Neutral Citation Number: [2019] EWHC 1803 (QB)

Case No: QB-2018-000247

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/07/2019

Before :

MASTER COOK

- -

Between :

Mr JEFFREY OSAGIE	**Claimant**
- and -	
(1) SERCO LIMITED	**Defendants**
(2) MARTIN JAMES	
(3) CARL CRYSELL	
(4) LYNN CHADBONE	
(5) GUISEPINA MANA	
(6) JON MCHALE	

- -
- -

Mr Osagie in person
Mr Adam Speker (instructed by **Addleshaw Goddard LLP**) for the **Defendants**

Hearing date: 10 June 2019

- -

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.

....

MASTER COOK

MASTER COOK:

1. The Claimant brings this claim for damages and injunctive relief in slander, libel malicious falsehood, negligence and under the Human Rights Act 1998 against his former employer, the First Defendant and five employees of the First Defendant, the Second to Sixth Defendants.

2. There are three applications before the court;

   i) the Defendants' application dated 27 March 2019 to strike out the claim and/or for summary judgment;

   ii) the Claimant's application dated 27 March 2019 to amend his Particulars of Claim;

   iii) the Claimant's application dated 8 March 2019 to set aside the costs order made by me in my order of 26 February 2019.

3. As far as the applications of 27 March 2019 are concerned Mr Speker made the point that the Claimant has effectively conceded his particulars of claim require amendment. In the circumstances it was appropriate to focus upon the Claimant's proposed amended particulars of claim and to consider whether permission to amend should be granted. Mr Speker's submission was that permission to amend should not be granted and/or the claim should be struck out because:

   i) There are procedural defects that have still not been remedied and to allow the claim to proceed in the form proposed would be contrary to the overriding objective;

   ii) There are unanswerable defences;

   iii) The claim is vexatious and/or an abuse of process however it is pleaded.

4. I consider that Mr Speker's suggestion is a sensible way of proceeding. As far as the application of 8 March 2019 is concerned, Mr Speker was prepared to concede that my order for costs should be varied to provide for "Defendants' costs in case". Mr Osagie was content with this outcome and therefore that disposes of the third application.

5. I should also record that shortly before this hearing, on 10 June 2019, Mr Osagie filed a notice of discontinuance against the Fourth Defendant Miss Lynn Chadbone. The discontinuance of the claim against Ms Chadbone means that paragraphs 22, 23 and 24 of the draft amended particulars of claim will be deleted.

Background

6. Mr Osagie was employed by the First Defendant, Serco Limited from March 2015 until August 2018 when he resigned. During this period, he worked as a prisoner custody officer and a deputy court custody manager.

7. In early March 2017 Mr Osagie was signed off work with stress and low mood by his general practitioner. On 6 March 2017 he sent a grievance to one of his managers, Mr

Chris Woodward. In his grievance Mr Osagie complained of seven instances of treatment at the hands of his supervisor, Mr Andrew Miller, which he alleged were contrary to the Equality Act 2010. The grievance was investigated and reported on by Wendy Mckenzie. Wendy Mckenzie produced a draft report, the thrust of which was that she did not uphold Mr Osagie's grievances. She also made three recommendations, including one that Mr Osagie should attend a disciplinary hearing in respect of a failure to carry out his duties in full uniform. The draft report was sent to Margaret Thompson in Serco's HR department.

8. On 30 June 2017, before he had received the outcome of his grievance, Mr Osagie commenced proceedings against his employer in the Employment Tribunal. It would appear he did so in order to preserve his position in respect of time limits.

9. On 25th July 2017 the result of the grievance was sent to Mr Osagie. The only difference from the draft report is that the recommendation of disciplinary action was removed as Margaret Thompson formed the view that it was an inappropriate outcome in the context of a grievance.

10. Mr Osagie was dissatisfied with the result of his grievance and initiated an appeal process by way of a letter dated 6 August 2017. The appeal process was conducted by Jane Stow. Following a hearing which for various reasons could not take place until 12 October 2017 Jane Stow decided that she would conduct some further interviews. Having completed her enquiries a final outcome was communicated to Mr Osagie on 21 December 2017. Jane Stow rejected the assertion made by Mr Osagie that Wendy Mckenzie had been biased or that there had been any significant procedural failings, she reconsidered the seven incidents which comprised the original grievance and while acknowledging there had been a delay in providing an outcome she went on to dismiss each of Mr Osagie's complaints.

11. Mr Osagie's Employment Tribunal claim was heard over five days between 12 and 27 March 2018 by a panel chaired by Employment Judge Crosfill. On 26 July 2018 the Tribunal handed down a lengthy written judgment and dismissed Mr Osagie's claims of; harassment related to sex, direct discrimination because of race, direct discrimination because of sex and victimisation. The Tribunal reserved one issue relating to whether Mr Osagie was disabled for the purpose of section 6 of the Equality Act.

12. Mr Osagie has two further Employment Tribunal claims, a claim for victimisation and harassment arising out of his complaint that various employees of Serco had alleged and repeated allegations that he had engaged in inappropriate sexual conduct towards a female member of staff and a claim for direct discrimination, victimisation and constructive unfair dismissal. The Employment Tribunal has stayed these claims pending resolution of these proceedings in the High Court for the reasons given by Employment Judge Morton on 30 April 2019.

13. It is right that I should note at this stage that the Employment Tribunal made a number of findings which were adverse to Mr Osagie. At paragraph 22 of the judgment;

> "We conclude that the Claimant was very difficult to manage and resented the instructions that he was given. In particular, he was intolerant of the policy of surrendering electronic devices.

> In light of that finding we would accept that the issue of electronic devices was raised with the Claimant more often than with other employees but only because the Claimant had failed to comply with the policy on numerous occasions and tended to push back against his managers."

At Paragraph 25;

> "Elsewhere in this judgment we find that that the Claimant was not an accurate historian. We make no finding as to whether the Claimant had observed Dirk Muller using his iPad. It is quite possible he did. However, we reject the Claimant's account that Andrew Miller demanded that he surrender his electronic devises knowing that that Dirk Muller was using his…."

At paragraph 28;

> "The Claimant says that he was singled out by being asked to do property duty alone. We accept that there were occasions when the Claimant was asked to do property alone. The 1 March 2017 is an example when he was asked to start alone. In fact (*he*) finished duty very quickly and before the person (2Mo") who was to assist him turned up. However, we do not accept this was anything out of the ordinary and if the Claimant resented the odd occasion when he, like others, was expected to undertake these duties he has an unjustified sense of grievance. There was evidence from Stephan McLean and other employees that the Claimant was not prepared to muck in and help and his attitude in regard to this allegation is consistent with that evidence."

At paragraph 40;

> "The Claimant says that at some point during the murder trial Adam Buchanan took annual leave and suggested that the Claimant sit in on the trial. He says that Michelle Stephens initially agreed and then later said it was not possible. Michelle Stephens has no recollection of this and in her witness statement suggests that Adam Buchanan did not take leave at least for three days of the trial. Michelle Stephens says that she would never have thought of allocating a PCO to a particular trial on the basis of their race. She had no recollection of any conversation relating to Adam Buchanan. Given the propensity of the Claimant to embellish his account of events we are not satisfied that the Claimant's account is accurate although we accept there was some conversation. We reach our conclusions on that point below. However we did note that in the course of the hearing the Claimant had to be prompted to put any allegation of race discrimination to Michelle Stephen whom he had made no criticism during his extensive grievance process

nor had he named her as a respondent to these proceedings in contrast to his approach to Andrew Miller."

At paragraphs 50 and 51;

> "We entirely reject any suggestion made by the Claimant that he was dressed in his company uniform underneath his fleece. We do so for the following reasons. It is most unlikely that the Claimant would have been doing exercises in a garment as warm as a fleece. We see no reason why the Claimant's colleague Samuel Kusi-Aidoo would lie about the incident. We have had regard to the fact that Andrew Miller set out his version of events contemporaneously in the Occurrence Record. Finally, and most compellingly, the fact the Claimant was not wearing his proper uniform beneath his fleece provided the most likely explanation of why he refused to unzip his fleece when asked to do so. The Claimant has tried to persuade us that that he did not know why Andrew Miller wished to see under his fleece. We consider that to be disingenuous. He was well aware that there were issues around wearing proper uniform and he would have been well aware that that was the purpose of asking him to unzip his fleece. His refusal to do so we find was simply because he knew full well that he had disobeyed the instruction to put his uniform on before coming to assist his colleagues.
>
> We regret to say we find that the Claimant has sought to mislead us about what he was wearing on that day and attempted to suggest that two of his colleagues were dishonest in an attempt to further his case."

At paragraph 59;

> "The Claimant has alleged that Andrew Miller said he wanted "4 men" to assist with the C&R incident. Andrew Miller disputes that. Again we prefer the evidence of Andrew Miller. We have two reason for that firstly, as before, we have found that the Claimant is an inaccurate historian in relation to other parts of his case. We accept that is not conclusive. In addition, we note that amongst the people held back were female PCOs. Had the request been limited to one gender it seems less likely that Andrew Miller would only referred to "men"."

At paragraph 90;

> "We unhesitatingly reject the Claimant's account of Kirsty Hawkes conduct. The Claimant has signed a copy of the notes and added a note to say that he had been provided with his own copy to take away. Had there been a disagreement about the notes taking one and a half hours the Claimant had an ample opportunity to record his concerns. We have had regard to the

> florid terms in which he has described the meeting, the fact that we have concluded that he has not been frank about other events and the fact that his account of events is unlikely given that the parties were already litigating. We have regretfully concluded that the Claimant has simply not told us the truth about these events."

14. Mr Osagie has appealed the Employment Tribunal decision.

These proceedings

15. On 30 November 2018 Mr Osagie issued his claim form. The brief details of claim were;

> "This is a claim for:
>
> Defamation, Malicious Falsehood, Negligence, Violation of Human right 1998
>
> The named defendants made several untrue defamatory statements against me which severely damaged my reputation and forced me to resign from my position as Deputy Court Custody Manager.
>
> All their defamatory statement contain Malicious falsehood
>
> Serco Ltd acted Negligently in the way it handled my grievance of March 2017 which caused me to suffer pesonal injury in the form of depression
>
> By defaming me, Serco is in breach of my Article 8 of the Human right ACT (1998) and the ECHR.
>
> Value 250,000"

16. Attached to the claim form was a two-page particulars of claim. It is not necessary for me to set out the contents of the particulars of claim save to say that the Claimant clearly failed to set out; a defamation claim in accordance with the requirements CPR Part 53, the necessary particulars of negligence or malicious falsehood, full particulars of the loss and damage claimed and the document was not verified by a statement of truth.

17. On 13 February 2019 the solicitor for the Defendants wrote a detailed and careful letter to Mr Osagie drawing his attention to each of the defects in his pleading. The letter also drew attention to the fact that the allegations set out in the particulars of claim appeared to be based on evidence and/or disclosure provided by Serco in the context of the Employment Tribunal claims and as such the claim was an abuse of the process of the court. The letter concluded by urging Mr Osagie to take specialist legal advice and warning him that an application to strike out the claim may well be forthcoming.

18. I have no doubt that each of the criticisms levelled by the Defendants' solicitor at the particulars of claim were valid and would have led a court to strike out the claim. Perhaps recognising this fact Mr Osagie responded by indicating that he proposed to amend his particulars of claim.

19. After some delay Mr Osagie sent a proposed draft amended particulars of claim to the Defendants' solicitor on 4 March 2019. On 25th March 2019 the Defendants' solicitor responded by indicating that the proposed amendments did not rectify the deficiencies which had been previously identified and put Mr Osagie on notice that an application to strike out the claim would be made.

20. On 27 March 2019 Mr Osagie purported to serve his original claim on the individual Defendants, despite the fact that they had already acknowledged service, and provided yet a further version of the proposed amended particulars of claim. On 10 May 2019 the Defendant's solicitor wrote to Mr Osagie responding in detail to the third iteration of his amended particulars of claim and informed him that they would not consent to the proposed amendments because the claim still suffered from many of the same defects previously identified and more besides.

The applicable law

21. The principles that apply on an application to amend are derived from CPR r.17. It is well established that when considering whether to exercise its power to amend the court has a discretion which must be exercised having regard to the factors set out in CPR r1.1 (2), so as to deal with the case justly and at proportionate cost.

22. CPR r.3.1A (2) provides that when exercising its powers of case management, the court must have regard to the fact that at least one party is unrepresented. However as explained by Lord Sumption in ***Barton v Wright Hassall*** **[2018] 1 WLR 1119** at [18] a lack of representation will;

> "…not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules: CPR rule 1.1(2)(f). The rules do not in any relevant respect distinguish between represented and unrepresented parties."

23. These applications are being made at the beginning of proceedings and I have had due regard to the fact that Mr Osagie is acting in person, however I must also have regard to the fact that he has been given a very clear opportunity to understand the objections taken to the way in which he has chosen to set out his claim and to amend his claim having regard to those objections. I am now considering the third iteration of his particulars of claim.

24. There is clear authority that an application to amend will be refused if the proposed amendment has no prospect of success at trial, see ***Tesla Motors v British Broadcasting Corp*** **[2013] EWCA Civ 152** at [28], ***Groveholt Ltd v Hughs*** **[2010] EWCA Civ 538** at [50], and ***Mandrake Holdings Ltd v Countrywide Assured Group Plc*** **[2005] EWHC 311 (Ch)**.

25. An amendment may also have no prospect of success if there are failures to comply with rules or practice directions such that the claim would be struck out under CPR r. 3.4(2) (c) and an amendment should be refused if the effect would be that the statement of case was an abuse of process or otherwise likely to obstruct the just disposal of the proceedings under CPR r. 3.4 (2) (a).

26. The service of a particulars of claim is not a mere technicality it is the means by which the law seeks to give effect to the right to a fair trial. A defendant cannot have a fair trial unless he can understand and respond to the case being put forward by the claimant. It is for that purpose rules exist to ensure that the material facts, that is those necessary for formulating the cause of action, are set out. These rules can be found in CPR Parts 16 and 53. I now examine the pleading requirements of the causes of action relied upon by Mr Osagie.

Defamation causes of action and defences

27. In a libel action, a claimant must establish;

    i) the defendant's responsibility for a publication,

    ii) that there has been publication to at least one third party,

    iii) on a particular date, which

    iv) refers to the claimant, and

    v) which is defamatory of him in a meaning he must identify which is arguable and which overcomes the s.1 Defamation Act 2013 threshold which he can prove by inference or facts. The requirement to specify the defamatory meaning is set out at CPR r.53.2.3(1),

    vi) the claimant must also prove serious harm has been caused by the publication or facts set out. The requirement to set out the harm caused is set out at CPR PD 53 para 2.3.

28. Additionally, in a slander action a claimant must set out the precise words and prove special damage was caused by the statement or plead one of the exceptions. The requirement to set out the words spoken is set out at CPR PD 53 para 2.4.

29. If a claimant can establish the above elements in respect of each publication, he will have an arguable cause of action. However, an arguable cause of action may be met by a defence such as absolute or qualified privilege.

30. I accept the submission that a court must not conduct a mini trial when considering the question of whether there is an unanswerable defence on an application to amend however, the court can and must, for the reasons given above, form a view of whether the claim has a real prospect of success at trial and may do so on the basis of a claimant's own pleading and unchallenged evidence.

Potential Defences

31. It is of relevance in the circumstances of this case to note that the defence of absolute privilege attaches to statements made or in connection with judicial proceedings, see ***Royal Aquarium v Parkinson*** **[1892] 1QB 431 CA at 451**. The defence will apply to the Employment Tribunal, which is a judicial body, see ***Wilson v Westney*** **[2001] EWCA Civ 839** at [11];

> "It seems to me that the judge's conclusion that any use of the witness statement before the employment tribunal would have been covered by absolute privilege was clearly right. It is quite clear that an employment tribunal operating under the Employment Tribunals Act 1996 is a tribunal exercising judicial functions and acting in a manner similar to that in which a court of justice acts. That makes it a body in respect of whose proceedings absolute privilege applies (see the decisions in Trapp v. Mackie [1979] 1 W.L.R. 377, and Copartnership Farms v. Harvey-Smith [1918] 2 K.B. 405 at 408)."

32. The categories of documents covered by this form of privilege were outlined in the case of **Lincoln v Daniels [1962] 1QB 237 AC** at 257-278;

> "The first category covers all matters that are done coram judice. This extends to everything that is said in the course of proceedings by judges, parties, counsel and witnesses, and includes the contents of documents put in as evidence. The second covers everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of the proceedings and starting with the writ or other document which institutes the proceedings."

33. The defence of qualified privilege extends to statements where the parties have what has been called a "common or corresponding interest in a statement" and include making a complaint or request for redress to a proper body for dealing the complaint and made within that context, see for example ***David v Hosany*** **[2016] EWHC 3797** at **[35];**

> "One of the longest-established and best-recognised occasions of qualified privilege is the making of a complaint or request for redress to the proper body for dealing with such complaints against the person in question, a doctrine which applies in particular to complaints against public officials but would also apply to complaints about fellow employees or others who might come into contact with people in the course of carrying out their remit. (See Gatley (121 edn. 2013) paras 14.59-62)."

34. In the circumstances it is clear that an employee cannot sue for defamation on the basis of the republication of statements within a disciplinary process because he will be taken to consent to the republications within that process, see for example ***Friend v Civil Aviation Authority (no1)*** **[1988] IRLR 253.**

Malicious falsehood

35. In a claim for malicious falsehood a claimant must set out the false and malicious statements said to have caused the damage or which are actionable under s.3 Defamation Act 1952. The claim must set out that the statement was calculated – more likely than not- to cause pecuniary damage, see ***Gatley on Libel & Slander*** (12th Ed) at 26.42. Malice is a very serious allegation and full particulars must be provided to support such a plea, see ***Thompson v James*** [2013] EWHC 858 at [16];

> "It is not in dispute that an allegation of malice is an allegation of dishonesty. A pleading of malice requires a high degree of particularity, and the matters pleaded must be more consistent with the presence of malice than its absence: *Telnikoff v Matusevitch* [1991] QB 102. A mere assertion of malice will not do. A claimant alleging malice may not persist in a defective plea of malice in the hope that, if the defendant gives evidence, something will emerge in cross-examination. Malice cannot be inferred from a pleading of matters which it is alleged that the defendant ought to have known, or ought not to have taken into account if he had been rational. That might support a case of carelessness, but carelessness is not malice."

Negligence

36. In a negligence claim a claimant must plead the duty of care said to be owed by the defendant to the claimant, the facts that give rise to a breach of the duty and particulars of the damage caused by the breach.

Human Rights Act claim

37. In a claim under ss 6 and 7 Human Rights Act 1998 the claimant must set out that the defendant is a public authority and has interfered with an identified Convention right, see ***Gatley*** at 26.44 and ***Serco Limited v Redfearn*** **[2006] EWCA Civ 650**.

Consideration of the amended particulars of claim

38. Paragraphs 3 and 4 of the amended particulars of claim set out the background to the specific causes of action relied upon by Mr Osagie;

> "2. In the course and aftermath of the tribunal claim, Defendants 2 to 6 acting in the course of employment, made several untrue defamatory statements against me.
>
> 4. The defamatory statements were seemed designed to damage my reputation among Serco workforce and create a hostile work environment that ultimately resulted in my constructive dismissal by the company. Equally, some of the statements were calculated to endanger my career prospect within and beyond Serco and in particular within the criminal justice system, which potentially would make finding another job difficult."

39. This wording seems to underline the view that Mr Osagie's claim is based on evidence and/or disclosure provided by Serco in the context of the Employment Tribunal claims. It is clear that in many of the allegations dealt with below Mr Osagie is simply setting out matters he has discovered in the course of his grievance and the Employment Tribunal proceedings.

40. Paragraphs 5 to 12 of the amended particulars of claim set out a claim against Mr James in slander. The words complained of are set out in the following way;

> "I behaved sexually inappropriately towards a female member of staff as a result I am not allowed to come to Bromley magistrates court to work.
>
> There is a grievance against me by a female member of staff alleging inappropriate sexual conduct."

41. Mr Osagie pleads the following defamatory meaning;

> "a. I sexually assaulted, harassed or abuse GS or other female members of staff.
>
> b. I exposed myself indecently; make sexually charged remarks, towards GS or another female or female members of staff.
>
> c. I intentionally touched her or other female employees in a sexual way without her or their consent.
>
> d. I make inappropriate comment towards other members of staff which GS overheard while we were on a training course.
>
> e. I engaged in other unlawful or inappropriate sexual act toward a female member of staff"

42. Mr Osagie has clearly failed to set out in direct speech his version of the words allegedly spoken for the simple reason that he has no direct first-hand evidence of what was spoken apart from what he has gleaned from the material disclosed to him in the context of the grievance and Employment Tribunal proceedings. This is clearly in breach of CPR PD para 2.4.

43. I also accept the submission of Mr Speker that there is a further breach of CPR 53 PD para 2.3 because the attributed meanings set out do not correspond to words used. The example he gave was that there was no plea that Mr James accused Mr Osagie of exposing himself. I also accept Mr Osagie's submission that it might be possible to further amend his pleading to better align the meanings with the words used. However, this is not the only difficulty with this allegation.

44. There is no plea that the words caused serious harm to reputation under section 1 Defamation Act 2013 or particulars of how any such damage occurred. Neither is there any plea that actual damage was caused or particulars of how it was caused or that the words were actionable under s.2 Defamation Act 2013.

45. Paragraphs 6 to 10 of the amended particulars of claim set out the background to this claim and assert that Mr James was the Court custody manager at Bromley Magistrates Court and was speaking to Mr Osagie's line manager, Grantley Gayle, and other employees about a concern raised about whether Mr Osagie could serve at Bromley. It is quite clear that all of these these conversations were between managers about a staff issue and took place on an occasion of qualified privilege.

46. It is also apparent that Mr Osagie made the same complaints about the statements complained of in the context of his Employment Tribunal claim, see the second and third paragraphs of his ET1 claim form.

47. In the circumstances I accept Mr Speker's submission that the claim is defectively pleaded and cannot be rectified. I am also satisfied that there is an unanswerable defence to it which means that the proposed amendment would stand no reasonable prospect of success. I therefore refuse the application to amend the claim against Mr James in slander.

48. Paragraph 13 of the amended particulars of claim sets out a claim in slander against an employee only identified as GS. The claim is set out in the following way;

> "In responding to my tribunal claim, it was claimed that an unnamed female employee only identified as (GS) and John Mchale were involved with Martin James in the preliminary dissemination of the false damaging allegation. It was claimed in their grounds of resistant to the tribunal that GS made the following statements to John Mchale and then to Martin James:
>
> *"I had behaved inappropriate towards her during initial training course (ITC in 2015"*
>
> *"She would not feel comfortable having me because of what happened"*
>
> *"I had displayed behaviour and made comments and remarks which made her feel uncomfortable.*"

49. Mr Osagie pleads the following defamatory meaning;

> "a. I sexually assaulted, harassed or abuse GS or other female members of staff.
>
> b. I exposed myself indecently; make sexually charged remarks, towards GS or another female or female members of staff.
>
> c. I intentionally touched her or other female employees in a sexual way without her or their consent.
>
> d. I make inappropriate comment towards other members of staff which GS overheard while we were on a training course.

> e. I engaged in other unlawful or inappropriate sexual act towards GS or other female members of staff."

50. Firstly, and most obviously, GS is not a party to these proceedings and Mr Osagie has not alleged that Serco is liable for her actions. I accept this might be susceptible to a further amendment, but it is not the only difficulty.

51. The words Mr Osagie complains of are clearly taken from Serco's grounds of resistance in the Employment Tribunal claim and are therefore covered by absolute privilege and/or immunity from suit.

52. The words complained of cannot be the words used or written as they are set out in the first person, which is a breach of CPR 53PD para 2.4.

53. In the circumstances I accept Mr Speker's submission that the claim is defectively pleaded and cannot be rectified. I am in any event satisfied that there is an unanswerable defence to it which means that the proposed amendment would stand no reasonable prospect of success. I therefore refuse the application to amend the claim against GS.

54. Paragraphs 14 to 15 of the amended particulars of claim set out a claim in slander against John McHale. The claim is set out in a similar way to that against GS and suffers from the same defects.

55. In the circumstances I accept Mr Speker's submission that the claim is defectively pleaded and cannot be rectified. I am also satisfied that there is an unanswerable defence to it which means that the proposed amendment would stand no reasonable prospect of success. I therefore refuse the application to amend the claim against John McHale.

56. Paragraph 16 of the amended particulars of claim sets out a claim in libel against Mr James. The libel is said to be contained in e-mails which are alleged to have been sent by Mr James to Mr Gayle, Mr McNamara, Jules Baldock and Jane Stow on unspecified dates. The relevant particulars of publication are;

> "*It was an issue on the training when Jeff was on the course with another officer.*
>
> *I am sending you this email as regards to the above officer coming to Bromley Mag this week (referring to me) I have said to Grantley twice that* ***I cant have him at Bromley due to his comments that was made to a few officer while he was on a training course with her, I will not be letting him into the building to work.*** *I feel that me informing CCM at his Court that I cant take due to this last week, find it mad that he would send that person here.*"

57. Mr Osagie pleads the following defamatory meaning;

> "a. I sexually assaulted, harassed or abuse a female or female member of staff.

> b. I exposed myself indecently; make sexually charged remarks to wards GS or another female or female members of staff.
>
> c. I intentionally touched her or other female members employees in a sexual way or without her consent.
>
> d. I make inappropriate comment towards other members of staff which GS overheard while we were on a training course."

58. Mr Osagie has made no attempt to identify the publications by date or to whom they were sent. This is a breach of CPR 53PD, para 2.2. The defamatory meanings set out by Mr Osagie in purported compliance with CPR 53PD, para 2.3 cannot be associated with any identified email and in my judgment cannot arguably be said to arise from the words pleaded above. There is no plea that the words have caused serious harm to Mr Osagie's reputation.

59. The conversations relied upon by Mr Osagie, on his own case, clearly took place between managers dealing with an employment issue and as such would be covered by qualified privilege. The words have clearly been taken from Mr Crysell's report which was produced as a result of Mr Osagie's grievance.

60. In the circumstances I accept Mr Speker's submission that the claim is defectively pleaded and cannot be rectified. I am also satisfied that there is an unanswerable defence to it which means that the proposed amendment would stand no reasonable prospect of success. I therefore refuse the application to amend the claim against Martin James.

61. Paragraphs 17 and 18 of the draft particulars of claim set out a claim in libel against Mr Crysell. Mr Osagie complains of a single sentence in Mr Crysell's report:

> "*I had overstepped my permission as far as assessing emails between others on a computer I was using*"

62. Mr Osagie pleads the following defamatory meaning;

> "I dishonestly acquired other people's password, to use it to lodge into their email addresses and obtain information.
>
> I committed the criminal offence of fraud.
>
> I invaded other people's privacy.
>
> I assessed other people's email.
>
> I assessed other people's email without authorisation."

63. It is clear to me that Mr Osagie has not set out the actual words contained in the report but has chosen to paraphrase them. Again, there is no plea that the words complained of have caused serious harm to Mr Osagie's reputation and the defamatory meanings pleaded cannot arguably be said to arise from the words pleaded above.

64. The publication of this report into Mr Osagie's grievance is clearly covered by the defence of qualified privilege and the defence of consent would also apply. Mr Osagie has not pleaded malice or adduced any evidence of malice on the part of Mr Crysell other than the rather bland statement at paragraph 26.c of the amended particulars of claim that malice can be inferred.

65. In the circumstances I accept Mr Speker's submission that the claim is defectively pleaded and cannot be rectified. I am also satisfied that there is an unanswerable defence to it which means that the proposed amendment would stand no reasonable prospect of success. I therefore refuse the application to amend the claim against Mr Crysell.

66. Paragraphs 19 to 21 of the amended particulars of claim set out claims in slander and libel against Guisepinna Manna. Mr Osagie relies upon three separate publications. The first publication to Speak Up, a whistle blowing phone line, on 14 March 2018 took place after Ms Manna had made e-mail reports to Jane Stow on 14 and 15 February 2018 and had received no reply. The relevant particulars of publication are;

> "*At work on 14/2/2018 there was a Control and Restraint situation where a prisoner was treated unfairly and was in breach of our SOP procedure.* ***On this day an Officer, 20051884 PCO Jeffrey Osagie, had pushed a prisoner's head into the floor and shortly after that he had shouted at the prisoner referring to him a little shit*** *with the court Custody Manager 20036233 Grantley GAYLE and PCO Douglas AMPOFO present…*
>
> ***"A control and restrain consisting of three Officers, myself PCO Guisepinna Manna as a head Officer CCM Grantley Gayle on the left and PCO Ampofo on the right arm PCO Jeffery Osagie has no reason in being there,*** *so after this event I spoke to the CCM Grantley Gayle about the issue and he dismissed it calling me a liar, in his words saying "write what you think you saw"*
>
> ***That same day Jeffrey Osagie threatened to punch me. This is due to the fact that I had seen the three of them writing their reports together.*** *My CCM heard this threat and has done nothing.*"

67. The second and third publications relate to the email reports made by Jane Stow on 14 and 15 February 2018. The particulars provided in relation to the 14 February 2018 publication are:

> "*Ms Mana made similar Statement to Jane Stow via e-mail*"

The particulars provided in relation to the 15 February 2018 publication are:

> "*Ms Mana published similar statements in a six page incident report she sent to Jane Stow and the OCC*"

68. Mr Osagie pleads the following defamatory meaning for all three publications:

> “I assaulted a prisoner.
>
> I called a prisoner a little shit.
>
> I got involve in a control and restraint incident, which I had no business with, with the intention to committed assault on a prisoner.
>
> I am an officer who got myself involved in a duty I had no reason to be carrying out.
>
> I hit or smashed a prisoner head on the floor.
>
> I am an unprofessional custody officer who derided joy in attacking a prisoner.
>
> I physically attacked or assaulted a prisoner.
>
> I assaulted her.
>
> I threatened to punch her.
>
> I threatened to punch her because she had seen me conspiring with others to write report.
>
> I am a dishonest person.
>
> I threatened to violently attack her.
>
> I am a violent person who takes pleasure in attacking people.”

69. Again, the matters set out by Mr Osagie have been culled from the material he has gathered in the context of the grievance and Employment Tribunal proceedings. It is difficult to see how the e-mails to Ms Stow and the Operation Control centre have been published to third parties. There is no pleading of serious harm. Even it was possible for Mr Osagie to establish a publication to a third party and if serious harm were proved the communication would clearly be covered by the defence of qualified privilege as Ms Manna was raising concerns that she had with proper persons. As for the publication to the Speak Up whistle blowing hot line it is difficult to conceive of a more appropriate occasion for the defence of qualified privilege to apply.

70. At paragraph 26 sub paras d to i of the amended particulars of claim Mr Osagie alleges that Ms Manna acted maliciously. Mr Osagie would have to prove that Ms Manna was acting dishonestly and with a dominant improper motive in making the complaints. The matters he relies upon are all unparticularised speculation and must be seen in the light that he has discontinued his claim against Ms Chadbone who conducted the investigation and concluded that Ms Manna was honest and should be commended for speaking up.

71. In the circumstances I accept Mr Speker's submission that the claim is defectively pleaded and cannot be rectified. I am also satisfied that there is an unanswerable defence of qualified privilege which means that the proposed amendment would stand no reasonable prospect of success. I therefore refuse the application to amend the claim against Ms Manna.

72. Paragraphs 25 and 26 of the amended particulars of claim seek to set out alternative claims in malicious falsehood in respect of each of the above publications. The first and most obvious difficulty is that no pecuniary damage is likely to have been caused by any of the statements or has alleged to have been caused. The second difficulty is that the particulars of malice provided fall a long way short of the particularity required.

73. I accept Mr Speker's submission that insufficient facts have been pleaded from which malice might be inferred and there is no allegation that any of the named Defendants have acted as alleged. In the circumstances I accept that there is no possibility of Mr Osagie proving that any of the Defendants was motivated by malice, which means that the proposed amendment would stand no reasonable prospect of success. I therefore refuse the application to amend the claim to plead the proposed claim in malicious falsehood.

74. Paragraphs 27 to 31 of the amended particulars of claim seeks to set out a claim in negligence against Serco. He alleges that Serco breached a duty of care to take all steps which are reasonably possible to ensure his health safety and wellbeing as an employee. The breach of duty he relies upon is the manner in which his grievance was handled by Andrew Miller.

75. This is a clear attempt to relitigate what has already been decided by the Employment Tribunal, see paragraphs 165-6 and 176-196 of the judgment. I accept Mr Speker's submission that this would amount to an abuse of the court's process such that the proposed amendment would stand no reasonable prospect of success. I therefore refuse the application to amend the claim to plead the proposed claim in negligence.

76. Paragraph 32 of the amended particulars of claim articulates a claim under article 8 of the Human Rights Act 1998 and the ECHR against Serco. Mr Speker's short point is that Serco is not a public authority and therefore no claim can be brought against it. Mr Osagie submitted that all of his complaints arose in the course of Serco's business function of running prisons. He referred me to the case of ***YL v Birmingham City Councils & Others*** **[2007] UKHL 27.** In the case of YL Baroness Hale put the position in the following way:

> " 36. Many services which used to be provided by agencies of the state are now provided, not by employees of central or local government, but by voluntary organisations or private enterprise under contract with central or local government. The issue before us is of great importance, both to the many hundreds of thousands of clients of those services and to the organisations and businesses which provide them. To what extent, if at all, are they covered by the Human Rights Act 1998 ('the 1998 Act')?

> 37. Under section 6(1) of the Act, it is unlawful for a public authority to act in a way which is incompatible with a Convention right. 'Public authority' is nowhere exhaustively defined, but by section 6(3)(b) it includes 'any person certain of whose functions are functions of a public nature'. However, in relation to any particular act, section 6(5) provides that 'a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private'. The broad shape of the section is clear. 'Core' public authorities, which are wholly 'public' in their nature, have to act compatibly with the Convention in everything they do. Other bodies, only certain of whose functions are 'of a public nature' have to act compatibly with the Convention, unless the nature of the particular act complained of is private. The law is easy to state but difficult to apply in individual cases such as this."

77. In this case YL was a publicly funded resident in a private care home and in these circumstances having analysed facts Baroness Hale concluded;

> " 73. Taken together, these factors lead inexorably to the conclusion that the company, in providing accommodation, health and social care for the appellant, was performing a function of a public nature. This was a function performed for the appellant pursuant to statutory arrangements, at public expense and in the public interest. I have no doubt that Parliament intended that it be covered by section 6(3)(b). The Court of Appeal was wrong to reach a different conclusion on indistinguishable facts in *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936. Furthermore, an act in relation to the person for whom the public function is being put forward cannot be a "private" act for the purpose of section 6(5) (although other acts, such as ordering supplies, may be). The company is therefore potentially liable to the appellant (as well as to the council) for any breaches of her Convention rights."

78. Mr Osagie is an employee of Serco. Serco is not supplying services of a public nature to Mr Osagie. In the case of ***Serco Limited v Redfearn*** Mr Redfearn's argument that an employee could bring a claim under the Human Rights Act was dismissed by Lord Justice Mummery;

> "60. The 1998 Act does not assist Mr Redfearn in this case. He is not entitled to make a claim under it as Serco is not a public authority."

79. I accept Mr Speker's submission. In any event this claim is not properly particularised. In the circumstances the proposed amendment has no reasonable prospect of success. I therefore refuse the application to amend the claim to plead the proposed Human Rights Act claim.

Conclusion

80. I have already observed that but for the proposed amendments to the particulars of claim this claim would be struck out. I have refused each of the proposed amendments and it must follow that the claim will be struck out. It is totally without merit. Mr Osagie must pursue his employment remedies in the proper forum.