Neutral Citation Number: [2007] EWHC 1658 (QB)

Case No: HQ07X01375

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/07/2007

Before :

THE HON. MR JUSTICE EADY

- -

Between :

Claire McBride	**Claimant**
- and -	
The Body Shop International PLC	**Defendant**

- -
- -

The Claimant appeared in person (assisted by Mr Freer)
Alexandra Marzec (instructed by Baker & McKenzie) for the Defendant

Hearing date: 21 June 2007

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Judgment

The Hon. Mr Justice Eady :

1. In this libel action Claire McBride ("the Claimant") claims damages, including special damages, against The Body Shop International PLC ("the Defendant") in respect of words published on or about 13 January 2006 in an e-mail from Nicole Farncombe, who was the manager of the Defendant's Gatwick Airport branches, addressed to two other employees, Tessa Boshoff (the regional human resources manager) and Stella Barham (the regional manager). The subject-matter of the e-mail was largely concerned with the conduct of the Claimant, who was at that time also an employee of the Defendant. The litigation was commenced by a claim form dated 25 April 2007 (and, therefore, one of a number of matters I am asked to consider relates to limitation).

2. It is necessary, in addressing the context of the publication in question, to have in mind not only its contents but also how it came to be written.

3. There are four branches of the Defendant's business at Gatwick and the Claimant had been employed as a sales assistant from August 2005 in one of those branches under the immediate supervision of her line manager Ami Fawcett. It seems that on 12 December 2005 Nicole Farncombe was telephoned by Ami Fawcett in relation to a relatively minor matter concerning a payment (known as a "paid out") which had apparently been made by the Claimant out of the branch till, without express authority, to cover some expenses. Ms Farncombe invited the Claimant and Ms Fawcett to a meeting on 16 December 2005 in order to establish the facts. In the interim, the Claimant carried on working as usual.

4. The Claimant explained at this meeting that she believed that she had implicit consent from Ms Fawcett to make such a payment even though a manager was not present. According to the evidence of Ms Farncombe, she decided not to suspend the Claimant but merely to advise her that the episode should be treated as a learning experience. The Claimant, on the other hand, contends that she was actually suspended and excluded from work. This was, at any rate, the stance she later took in proceedings before an employment tribunal. It is not, however, easy to reconcile with the fact that she continued to work her usual shifts following the meeting.

5. On 7 January 2006 the Claimant wrote a letter in which she identified a number of grievances against the Defendant, and in particular against Nicole Farncombe and Ami Fawcett. Also on 7 January the Claimant left work early, saying that she was unwell. She never returned to work thereafter. It has been part of her case that she had been caused so much stress by recent events that she was unable to carry on working.

6. The grievance letter was dealt with by Tessa Boshoff, who sent a copy of it to Ms Farncombe. It was her e-mail in response, dated 13 January 2006, that contained the words complained of in these proceedings. It was addressed to Miss Boshoff and copied to Ms Barham.

7. The grievance letter itself was in these terms:

> "7th January 2006
>
> Personal and Private
>
> Not for publication
>
> Without Prejudice
>
> Dear Sir or Madam,
>
> In regard to my employment with Bodyshop, I regret to inform you that recent events have given me pause and compel me to state my concerns officially.
>
> As you will see from my record, I was recently excluded from work, and subsequently it was found that I had not followed a procedure for personal disbursement reimbursement and I was told I would be issued with a written warning.
>
> I will say now that I am confused regarding my exclusion, in that it appears with hindsight that I had been suspended without being told I was suspended, and I am further confused that I was told that my exclusion was to allow an investigation following which there would be a 'meeting'. During this first meeting notes and statements were taken from me that I was told to sign, and I was told specifically that this was not a disciplinary, despite the meeting consisting as it did of my being subjected to accusatory questioning after which I was told that pending a decision from Head Office there would then

be a further 'meeting' but that in the mean time I should return to work. My confusion arises from the fact that it is apparent that despite the terminology used, I was de facto suspended, investigated and disciplined without being informed of my right to be accompanied, nor informed of the reason for my exclusion and without being presented with any accusations or concerns in writing and therefore in a manner that would allow me to respond properly and adequately prior to what was in fact a disciplinary.

Therefore it is apparent that I have been subjected to illegal disciplinary measures in that no or no proper procedure was followed.

In respect of the above, during the second 'meeting' I was also told that my customer service ability was unacceptable and that therefore my position as supervisor that had been declared and confirmed was now rescinded. The declaration that I lacked customer service ability is in my view contrary to the feedback I received from South airside, and most notably during a store visit from Head Office after which Dhanisha informed me that she had been specifically complimented vis-à-vis my customer service ability. In giving reasons for my alleged lack of customer service. I was told that I did not approach customers and I was accused by Ami of 'spending my time standing in front of the mirror' of which neither the parenthesis nor the relevance was apparent or made clear, in addition to which I was told that as I had missed supervisor training that no further training would be offered.

This was stated in light of the known facts that I missed training because of absence from work that resulted from my father suffering an exceptionally serious motorbike accident that had caused multiple breaks and a spiral fracture requiring extensive orthopaedic surgery, complicated by a pre-existing condition that indicated that he may not survive the procedure and/or that he may not survive recovery and that it was during this time that I was briefly absent.

Immediately upon being told that my father was in a serious condition in hospital following an RTA and before even making arrangements to get to him and in any event in accordance with company policy, I informed work that I could not attend work and or training the next day, and fully explained the reasons.

Despite this I was telephoned several times before and while my father was being operated on and immediately after to ask me when I would be back to work. Naturally this placed great pressure on me at a particularly difficult time and accordingly I

felt I was being asked to choose between my work and my dad at a time when I did not know if I was still going to have a dad.

When I then returned to work the issue of the disbursement arose and I was excluded in the circumstances described above, but while I was excluded, the staffs Christmas party was due and I was told it was okay to go.

On the evening in question Ami approached me, and of her own accord stated that I am not to worry as nobody knows anything, which I found strange as I was under the assumption that these matters were automatically and strictly confidential in any event, and I took her words to be an unnecessary assurance.

However, at the party people were talking about it and I was asked about it several times. Subsequent to this I have been told that on other occasions people have been told that I was a thief and that I was going to be fired.

Naturally, I was and am very upset by this. I have been advised that this amounts to slander, and in that I reserve all my rights. That notwithstanding, I was confused and angry that despite Ami's words, my colleagues were privy to information that was variously confidential, incorrect and defamatory.

My Grandfather passed away on Wednesday 28th December. I informed Ami of my Grandfathers passing on the day of his passing. When I then received a call from Ami on Thursday asking if I could come into work to cover a shift the next day, I became worried that I should not be with my mum and dad the day after my granddad died when I was needed at work. I was made to feel guilty.

Taken in context of the previous occasion where I was pursued by work when my dad was being operated on, the manner in which she asked was particularly inappropriate. She said, 'I know you don't like being called at home' and then went on to ask if I could cover a shift. The manner in which it was phrased was sarcastic, factually incorrect and inappropriate. It has never been the case that I do not like being called at home. I have always done everything I can to accommodate work whether at work or in my private time, but it is most definitely the case and as Ami is well aware, that I was and am distressed by being called by her to go to work immediately after I have told her that I am bereaved or that my dad may die and that I need a little time.

In her position as my immediate superior I had previously informed Ami that I suffer from emotional problems including anxiety and depression. Clearly, subjecting someone with

> emotional problems to unwarranted emotional stress, such as I have been, is contrary to the duty of care owed to me in respect of health and safety at work. To be very blunt, Ami, and therefore my employers, were informed that I have emotional issues that do not interfere with my ability to work but nonetheless are there and can be adversely affected by inappropriate or unwarranted stress stimuli.
>
> The treatment I have been subjected to would be galling for anyone, and with that in mind I ask you to consider the effect of that treatment on a person with emotional problems as I have.
>
> I feel that Ami's actions have been at the very least insensitive to the point of cruelty, and whereas I deeply value my job and have committed myself to a college course to compliment what I had hoped would become a career. I nonetheless feel I am being forced to leave both.
>
> I do not want to leave Bodyshop. I hoped to have a career with you, but in the present circumstances I really cannot see any point in staying if I am to be treated like this.
>
> This catalogue of abuse has led me to become physically sick with worry and stress to the point that I cannot sleep. This came to a head in the early hours of today when I was due to begin an early shift starting at 5.45am. I cannot adequately describe the despair I felt at the prospect of going to work and I spent the night and the early hours of the morning nauseated and frozen with distress. Despite this and because there is no way to inform anyone from work in case of illness prior to an early shift I opened up the shop and worked until the next member of staff came in at which point I excused myself as soon as possible and went home for reasons of illness.
>
> I would like to discuss this matter but I put you on notice that I feel I am being forced to tender my resignation and I would like to shown (*sic*) that this is not so especially in light of your claim to value an individuals right to self esteem. I feel that I am having my self-esteem battered and I need your help to allay my fears if that is all they are. Please help.
>
> Yours sincerely
>
> Claire McBride"

8. It will be noted that this letter contains quite serious criticisms of Ami Fawcett and Nicole Farncombe. It was obviously appropriate that they should be given an opportunity of dealing with the points which she had made. Accordingly, Nicole Farncombe addressed the criticisms in her e-mail of 13 January as follows:

> "Hi Tessa

I thought it would be easier if I captured all the points from Claire's letter and e-mailed it to you. So you can look at it in your own time. I have Claire's file for you ready for Monday.

- Not excluded as she worked all her shifts that week.

Sunday 11th –worked-7.5 hours

Monday 12th- shopping day-7.5 hours

Friday16th- meeting/went home sick 7.5 hours

Sat 17th–Worked-7.5 hours

- As we always do, we investigated the paid out issue and took notes. I had taken advice from Stella about how to approach the issue and what questions I was to use. Throughout the meeting I was professional and fair and tried to make Claire feel comfortable. Just to point out I always document conversations with all members of staff.

- In regards to the 'supervisor' position this role was never discussed or terminology used. I had talked to Claire about key holder rate and what was expected if she was to be part of the Key holder team. Claire wanted her contract to be changed and I explained to her that her role was still that of a Sales advisor but she could step up to take on extra responsibility and training would be arranged, Ami also had the same conversation with her and explained what would key holder responsibility look like. Claire said she understood the Key holder expectations after several discussions and I did check her understanding as well. We did rearrange Key holder training contrary to Claires letter, Shifts were changed to accommodate these training events.

- Claire says that at the 2nd meeting she was told her customer service was 'unacceptable' this is completely untrue. We did have issues with Claire customer service as for the last 4 weeks she did not seem to engage with customers so much and waited for customers to approach her. We did give her examples of were (*sic*) she could improve and used the 'You Me And Agree' tool, we also said that we had seen excellent customer service in the past so we knew she could do it. Claire responded that 'she had been away with the fairies' and that she had not been giving 100%, and agreed with the comments and said we would see an improvement.

- Regarding the times Claire was hassled by work when her Farther (*sic*) was ill, When I found out about this I apologised this was when Marion was running South Land even so I realise that it would seem or was insensitive and apologized.

- Ami Denies speaking to Claire at the Christmas party. Ami was with myself and Nicky nearly all night and I doubt very much she would have put herself in that situation. Claire arrived late that night and spent the night talking to Nicole a member of the Gatwick South landside team. Never have I gossiped about Claire and Ami assures me she has not either. People knew she was having a meeting with me and Ami the next day as the reason we found about the paid out was through 2 members of staff who complained to Ami that it was not fair that Claire got taxi's (*sic*) and they did not.

- Claire was at work when her Grandfather passed away. Her mum called the store to inform Claire of his death. Ami was in store and sat in the office with Claire C and comforted her and said would she like to go home? Claire said she would prefer to work to keep her mind active and not think about it. The funeral was on Thursday 29th and Claire phoned the store to say she would not be in on Friday (she was down to do the early shift) but would be back on Saturday for the early. There was no reason for Ami to call Claire as Claire had informed us that she would not be back until Sat So again a false account from Claire.

- Claire never informed Ami of her Anxiety and depression but on several occasions did talk to Ami about why she was not performing and said she was in financial difficulties and her college work was to much (*sic*) and she was falling behind. Ami offered to help her with her coursework as she had completed the same course 2 years prior. Never was emotional problems mentioned Ami also on these occasions coached Claire around I.T.C.

- Claire does not do everything for The Body Shop. Infact quite the opposite she is consistently wanting to change her shifts at the last moment even though the rotas are 12 weeks in advance and she agrees with them when they go up. She will give as at the very most a days notice saying she suddenly can not work her agreed shifts and leaves it for Ami to sort out.

- The only time we have called Claire was on 7th after she went home sick. I was in Gatwick at that point and had spoken to her in the morning she seemed fine infact quite happy telling me about the targets for the day, so I very surprised to learn that she had gone home at 8.am without informing myself or any other managers Claire does know the procedure for sickness. We called her at 2pm (Ami and myself) and I left her a message saying, hope she was feeling better sorry for calling her but we would need to know if she was coming in tomorrow all in a professional, happy tone and could she call us by 5.30 when Ami was going home to let us know as we needed to cover a shift. Claire never called so Ami called Claire and said that we had covered the shift and hope she was better for Monday and to keep us informed.

Claire was treated fairly but I will point out she is a compulsive liar and will say or do anything in order to better herself. On the 2nd meeting She was adamant that Ami Had put a paid out for her through only weeks before I challenged her about this 3 times but she was adamant, as you can imagine, this if true would have been particularly embarrassing after being so by the book with the fact that the reason I was speaking to Claire was the fact she was doing paid outs. Once Claire had left I asked Ami who was sure she had never done paid outs for taxis. When I checked with the stores computer NO paid outs had been completed for any transport on that day and Ami was not even in.

Claire was originally for South Airside but we can not get her a pass as not one of her x companies will give her a reference, and she quite openly talks about how she took another company to court as she was 'bullied and treated unfairly'. I stick by how Claire was treated during the meeting and her time with The Body Shop During the two meetings with Claire I always made sure she understood the next steps and at the last meeting said that I would keep a note on her file regarding this incident but for it to be a learning curve and did she have any questions and how she felt that it had gone, Claire was fine not at all upset but did go home as she had been vomiting in the morning.

Regards

Nicole"

9. It is, submits Ms Marzec on the Defendant's behalf, a striking aspect of this libel claim that complaint is made of one sentence only in that e-mail, namely to the effect that "… she is a compulsive liar and will say or do anything in order to better herself". None of the specific allegations is sued upon.

10. The Defendant's internal grievance procedures were pursued and there was a meeting on 2 February 2006, attended by Ms Boshoff, the Claimant and her friend Mr Freer for the purpose of investigating her grievance. A hearing then took place, on 10 February 2006, before Ms Barham which was attended by the Claimant herself and by Ms Boshoff in the capacity of a note taker. The upshot was that Ms Barham made certain recommendations to resolve matters. It is significant that no one was disciplined or criticised as a result of the investigation. Furthermore, neither of the recipients of the offending e-mail, Ms Barham and Ms Boshoff, had anything further to do either with the Claimant personally or with how her case was dealt with by the Defendant. I can summarise the conclusions reached from the evidence of Ms Barham submitted for the purposes of the employment tribunal proceedings which later took place:

    i) The meetings held with the Claimant, Ami Fawcett and Nicole Farncombe were not intended to resemble a disciplinary hearing and no disciplinary action had been taken against the Claimant.

    ii) With reference to allegations of "poor customer service" against the Claimant, it was recommended that there should be feedback through the Defendant's coaching method and that, when incidents occurred, feedback should be given by the Claimant and her manager on a daily basis, including in relation to customer service.

    iii) It was recorded that the Claimant was paid an additional amount to take on added responsibility when her manager was not in the store. She was concerned about the lack of training for her "key holder" role and it was confirmed that it would be ensured that "the training was formalised and signed off".

    iv) A monthly meeting should be held between the Claimant and Nicole Farncombe to discuss progress and any "ongoing concerns" the Claimant might have.

    v) The Claimant was offered the opportunity to appeal against Ms Barham's recommendations by writing to Mr Godfrey Moger, the regional controller, within five days.

11. This was an opportunity of which the Claimant availed herself, and an appeal was heard on 6 April 2006 chaired by Mr Moger. The Claimant's interests were represented at the hearing by Mr Freer. The Defendant was represented by Elizabeth Orford, a senior human resources manager. No evidence has emerged that either Mr Moger or Ms Orford had seen the contents of the e-mail forming the subject-matter of these proceedings.

12. Mr Freer asked at the appeal for a financial payment to the Claimant, but this was rejected by Ms Orford, who explained that the Defendant wished the Claimant to return to work and that it would offer her support. It was at this point that Mr Freer stated that the Claimant would pursue a claim for disability discrimination. It is the Defendant's case that this was the first time it had ever been suggested that the Claimant suffered from a disability.

13. The Claimant claimed that she had a history of self-harm and that she had mentioned this to some colleagues at a staff party. She had also apparently been receiving hospital treatment to address the problem. Ms Orford, therefore, suggested that the Defendant would need to have a medical report for the purpose of deciding how a return to work might be managed, although the Claimant stated that there was no step which the Defendant would be able to take to deal with her concerns.

14. Nevertheless, during April 2006, Ms Orford asked the Claimant to see the Defendant's company doctor, Dr Tim Stevenson. He recommended simply that a return to work should take place as soon a possible and that there was no need for special provisions to be made. At a meeting held on 26 May 2006, for the purposes of discussing Dr Stevenson's report, the Claimant stated that she no longer wished to pursue her grievance and that she was unable to return to work.

15. A further opportunity was given to the Claimant to attend a "capability interview" on 10 July 2006 with the Defendant's regional controller, but she failed to attend. It was at that stage that the regional controller (Mr Darren Williams) decided to dismiss the Claimant on the ground that she was incapable of doing her job and that there was no foreseeable date for her return to work.

16. On that very day, 10 July, the Claimant issued and sent the first employment tribunal claim to the Defendant, which was based on alleged disability discrimination.

17. On 21 July 2006 the Claimant was notified of her dismissal and given information as to how to appeal that decision. The appointed date for the appeal was 24 August, but the Claimant asked for an adjournment because of her pending disability discrimination claim. The hearing was rescheduled for 6 September 2006 but the Claimant did not attend. Accordingly, her appeal was heard and dismissed by the Defendant's merchandising manager, Ms Maskell.

18. On 21 September 2006 the Claimant began a second employment tribunal claim based upon unfair or constructive dismissal. She was claiming £33,770.16 together with general damages in respect of other complaints.

19. The two claims launched in the employment tribunal were heard between 28 March and 2 April 2007. The first claim, based upon disability discrimination, was rejected part way through the hearing because the tribunal concluded that she was not disabled. This was based upon medical evidence.

20. On 2 April the tribunal adjourned the hearing until 21 May 2007. This followed an application by the Claimant because she wished to obtain legal representation, as Mr Freer was no longer willing to act on her behalf. Before the adjourned hearing date, however, the Claimant issued the libel proceedings now before the court. The Claimant next applied to have the employment tribunal proceedings transferred to the High Court, unsuccessfully, and then applied to the High Court for a stay of the tribunal proceedings, which was refused by Cox J.

21. There were further applications to the High Court (a) seeking to have the limitation period disapplied and (b) claiming a declaration that the Claimant be permitted to use "a document disclosed in another claim". This was because the e-mail, which now forms the subject-matter of the libel action, had only been obtained by the Claimant as

a result of the compulsory disclosure process in the employment tribunal proceedings. It is now accepted on her behalf that the document was sent to her on or about 3 February 2007 (i.e. outside the 12 month limitation period running from the date of publication). Mr Freer has stated, however, that its significance was not spotted and the Claimant did not take steps promptly to have the limitation period disapplied. Be that as it may, the application came first before Langstaff J who at that time made no order on the application.

22. At the resumed tribunal hearing, on 21 May 2007 the Claimant applied for a stay pending the outcome of her libel action. This was refused. She then indicated that she did not wish to take any further part in the tribunal proceedings.

23. It was also on 21 May that the Defendant applied for an order under CPR 31.22(2) prohibiting the Claimant from suing upon the e-mail obtained, as it had been, by way of disclosure. The Claimant contends that this issue had been raised by her before the employment tribunal. There was a dispute between the parties as to whether the tribunal had, on the one hand, declined to exercise any such jurisdiction on the ground that the decision should be made by the High Court (as the Defendant contends) or, on the other hand, whether the discretion had been exercised by refusing to make an order (thus arguably giving rise to an issue estoppel). There was no reference to this in any of the written orders of the tribunal, but Mr Freer asserted that an order had been made orally (but not reduced into writing). I agreed, therefore, that when further information was forthcoming in response to a request to the tribunal itself, the parties could make written submissions to me if they wished. Notwithstanding her stance of *res judicata* on this aspect of the case, the Claimant applied herself on 24 May to the High Court for a declaration that she might be permitted to rely on the document.

24. Meanwhile, on 21 May, the tribunal gave directions that written submissions should be placed before them and indicated that a decision would probably be reached by the end of July. In view of this background, the Defendant applied in the High Court on 24 May for an extension of time for serving its defence until the conclusion of the tribunal proceedings. This was naturally because it was perceived that the tribunal proceedings could have a bearing, one way or the other, on the merits of the libel action and, in particular, the Defendant wished to keep open the opportunity, at least, of making an offer of amends under the provisions of sections 2-4 of the Defamation Act 1996. Master Ungley duly extended time until 14 days after the tribunal had "rendered its award or further order".

25. For reasons that are unclear, the Claimant withdrew all her claims against the Defendant in the employment tribunal on 4 June 2007, with the result that all the public and private resources expended on those proceedings had been wasted.

26. On 12 June 2007 the Defendant issued an application seeking, by one means or another, to dispose of the libel claim. The remedies sought are as follows:

    i) that the Claimant be prohibited from using or relying upon the e-mail containing the words complained of, pursuant to CPR 31.22(2), and that, in consequence, the claim should be struck out;

    ii) that the claim be struck out, or summary judgment be entered, in the light of the limitation defence available;

(iii) that the claim be struck out as an abuse of process in accordance with the principles outlined in *Henderson v Henderson* (1843) 3 Hare 100, as further explained in *Johnson v Gore-Wood & Co* [2002] 2 AC 1;

(iv) alternatively, that the proceedings be struck out as an abuse of process for the reasons that no substantial tort has been committed, that any damages payable to the Claimant, if she succeeded, would be minimal and that the costs would be out of all proportion to any legitimate or tangible advantage: see e.g. *Dow Jones & Co Inc v Yousef Abdul Latif Jameel* [2005] EWCA Civ 75;

(v) that, in the further alternative, certain paragraphs should be struck out of the particulars of claim (relating to the extent of the publication of the e-mail, the allegation of deliberate concealment of the document sued upon, and the claim for special damages).

It will be apparent that there is a considerable overlap between the subject- matter of the Claimant's outstanding applications in the High Court and those initiated on behalf of the Defendant.

27. For the purposes of the hearing on 21 June, I permitted Mr Freer once again to represent the Claimant, who took no direct part in the proceedings herself. His oral submissions were very brief. They were supplemented in a written document dated 2 July and consisting of 12 closely typed pages. (Ms Marzec was given the opportunity to respond, but chose not to do so.)

28. I turn first to the scope of publication, which is pleaded at paragraphs 11 and 12 of the particulars of claim:

> "11. By reason of their knowledge of the said facts and matters, the Claimant was identified by an unquantifiable number of persons as the individual referred to by the matters complained of. Without limiting the generality of this averment, these persons included the staff, employees and principles (*sic*) of the Defendant.
>
> 12. By reason of their knowledge of the said facts and matters, the Claimant was identified to Tessa Boshoff and Stella Barham to whom the email was specifically addressed, they being the senior managers to whom the Claimants letter of concern was originally passed and who in light of which apparently demanded of Farncombe that she explain herself, in response to which Farncombe published the matters complained of which bore no relevance to the Claimants concerns, in addition to being untrue and defamatory."

It will be noted that it is not actually alleged that the Defendant published the contents of the e-mail to an unquantifiable number of persons. Moreover, there is no evidence

that it did. The Defendant's evidence is that the communication was sent only to the two individuals named and, moreover, that it was not filed by the Defendant on the Claimant's employment record. In particular, there is no evidence that the contents of the e-mail were sent to any of those involved in the process of dismissing the Claimant (as described above) or in any of the internal grievance procedures. Emphasis is naturally placed upon that fundamental fact, on the Defendant's behalf, because it is said that there is simply no causal link which has been pleaded, let alone supported by evidence, between the defamatory publication and the dismissal – which is alleged to give rise to the substantial claim for special damages. Mr Freer told me that he and the Claimant do not believe the evidence as to the limited scope of publication, but that is not evidence.

29. Mr Freer submitted that it is not so much the scope of publication which matters here as the identity of the recipients who were, he said, "targeted" as being "in control" of the Claimant's employment. He even suggested that the contents of the e-mail explain why she was dismissed. But there is no evidence to that effect for the court to weigh against the denials of the Defendant's witnesses in their statements.

30. It seems to be clear, from the largely uncontroversial history which I have narrated above, that the stated grounds for the Claimant's dismissal were that she had been away sick for about six months and that, there being no indication as to when she might ever return, she was accordingly incapable of performing her tasks. Indeed, it was the Defendant's wish that she should return to work and that any reasonable steps should be taken to facilitate her return. Against this background, I can see no substance in Mr Freer's claim that there was an "elastic conspiracy between the Defendant and the author [of the e-mail] to defame and harm the Claimant in order to justify firing the Claimant as and when it was decided to do so". No such justification was ever put forward.

31. It is also significant that any suggestion that the dismissal was brought about by the contents of the 13 January e-mail would be inconsistent with the way the claim was advanced before the employment tribunal. The reasons then relied upon had nothing to do with the e-mail (of which, of course, at that time the Claimant was unaware). The reasons identified for her allegedly unfair dismissal were:

> "a) Having suffered a detriment and/or dismissal due to requesting leave or time off to assist a dependent in that the Respondent's claim that the disciplinary process against the Applicant, and that led to her dismissal, was due to absenteeism, and in that the Applicant was absent from work following serious family crises, and in that the Respondent does not specify what absenteeism was the subject of the alleged disciplinary process;
>
> b) Having suffered a detriment and/or dismissal resulting from a failure to allow an employee to be accompanied at a disciplinary/grievance hearing, in that the Respondents stated that they would not allow the Applicant to be accompanied at either the alleged disciplinary hearing or the alleged appeal hearing;

> c) Having suffered a detriment, discrimination and/or dismissal on grounds of disability or failure of employer to make reasonable adjustments, in which the Applicant refers to all herein and the particulars of the first case and in any event as will be demonstrated;
>
> d) Having suffered unfair dismissal after exercising or claiming a statutory right in that the Applicant was dismissed after and for the reason of having made the complaint in the first case [i.e. the first employment tribunal proceedings];
>
> e) Having suffered unfair dismissal on grounds of capability, conduct or some other general reason in that the Respondents claim that the Applicant's dismissal was due to absence, which in any event and notwithstanding (a) above was caused by the Respondent's actions and treatment of the Applicant;
>
> f) Failure to provide a written statement of reasons for dismissal or the contents of the statement are disputed in that notwithstanding the stated reason for dismissal which in and of themselves and as will be demonstrated do not stand up to scrutiny, the reasons for the Applicant's dismissal are and as will be demonstrated due to her having made her complaint to the Tribunal in the first case."

32. No attempt was made to supplement or amend the grounds of complaint in the employment tribunal proceedings at any stage between obtaining the 13 January e-mail at some point in February 2007 and the abandonment of those proceedings in June. It is submitted that such an application would have been a natural step to take if the Claimant genuinely believed that the content of the e-mail was causative of her dismissal.

33. It is also submitted that it is an abuse of process on the Claimant's part to claim special damages in the libel action, since this claim had also been advanced before the employment tribunal. Accordingly, the Defendant is being vexed twice at considerable expense for what is to all intents and purposes the same claim for financial relief. On the other hand, Mr Freer argued that it was appropriate to drop the tribunal proceedings, as it would have no jurisdiction in respect of defamation, and it would be convenient to have all issues dealt with together.

34. Of course it is true that the tribunal could not have determined a claim founded in defamation, but the substance of the financial claim put forward by the Claimant related to the special damages said to flow from the allegedly unfair dismissal. To that extent it could and should have been pursued before the tribunal.

35. Ms Marzec submits that if the claim for special damages is struck out, whether as being unsubstantiated in respect of causation or in accordance with the principle in *Henderson v Henderson* (i.e. because it had been raised in the employment tribunal proceedings and then abandoned), the Claimant is left with the only publications having been to the two individuals Ms Boshoff and Ms Barham. On that scenario, it is submitted, the case will fall within the mischief identified by the Court of Appeal in

the *Jameel* case, since the Claimant could obtain no tangible or legitimate advantage in establishing that purely technical publication and "the game would not be worth the candle". There were almost certainly no consequences for the Claimant's reputation or career in the limited publication; what is more, there would be no prospect of libel proceedings achieving vindication of the Claimant's reputation in the eyes of either of the two recipients of the e-mail.

36. In this context, it is important to remember that the Claimant complained merely of one sentence in the e-mail. That is why it was important for me to set out its entire content in this judgment, since the prospect of any vindication being achieved is minimal in the light of the bulk of the allegations which were unchallenged.

37. I need to be cautious in the application of the reasoning in *Jameel*, however, and especially in light of the observations of Sedley LJ in *Steinberg v Pritchard Englefield* [2005] EWCA Civ 288 at [20]-[21]. Yet here there can be no inference of "substantial publication", as there was in that case (concerning, like *Jameel*, an internet communication).

38. Thus, although I acknowledge that findings of abuse of the kind contemplated in *Jameel* will be relatively rare, it does seem to me that this case crosses the threshold for the reasons advanced by Ms Marzec. If it were necessary to do so, therefore, I would have been prepared to strike out the claim on that ground. As will shortly emerge, however, there are more fundamental reasons for granting the Defendant the relief sought.

39. I turn next to Ms Marzec's submissions on CPR 31.22. Traditionally, a party who obtained a document in the course of legal proceedings, pursuant to the process of discovery, was deemed to have given an implied undertaking not to use the document in question for a collateral purpose: see e.g. *Riddick v Thames Board Mills Ltd* [1977] 1 QB 881. The law in this respect was, however, changed following the decision of their Lordships in *Harman v Secretary of State for the Home Department* [1983] 1 AC 280, when it was held by the European Court of Human Rights that the rules then operative were not consistent with Article 10 of the Convention. Accordingly, domestic law was changed so that the implied undertaking was not to apply in circumstances where a document had been referred to in open court, unless the court for "special reasons" had otherwise ordered on the application of a party or of the person to whom the document belonged: see the former RSC Ord 24, r 14A.

40. It is important to have in mind the current provisions contained in the CPR, where rule 31.22 states

    i) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where –

        a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;

        b) the court gives permission;

        c) the party who disclosed the document and the person to whom the document belongs agree.

ii) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public.

41. Plainly, where a discretion falls to be exercised in accordance with these provisions, the court will naturally have regard to the same public policy considerations which originally underlay the implied undertaking. My attention was drawn, in this respect, to *Matthews and Malek* (3rd Ed), para 13.05. As the learned editors point out, it is appropriate still to bear in mind that compulsory disclosure involves an infringement of privacy, that public policy requires the encouragement of full disclosure in litigation, and that there is always a need to treat litigants justly.

42. It is also suggested by the learned editors of *Gatley on Libel and Slander* (10th Ed) at 13.28 (fn.31) that the court would "always" prohibit collateral use of a document, even if it had been read or referred to in a public hearing, in circumstances where it was sought to bring a libel action based upon it. It may be that this goes rather far in the light of modern developments. I have in mind, for example, the observations of the Court of Appeal about RSC Ord 24, r 14A in *Mahon v Rahn* [1998] QB 424, 455 (Staughton LJ) and 452 (Otton LJ). But the threat of collateral litigation is plainly a consideration which needs to be weighed very carefully.

43. It is important to have in mind the decision in *Lilly Icos Ltd v Pfizer Ltd* [2002] 1 WLR 2253 where the provisions of CPR 31.22(2) were considered by the Court of Appeal. The document in question had been referred to in a witness statement, but none of its detail was read out in court and, moreover, it did not appear to have any bearing on the outcome of the trial. Thus, it could not be said that reference to it would be necessary for understanding the result of the case or the reasoning processes which led to it. When considering an application in respect of a particular document, the court should take into account the role that the document has played or will play in the trial, and thus its relevance to the process of public scrutiny referred to by Lord Diplock in *Home Office v Harman* [1983] 1 AC 280 at 303 ("Publicity is the very soul of justice"). The court should nonetheless generally start from the assumption that all documents in a case are necessary and relevant for that purpose, and should not accede to general arguments that it would be possible, or substantially possible, to understand the trial without access to a particular document. Yet, in particular cases, the centrality of the document to the trial is a factor to be placed in the balance.

44. This question of the "centrality" of the document may be a significant factor when balancing the competing considerations. It is necessary to have in mind the public policy underlying the relevant rule and also the interests of the various litigants (and indeed third parties) who may be involved.

45. This document was indeed disclosed under compulsion pursuant to the tribunal's directions that lists be exchanged on or before 31 January 2007. It was exhibited to Ms Farncombe's witness statement for the purposes of the tribunal proceedings, and it was thus presumably read by the members of the tribunal. Mr Freer cross-examined Ms Orford, asking whether or not she had read the e-mail. She denied that she had and this evidence was unchallenged. The evidence makes clear that the actual words complained of in the e-mail were not read out or expressly referred to at a public hearing. Ms Marzec submits against this background, in so far as it matters for present purposes, that the 13 January e-mail was peripheral to the tribunal proceedings. But in

the end the question I have to resolve seems to me to depend on rather broader matters of principle.

46. It is no longer necessary (as was the case under the former RSC Ord 24, r 14A) to show that there are "special reasons" for restricting the use of the document. It is a question of balancing the competing interests, both private and public, without the inhibition of any presumption either way. The purpose of the obligation of confidence in respect of documents disclosed by compulsion of law has always been to encourage full and frank disclosure. It has to be recognised that the threat of being sued over a defamatory document would be a powerful disincentive to disclosure. This is especially so in circumstances where the document would be unlikely to see the light of day other than through the legal obligation.

47. It is perhaps also relevant to have in mind the public policy underlying the long-standing parallel rule that allegations made in the course of litigation are protected by privilege. This is obviously primarily because it is desirable that parties and their legal advisers should not be inhibited in the conduct of court proceedings by the possibility of being sued for defamation.

48. In this case, it is proposed that the document disclosed should be used to launch an attack upon the good faith of the Defendant and a number of its employees. The occasion of publication was manifestly one of qualified privilege. Mr Freer's written submissions of 2 July contained the argument that "no duty existed to publish the matters complained of". A duty is not, however, essential to qualified privilege. The subject-matter of the e-mail was of common and corresponding interest to Ms Farncombe and the recipients. While recognising that she was expected and entitled to respond to the Claimant's allegations, Mr Freer suggested that she had to do so "fairly and evenly". Yet that is not an essential ingredient in a defence of qualified privilege either. The point of the defence is to enable people to communicate in strong and forthright terms – provided only that they do so *honestly*.

49. Although the Claimant would no doubt wish to advance a case of malice against the author, such findings are very rare indeed. Moreover, it is necessary for a claimant who wishes to prove malice to plead and prove facts which are more consistent with its presence than with its absence: see e.g. *Somerville v Hawkins* (1851) 10 CB 583, 590; *Alexander v Arts Council of Wales* [2001] 1 WLR 1840 at [32]-[33]; and *Telnikoff v Matusevich* [1991] 1 QB 102, 120.

50. There is nothing here to suggest, especially in the light of the bulk of the e-mail itself, that Ms Farncombe was other than sincere in the view she expressed. Although the stage of pleading malice has not been reached, no evidence has been put forward to show how such a plea could be viable. During the hearing, Mr Freer put it no higher than to say that Ms Farncombe "*could* be malicious". In his supplemental submissions, he claimed that she "could have no reason to publish [the words complained of] except out of malice and to vent spite". Yet this is not so: the alternative explanation is that she simply believed the content of the e-mail to be true.

51. If the Defendant were successful in defending these proceedings, there is very little prospect of recovering anything significant by way of costs against the Claimant. In these circumstances, argues Ms Marzec, the balance of justice lies firmly in the Defendant's favour rather than in permitting the Claimant opportunistically to use the

e-mail she obtained through the tribunal disclosure processes, so as to vex the Defendant all over again with a view to recovering largely the same remedies sought in the now abandoned proceedings. Her argument in this respect obviously overlaps to a large extent with that advanced in support of the application based upon *Henderson v Henderson*.

52. When the response of the tribunal to the Claimant's written request about the supposed exercise of its jurisdiction under CPR 31.22 became available, on 28 June, it was to the effect that, even if it had jurisdiction, it had been thought inappropriate to exercise it. The Chairman's note concluded that it was "… quite simply not our place to make [an] order restricting/prohibiting litigation in a higher court. Any application should be made to the High Court". In these circumstances, despite Mr Freer's written submissions to the contrary, it is clear that there is no reason why I should not exercise the court's discretion under CPR 31.22(2). In doing so, I have concluded that the balance of justice lies very much in favour of prohibiting the use of this disclosed document for the extraneous purpose of claiming damages for defamation in respect of what appears to be a limited publication. That is sufficient to dispose of the applications now before me in the Defendant's favour. I will nevertheless consider the remaining issue of limitation for the sake of completeness.

53. The primary limitation period has obviously expired, and the proceedings were launched just over three months out of time. The Claimant argues that there has here been deliberate concealment of the words complained of, within the meaning of s.32(1)(b) of the Limitation Act 1980; alternatively, she invites the court to disapply the primary limitation period as a matter of discretion, pursuant to the provisions of s.32A of the 1980 Act (as amended by the terms of the Defamation Act 1996).

54. It is elementary that, in this context, there is a distinction between not revealing a confidential document (until disclosed under compulsion of law) and deliberately concealing it. It is implicit in the notion of "deliberate concealment" that a document has been concealed from someone who would otherwise have a right of access to it. The evidence of Ms Orford confirms that it would not be the policy of the Defendant to show an e-mail of this nature to the subject of it. Mr Freer said that it would be "ludicrous" to suggest that the Claimant had no right to know what judgments her superiors (including Ms Farncombe) were making about her – especially in the context of her grievance procedure. I am not persuaded. It was a private communication between Ms Farncombe and her managers. There is no right in an employee to see all internal documents passing about him or her within the employing company.

55. The test for disapplying the limitation period is whether or not it would be "equitable" to allow an action to proceed. The discretion is a broad one and it is necessary to have regard to "all the circumstances". Plainly, it would be legitimate for the court to take into account the inherent merits of the claim, or lack of them, and to have regard also here to the factors which have been raised in the context of alleged abuse of process (whether in accordance with the principles of *Henderson v Henderson* or those discussed in the *Jameel* case).

56. Moreover, in applying with the terms of s.32A itself, it is necessary to have regard to "the extent to which [the Claimant] acted promptly and reasonably once [s]he knew whether or not the facts in question might be capable of giving rise to an action". No

explanation has been offered for the delay between 2 or 3 February and 25 April 2007. Reference has been made to a letter before action dated 12 April 2007 (to which the Claimant alleges that the Defendant made no response), but the Defendant denies ever having received it. Moreover, despite requests, to date no copy has been supplied.

57. Yet again, Ms Marzec relies upon the obvious defence of qualified privilege which would be available to the Defendant, to the absence of any evidence of malice, and to the arguments raised on abuse of process.

58. She attaches particular significance to the fact that the Claimant has chosen to sue over only one general sentence in an e-mail which contains a considerable number of specific defamatory allegations.

59. In all the circumstances, I would not be prepared to exercise the court's discretion in favour of disapplying the 12 month limitation period which Parliament chose to introduce for reasons of public policy in 1996.

60. Finally, I must address a general submission advanced by Mr Freer. This was to the effect that there are facts in dispute, such that the court is not in a position to give summary judgment. He suggests, in particular, that a jury should adjudicate upon the allegation of "deliberate concealment" and also upon whether the e-mail led to the Claimant's dismissal. As I have said, however, there is no evidence to support either proposition.

61. Such an argument may well be material in some circumstances; for example where a defendant denies responsibility for publication, or in a case in which a defence is defeasible on proof of express malice, provided the groundwork has been laid by showing that there is *some* evidence more consistent with malice than with its absence. That is not so here, as I have already pointed out. It is not legitimate to proceed to trial merely in the hope that some evidence of malice might emerge in cross-examination. It is not sufficient either to rest on Mr Freer's proposition that the Claimant "puts the Defendant to strict proof". More importantly, however, the "disputed facts" argument does not go to undermine the Defendant's case on CPR 31.22 or on limitation in any event.

62. Against this background, I do not consider that there is anything to inhibit the grant of summary judgment.