135 at 149 to 150. A defendant is entitled to be protected by the defence of qualified privilege unless some dominant improper motive on his or her part is proved. Knowledge that what is said is false is generally conclusive evidence of malice. So too is recklessness, but not carelessness or irrationality. But there are exceptions where a person may be under a duty to pass on defamatory reports made by another, even if he has no knowledge of whether they are true or false. An example of this situation is when a proper investigation is being made by a defendant of allegations made by a third party. Even knowledge that a statement will injure the claimant does not destroy privilege if the defendant was using the occasion for its proper purpose.

50. Ms Marzec also relies on *Telnikoff v Matusevitch* [1991] 1 QB 102 at 120:

> "The point is quite simple. If a piece of evidence is equally consistent with malice and the absence of malice, it cannot as a matter of law provide evidence on which the jury could find malice. The judge would be bound so to direct the jury. If there are no pieces of evidence which are more consistent with malice than the absence of malice, there is no evidence of malice to go to the jury."

51. Ms Marzec submits that the case in malice, based as it is on alleged knowledge of falsity and recklessness, is no more than assertion.

52. The context of this case is one in which it is not at all surprising to find that critical remarks are made of a person in the position of the Claimant. It is not alleged that the publishers have fabricated the complaints against him which gave rise to his

grievance. This is a case where it is common ground that there was a complaint against the Claimant, and the Defendant, as a well organised and large scale employer, was bound to investigate. It was also entitled, as an employer, to review the performance of its employees, including the Claimant, whether or not there had been a complaint made. For that matter, if it did want to get rid of the Claimant, as he alleges, there would have been nothing wrong with that in principle, so long as they set about it fairly and lawfully.

53. This does seem to me to be a case where the Claimant is exaggerating the meanings relied on, and what he alleges to be falsehoods in the statements of which he complains. If the words were understood to mean what he alleges they meant, namely dishonesty or serious wrongdoing, it is hard to explain the outcome of the grievance procedure. The outcome was that no action was taken against him. He was not dismissed. The upshot was that concerns were expressed about how he was carrying out his functions both with regard to his manner towards his staff and on his compliance with company procedures. That is all. The proposal that he leave by agreement arose only in August 2003, after a further note containing a complaint from his staff had been submitted.

54. If malice is to be inferred, it is necessary to explain away as disingenuous all the apparently positive comments made to him. Of course, he was not wholly vindicated, but if the words complained of as defamatory (in the case of the libel and slander) and false (in the malicious falsehood) are taken to say what they mean and to mean what they say, there is no possible basis for inferring that the publishers of those words must have been reckless or dishonest. And yet there is nothing else from which the court is invited to infer malice.

55. At this point in the enquiry, my conclusion is that, subject to any other relevant consideration, the Claimant has no real prospect of proving malice.

56. Having regard to the overriding objective, in a case such as the present, requires consideration by me of what is at stake. On the Defendant's side Ms Marzec has strongly urged that the cost in time and money to the Defendant to defend this claim will be very substantial, and I accept that. She goes on to submit that there is little if any corresponding benefit to the Claimant in the action being allowed to continue. It is clear that if he loses he will be unable to pay the costs of the Defendant, and the court must consider what he will gain if he wins.

57. The fact that a libel or slander has been communicated only to very few publishees within an organisation does not of itself give any indication of what is at stake. For example, if one employee makes an allegation of dishonesty or sexual harassment at work against a claimant, then the claimant may have very much at stake in bringing a libel action. Without vindication, that single accusation may seriously impair or destroy his or her prospects of obtaining employment in the future. In such a case, with so much at stake, the overriding objective may require the court to be very slow to find that the claim has no real prospect of success, or to exercise its power to give summary judgment.

58. Here, as Ms Marzec points out, the publishees are largely persons who are also said to be parties the defamation (and harassment) of the Claimant. There is no claim for special damage or loss of employment. I was given to understand that the Claimant is

employed elsewhere. I asked him what he hoped to gain by this action. The Claimant's case is that some people other than the publishees named in the statements of case will probably have come to hear of the allegations against him, and his reputation would be vindicated in their minds if he wins the action.

59. This is very tenuous. In libel actions it is often real to presume or infer that the words complained of will have been more widely disseminated than can be proved directly. But in the present case I see no reason why a management document such as the ASR should be presumed to have been disseminated outside the circle of those who are alleged to be publishees, still less the transcripts of the grievance procedure. Nor does it appear to me the Claimant has a real prospect of persuading a trial judge that that the words complained of in libel bear a meaning that is so serious that vindication, if available, will really be necessary for him.

60. In his current Particulars of Claim the Claimant asks for damages in respect of his causes of action in the sums of £45,000 for the alleged libel; £55,000 for the alleged slander; £36,000 for the alleged malicious falsehoods; and £30,000 for the alleged harassment: £166,000 in total.

61. If the Claimant had a real prospect of recovering such sums for defamation or malicious falsehood as he claims, then the overriding objective would point towards him being allowed to pursue the claims. In fact he has no such prospect at all. At the highest the possible damages for the words complained of in this case would be a very modest part of the total of £136,000 claimed under this head.

62. In my judgment, none of the factors listed in the overriding objective suggest that this claim ought to be allowed to proceed, and all of them point towards the opposite conclusion.

CALCULATED TO CAUSE PECUNIARY DAMAGE

63. Ms Marzec submits in relation to the malicious falsehood that the words complained of were not likely to lead to dismissal, but only to the investigations which in fact occurred. She relies on *Brady v Express Newspapers* TLR 31.12.94, where the "likely" loss alleged was the possible loss of weekly allowance to prisoner. The claim was struck out because no reasonable prison authority would have withdrawn the privilege without a proper inquiry. Similarly, in this case, she submits the Claimant does not allege that there was any probability of the ASR leading straight to a dismissal. Such an allegation would be obviously unsustainable.

64. It does not seem to me that this point is one that can succeed independently. If the Defendant succeeds on malice, it does not need this point. If it fails on malice, then the Claimant's case is one of a general conspiracy involving those conducting the investigation, Mr Yeates and Mr Bankes. There is, on this case, no separate reasonable authority who would investigate the allegations.

ESTOPPEL AND CONSENT

65. Ms Marzec submits that the effect of the decisions in the Employment Tribunal is that the Claimant is now estopped from alleging in this action that he was dismissed or subjected to any illegitimate or unfair pressure to sign the agreement, or that the agreement was invalid for whatever reason. The Claimant does in fact claim in this action that he was "harassed" into signing and therefore effectively dismissed. She submits that the court in this action should proceed on the basis that the Claimant left the Defendant voluntarily, and that he freely settled any claims in respect of unfair or constructive dismissal against the Defendant (although any such claim would, in any event, have had no merit).

66. This submission seems to me to be clearly correct, so far as it goes.

67. Ms Marzec also submits C has no real prospect of rebutting the defence of consent in relation to the publications complained of (except for the publication of the ASR to Ms Revuelta after the conclusion of the disciplinary process). She relies on *Friend v Civil Aviation Authority* (unreported) CA 29 January 1998. In that case the Court of Appeal held that a claimant had assented to his employer's disciplinary process when he accepted employment, and he also consented to the publication of documents such as was necessary for the fair conduct of that disciplinary process, regardless of whether the documents had been created maliciously (p17 and 26). Eady J has recently handed down his judgment in that case after a long trial: [2005] EWHC 201 (QB).

68. In this case, she submits that the Claimant had accepted both the grievance and disciplinary policies of the Defendant as part of the terms and conditions of his employment. In this case the original publication of the ASR to Mr Yeates was for the purpose of investigating the Claimant's own grievance against Ms Griffiths and Mr Dawson, and his allegation that the investigation was flawed. The Claimant had complained that the original investigation had not given a true picture of functioning of the store and his compliance with the Defendant's systems and procedures. He expressly asked for his grievance to be investigated. This investigation would not have happened had the Claimant not requested that the original investigation be re-examined. The Claimant has never complained that it was wrong of the Defendant to conduct the review leading to the ASR; his complaint is about its contents.

69. She also submits that the case on consent in respect of the other publications complained of is even clearer. The words in the meeting on 13 March 2003 were spoken in the course of a meeting to investigate and resolve the Claimant's grievance, which he had agreed to attend; the words complained of in the meeting of 20 March 2003 were spoken in the course of a disciplinary hearing which he was obliged to attend under the terms of his employment he had accepted. The letters of 18 March 2003 and 14 May 2003 were written as part of that disciplinary process in an attempt to resolve matters.

70. The Claimant submits that he could not be said to have consented to the ASR if it was malicious. I agree with that. What Captain Friend was held to have consented to was the re-publication of accusations as part of the process. The ASR had not come into existence before the Claimant's grievance. Once he knew what it contained, and chose to complain about, then he consented to the re-publication of it in the proceedings to resolve his grievance. But as I understand the principle, he did not consent it its first publication, when he did not know what it contained.

71. On that footing, consent is available only as a defence to a limited number of the Claimant's allegations in this case, namely the slanders alleged to have been spoken on 13 and 20 March 2003. In relation to those, I find that the Claimant has no real prospect of defeating the defence of consent.

HARASSMENT

72. This claim is a mixture of allegations of breach of contract or unfairness towards the Claimant as an employee and repetition of the complaints already made in the defamation and malicious falsehood claims. Particulars of Claim para 18(i) and (ii) includes:

> "By submitting the grievance, he was harassed on false charges by Steve Yeates. The use of false charges to suspend the Claimant from 13th March 2003 to 1st May. The Claimant was in fear of persecution, dismissal and was harassed…. When Steve Yeates said he was not considered for promotion to the Bridgend store [the Claimant] knew Steve Yeates was not telling the truth…"

73. It is not clear on what legal basis he advances these claims. In the Claim Form he refers to the employer's liability to protect its employees from harassment. That appears to be based on an implied term in the employment contract. In so far as the allegations of harassment are allegations of breach of contract, they are clearly the subject of the settlement in the Compromise Agreement, and could not now be re-opened.

74. Ms Marzec does not confine her submissions to that. She addresses the claims as being also advanced under the Protection from Harassment Act 1997, on the assumption that that would not be barred by the Compromise Agreement. That provides:

> **1.** - (1) A person must not pursue a course of conduct-
>
> (a) which amounts to harassment of another, and
> (b) which he knows or ought to know amounts to harassment of the other.
>
> (2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.
>
> (3) Subsection (1) does not apply to a course of conduct if the person who pursued it shows-
>
> (a) that it was pursued for the purpose of preventing or detecting crime,

> (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
>
> (c) that in the particular circumstances the pursuit of the course of conduct was reasonable…
>
> **7.** - (1) This section applies for the interpretation of sections 1 to 5.
>
> (2) References to harassing a person include alarming the person or causing the person distress.
> (3) A "course of conduct" must involve conduct on at least two occasions.
> (4) "Conduct" includes speech.

75. Ms Marzec cites *Thomas v News Group* [2002] EMLR 78. Lord Phillips MR, dealing with the nature of harassment, said:

> "29. Section 7 of the Act does not purport to provide a comprehensive definition of harassment. There are many actions that foreseeably alarm or cause a person that could not possibly be described as harassment. It seems to me that section 7 is dealing with that element of the offence which is constituted by the effect of the conduct rather than with the types of conduct that produce that effect.
>
> 30. The Act does not attempt to define the type of conduct that is capable of amounting to harassment. "Harassment" is, however, a word which has a meaning which is generally understood. It describes conduct targeted at an individual which is calculated to produce the consequences described in section 7 and which is oppressive and unreasonable. The practice of stalking is a prime example".

76. In *Sharma v Jay* [2003] EWHC 1230 Gray J, citing *Thomas*, set out the proper approach on applications for summary judgment on claims for harassment under the Act. He said the relevant principles are (at paragraph 22):

> "(i) that in order to constitute harassment the conduct must be calculated (i.e. likely) to produce the consequence that the claimant is alarmed or distressed;
>
> (ii) that the conduct must in addition be oppressive and unreasonable;
>
> (iii) as to reasonableness, that it is incumbent on the claimant in his pleading to allege conduct which is arguably unreasonable;
>
> (iv) that the mere fact that the conduct complained of has foreseeably caused distress to an individual is not enough: the requirement to establish an

> arguable case of oppression and unreasonableness must also be satisfied if the claim is not to be struck out".

77. There is nothing unusual in English law in having a variety of different causes of action available to a claimant to rely on cumulatively or alternatively. Claims in contract and tort are a common example. So in principle a claim in harassment is available at the suit of a person against a former employer. But in my judgment this claim suffers from the same defect as the other claims. It may well be that the conduct of the Defendants towards the Claimant upon which he relies can be described as a course of conduct which caused the Claimant distress. Assuming that to be so, it does not follow that it was harassment. The question is whether it was targeted at the Claimant and unreasonable.

78. As *Thomas* also showed, a broad interpretation of harassment would be capable of seriously interfering with the rights of free speech. It would also be capable of creating serious inroads into the rights of those carrying on business, (and for that matter of employees), to pursue their legitimate aims. It cannot be excluded that the conduct of an employer towards an employee might be harassment. Nor can it be excluded that the conduct of an employee towards an employer, or another employee, might be harassment. But something more is required than the robust pursuit of a person's own interest within what is otherwise recognised as the limits of the law.

79. In *Thomas* that extra element was the incitement to racial hatred which was arguably to be found in the words complained of. As Lord Phillips said in *Thomas* at para 32:

> "… the answer does not turn upon whether the opinions expressed in the article are reasonably held. The question must be answered by reference to the right … to freedom of experession…"

80. Freedom of expression is, of course, a right enjoyed by everyone, not just the press, and it applies to expressions of fact and opinion made between individuals carrying on the business of a company. It has long been a right for which the common law gives protection in libel by means of the defence of qualified privilege. But that defence does not apply to statements made to (rather than about) a claimant, and the courts must (in accordance with Art 10 of the Convention) also protect the right of individuals to speak freely to other individuals without finding themselves facing a law suit for harassment, when such a suit is not within the exceptions to Art 10. Art 10 provides as follows:

> Article 10 - Freedom of expression
>
> 1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority …
>
> 2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, …. , for the protection of

> the reputation or rights of others, for preventing the disclosure of information received in confidence ….

81. There is no detailed consideration in *Thomas* of why a publication which was arguably calculated to incite racial hatred of an individual might amount to harassment under the 1997 Act. That is because that was agreed between the parties. The judgment simply records (para 37) that the newspaper defendant recognised that "the Convention right of freedom of expression does not extend to protect remarks directly against the Convention's underlying values". It is obvious that such remarks are at least likely to fall foul of the protection given by the Convention under Art 8 (right to respect for private life), and perhaps of other rights too. In so far as the conduct relied on by a claimant as harassment is speech, the courts must not allow baseless claims to chill the exercise of rights of freedom of speech of employers and others.

82. It does not follow that there is to be imported into the 1997 Act the concept of malice from the law of defamation and malicious falsehood. Nevertheless there must be something alleged by an employee who claims harassment by his employer which is more than that the employer has caused foreseeable distress. Where a claimant invokes Art 10(2) on the basis that his own claim shows an interference with his rights under Art 8, the tension between the competing convention rights is to be addressed in accordance with the guidance given by the House of Lords in *Re S (A Child)(Identification: Restriction on Publication)* [2004] UKHL 47; 3 WLR 1129.

83. It is not necessary for me to consider each of the 35 particulars of harassment pleaded in para 18 of the Claimant's Particulars of Claim. In addition to those cited above, there are included in them the following allegations, which are representative of the way the case is advanced:

> "xxii. The removal of the GMB convenor, Billy Gaskell, from the Claimant's defence to his 'prosecuting counsel', on 20th June 2003. This demonstrated the power of the Company to intimidate him and show scant regard for the laws of natural justice by promoting this conflict of interest
>
> xxiii. The knowledge that Cath Revuelta was attempting to use and encourage complaints from staff, because the Claimant was enforcing company policy, made the Claimant feel trapped, that no matter what he did he would be in the wrong.
>
> xxiv. The use of exaggerated grievances, but undeclared for 2½ months by the Company, to harass the Claimant to sign a compromise agreement…"

84. These allegations are not supported by any evidence and are entirely fanciful. The Claimant may or may not have a legitimate grievance about Mr Gaskell becoming the representative of the staff making complaints against the Claimant, having previously represented himself, but there is no evidence that that can be attributed to the Defendant, rather than the Union. The suggestion that Ms Revuelta was encouraging these complaints from staff because the Claimant was enforcing company policy makes no sense. The allegation that he was harassed into signing the compromise

agreement is substantially the allegation of duress that was rejected twice by the Employment Tribunal. It is not necessary for me to conclude that that is formally res judicata. I see no real prospect of the Claimant succeeding on that allegation. The transcript of the meeting of 14 August 2003 is entirely to the opposite effect.

85. Having held there is not real prospect of success in his case on malice, I can identify no other element in the Claimant's case on harassment against the Defendant upon which has a real prospect of success.

86. I find that the claim for harassment has no real prospect of success.

ABUSE OF PROCESS

87. Finally Ms Marzec advances a novel argument based on the decision of the Court of Appeal in *Jameel v Dow Jones* [2005] EWCA Civ 75. The Court of Appeal affirmed a line of authority suggesting that the Human Rights Act (together with the Civil Procedure Rules) had altered the court's approach to tenuous and technical defamation cases. Such cases would be looked at much more critically and, in appropriate cases, where any benefit to the claimant in succeeding in his action would be minimal and far outweighed by the cost, effort and expenditure of public resources needed to litigate the case, would be struck out as a abuse of process:

> "We accept that in the rare case where a claimant brings an action for defamation in circumstances where his reputation has suffered no or minimal damage, this may constitute an interference with freedom of expression that is not necessary for the protection of the claimant's reputation. In such circumstances the appropriate remedy for the defendant may well be to challenge the claimant's resort to English jurisdiction or to seek to strike out the action as a abuse of process…. An alternative remedy may lie in the application of costs sanctions" per Phillips LJ MR.

88. The Court struck out Mr Jameel's case even though there was no allegation of bad faith against him.

89. As already noted, Ms Marzec submits that this action would be extremely costly and time-consuming to try, even with a judge sitting alone. Furthermore, whatever the outcome, the Defendant is unlikely to recover any costs that the Claimant may be ordered to pay. The costs of the exercise would be borne entirely by the Defendant, whether or not the Defendant is blameless, and by the public purse. In the light of that potential injustice, it is submitted the court should carefully scrutinise the potential benefit to the Claimant to see if the "game is worth the candle".

90. She submits that there are three publications of the ASR that the Claimant can prove, either by his own evidence or because the Defendant admits them, and two (to Mr Hood and/or Ms Pearson) that it is possible that a court will find occurred. They were

all to the Defendant's managers dealing with his case. There is no evidence those publications did him any harm.

91. She submits that it is significant that the Claimant does not complain of the whole document, but only some of the allegations which are critical of the functioning of the store; he does not complain, for example, of allegations of breach of confidence, haphazard filing, failure to complete the business plan. He has more recently become aware of a further page of the document, not set out above, in which are recorded the comments made by staff to Mr Myers and Mr O'Reilly, including allegations of sexual harassment, which are likely to have been equally or more damaging to his reputation than the matters complained of.

92. She further submits that publication of the few comments in the interviews that are said to be defamatory were only to the two witnesses, one of whom was the Claimant's representative. He could not himself have been overly concerned about anything said in the interviews, because of his stated contentment with the process. The complaint about the remark in the interview on 13 March 2003 was added only in December 2004, indicating that the Claimant is scraping the barrel in an attempt to find further complaints to use against the Defendant, regardless of the one year limitation period.

93. Ms Marzec submits that the Claimant does not need, or cannot achieve, vindication in respect of any of these allegations. Not one of the publishees of the alleged defamatory words would think any better of the Claimant if he succeeded in his action. The allegations are, in themselves, trivial. She invites contrast with the *Jameel* case. There the Claimant was accused of providing financial support to Al Qaeda terrorists, which would have undoubtedly caused the readers to think the worse of him, albeit there were only 2 of them in this jurisdiction.

94. Ms Marzec continues that the Claimant does not need an injunction in respect of the allegations. He does not even ask for one. There is no prospect of the Defendant repeating any of these words, which concerned internal company matters. The Claimant is no longer with the Defendant and the ASR is now an irrelevance to them. As for the alleged malicious falsehoods, publication of the few sentences of which the Claimant complains in the letters of 18 March and 14 May 2003 was again to the same managers of the Defendant. All were involved in dealing with his case: the first to Ms Revuelta and Mr Hood, the second to Mr Gaskell, Mr Hood and Ms Revuelta. No objective reading of the passages complained of would lead to the conclusion that they were damaging to the Claimant.

95. It is hard, she submits, to see how they would even be hurtful to a sensible person. What the Claimant appears to want from this action is first a lot of money, and, second, to re-open the settlement he reached with the Defendant on his departure from the company. These are illegitimate aims. She refers again to the sums claimed in the Particulars of Claim. This is in addition to the £18,886 he agreed with the Defendant as a settlement in September 2003. There is no correlation between these sums of money and the causes of action relied on. They appear to have been plucked from the air in order to increase the pressure on the Defendant to pay him off.

96. Ms Marzec submits that the Claimant's aims in this action as set out above cannot be realised. I agree that there is no chance of him obtaining large sums of money in

damages. She submits that, if he were to succeed, what he would gain would not, when looked at objectively and rationally, justify the huge expenditure of time and costs that the trial of these claims would involve.

97. These are formidable submissions. On the other hand, I have some sympathy for the Claimant. The first he heard of this argument was, of course, after 3 February this year. He clearly felt that the goal posts were being moved. They have been moved, although not by Ms Marzec or the Defendant.

98. Having held that the claim has no real prospect of success for other reasons, I do not need to consider this new argument, and in the circumstances I do not think it right to do so.

99. Nevertheless, many of the points which Ms Marzec advanced about the cost of the proceedings and in the imbalance of the financial risks are familiar in cases where a former employee or other litigant with limited means sues a former employee. The *Newham* case and *Friend v Civil Aviation Authority*, both referred to above, are examples. As appears from the earlier part of this judgment, I have had these considerations in mind when approaching the task that Lord Woolf in *Newham* said should be approached under CPR 24.

100. It follows that there shall be summary judgment on the whole claim in favour of the Defendant.