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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
[2020] EWHC 3619 (QB)

No. QB-2019-002862

Royal Courts of Justice
Strand
London, WC21 2LL

Monday 23 November 2020

Before:

MRS JUSTICE STACEY

B E T W E E N :

PAUL LANGLEY — Claimant

- and -

(1) GMB
(2) KATHARINA KOESTER
(3) TRADE UNION LEGAL LLP
T/A TRADE UNION LAW — Defendants

THE CLAIMANT appeared in Person.

MS B. GROSSMAN (instructed by Slater & Gordon UK Limited) appeared on behalf of the First Defendant.

MR J. STEER (instructed by Reynolds Porter Chamberlain LLP) appeared on behalf of the Second and Third Defendants.

Hearing dates: 19-20, 23 November 2020

J U D G M E N T

(v i a v i d e o l i n k)

MRS JUSTICE STACEY:

1 The claimant, Paul Langley, brings a claim of negligence in both tort and contract against these three defendants. His trade union, the GMB is the first defendant. The second defendant is a solicitor, Katharina Koester, who (at the material time) was employed by Trade Union Legal LLP, a firm of solicitors trading under the name of Trade Union Law, which is the third defendant and who represented Mr Langley in connection with an agreement ("the Compromise Agreement") terminating his employment with his employer Birmingham City Council. The case concerns the advice and representation Mr Langley received from his union and Trade Union Law following his suspension from work by his employer which was first indicated on 16 May 2014 until the signing of the Compromise Agreement on 27 February 2015. He considered that the advice had been negligent and that he should have been advised to reject the offer since he considers that would have either retained his employment following a disciplinary hearing, or, if he had been dismissed he would have been successful in the employment tribunal. He calculated his quantum as his wages had he remained an employee continuing to earn his salary or uncapped compensation or a reinstatement order from the employment tribunal of £500,000-£700,000 instead of the 1 year's gross pay that he received from the Compromise Agreement.

PRELIMINARY ISSUES

2 There was an application for the GMB's witness Gill Ogilvie (formerly Whittaker) to give her evidence remotely on medical grounds which was supported by a witness statement from her and an email from her treating consultant. It was confirmed that she would be able to give her evidence undisturbed without any others present in the room and that she would have either a hard copy of the bundle or a second full screen device with an electronic copy of the bundle available and be able to replicate conditions in the courtroom as much as possible. She had sufficient broadband width and computer facilities to ensure a good connection, audio and visual images on screen in the court room.

3 Mr Langley objected to Ms Ogilvie not attending in person. He had travelled down from Birmingham to be here and he wanted her to be in the room when he cross-examined her. Ms Ogilvie has two medical conditions which place her in a high-risk Covid-19 category and she has been shielding throughout the pandemic. The journey to court to give evidence from her home in the West Midlands would be considerable and only essential travel is permitted under current government restrictions.

4 I find that it is not essential for her to be physically in the court. The formality, control, and integrity of the court proceedings can be maintained whilst she gives evidence remotely. The screen can be positioned in front of Mr Langley to assist him whilst cross-examining her which will be considerably closer than would be the case if she was physically in the courtroom and be beneficial for his hearing. I find that Mr Langley will not be prejudiced by Ms Ogilvie not being in court and the application was granted.

5 Mr Langley was not permitted to rely on an additional witness statement to the two witnesses of fact that had been permitted by Master Davison in his order of 14 April 2020. It was explained to Mr Langley that he was also a witness in his own case as well as being the claimant and had therefore been permitted one additional witness to himself, not two, and he already had Daniel Kilgallon appearing on his behalf.

6 Mr Langley was permitted to rely on a bundle of documents disclosed late on the afternoon of the day before the hearing (e-bundle 3) which mainly consisted of publicly available

material such as the annual accounts of Trade Union Law, some statutory materials, including the ACAS Code of Practice 4, but he was not permitted to rely on a further bundle (e-bundle 2) which contained detailed new material relating to his schedule of loss and associated documentation which had been served in breach of the order requiring service by 21 August 2020 as it gave no time to the defendants to respond and react. There was no explanation as to why either bundle was served so close to the hearing but to avoid any risk of any prejudice to Mr Langley, I concluded that I would restrict this hearing to liability, leaving open the possibility for him to renew the application for additional documents to be filed prior to any quantum hearing.

7 Mr Langley, MS Koester and Trade Union Law agreed for Gill Ogilvie's work diary being added to the bundle late which had apparently only recently been discovered. Since there was no prejudice to any other party who had given their consent the application was granted.

8 There was a renewed application for a right of audience for Mr Joe Sykes, Mr Langley's McKenzie friend, but since no new grounds had been advanced subsequent to the pre-trial review when I decided the matter previously, the application was refused. The ruling did not, of course, prevent Mr Sykes from continuing to assist as McKenzie friend, which he continued to do during the hearing although he did not attend on the final day and was not in court at the start of the hearing every day.

THE ISSUES

9 The parties had helpfully agreed a list of issues of both fact and law which were further narrowed during the course of the hearing. The GMB now accepts it owed a duty of care to Mr Langley since it had assumed a degree of responsibility towards him voluntarily by advising, assisting, and representing him. It accepted the duty began from the moment Birmingham City Council intimated it would be suspending Mr Langley on 16 May 2014 through to the appointment of the trade union solicitors on 9 February 2015 and that their pastoral role of care and support for their member continued beyond that date.

10 There is a dispute as to the standard of care to be provided by the GMB and whilst it was agreed in general terms that the duty was one of reasonable skill and care in advising and representing the claimant in internal disciplinary proceedings and in negotiations with his employer, there was some disagreement as to what precisely that entailed. The GMB considered that it was limited to providing practical advice in the circumstances, relying on *Friend v Institution of Professional Managers and Specialists* [1999] IRLR 173.

11 Mr Langley submitted that a higher standard was required and that the standard of the ordinary skill and care was subsumed by a quasi-legal standard of the reasonably competent trade union lay advisor and representative on legal issues and in relation to potential employment tribunal claims, the duty extended to providing formal legal advice, whether externally or internally, including a duty to apply to an Employment Tribunal for interim relief under the whistleblowing legislation. It would therefore partly be a question of law: what is the duty of care owed by a trade union to one of its shop steward members, and also of fact: did the GMB breach the applicable duty and standard? Both Mr Langley and the GMB considered it necessary for the court to consider and make findings on the underlying merits of any potential employment tribunal claim that Mr Langley might have had and to engage with the whistleblowing sections of the Employment Rights Act 1996, sections 43A-H.

12 There were thirteen specific allegations, not all of which were fully pleaded but no point was taken by the GMB, that coalesce into four distinct issues. Firstly, advice on the merits of a potential employment tribunal claim including whistleblowing: had the GMB's advice fallen below the standard of care required? Secondly, had the GMB provided reasonable advice and support on strategy and tactics to be deployed in the case? Thirdly, had they failed in a duty to provide legal advice (which partly turns on whether that duty existed)? Fourthly, was there pressure on Mr Langley to agree unfavourable terms which amounted to a breach of the GMB's duty towards its member and was there collusion between GMB and Birmingham City Council to disadvantage Mr Langley? Fifthly, it became apparent during the course of the hearing, and particularly in the closing submissions this morning, that Mr Langley felt he had been let down with a lack of support and pastoral care by his union during the period of his suspension. This has not specifically been pleaded but I have borne it in mind and will make some observations in my conclusions. Also relevant and in dispute was what Mr Langley's instructions to the GMB had been and what had been his desired outcome following his suspension, at the time. What instructions had he given the GMB in their negotiations with Birmingham City Council? Had he been holding out for reinstatement or did a termination payment better suit his future plans as they were then?

13 The GMB submitted that once lawyers were instructed, their duty fell away relying on the case of *Friend v IPMS* above and also *Brunsdon v Pattinson and Brewer (a firm) & Ors* [2006] EWHC 1562 (QB).

14 Turning to the second and third defendants, there was no dispute that Ms Koester (the solicitor) and Trade Union Law (the trade union law firm instructed to represent Mr Langley) owed him a duty of care. The standard of care is that of a reasonably competent employment lawyer and there is a wealth of case law in relation to the standard of care to be provided by solicitors (in marked comparison to the dearth of case law in relation to the duty owed by trade unions to their members). If an error of judgment has been made by the solicitors, there will be no liability unless the error is one that no reasonably well informed and competent member of the profession could have made. When, as here, advice is in relation to a settlement agreement, the question is whether the advice is blatantly wrong (*VG v Denise Kingsmill* [2001] EWCA Civ 934).

15 Ms Koester was also sued in an individual capacity. A strikeout application before Master Davison failed but, contrary to Mr Sykes written submissions (that Mr Langley adopted on the advice of his McKenzie friend) that does not, of course, preclude the argument being raised at the substantive hearing. The Master Davison judgment merely found that it was *arguable* that there might be personal liability by the solicitor employee of the firm instructed. It did not in any sense decide the substantive point. However, in any event, the cause of action fell away as Mr Langley withdrew any criticism of Ms Koester describing her as being as good as gold and pointing out he did not wish to criticise her advice or conduct towards him, but he had merely followed Mr Sykes' advice in adding her as a party.

16 There were nine separate allegations of negligence against Trade Union Law which neatly fall into three categories. The first challenge was to their independence given their relationship with the GMB. It touched on the meaning of the term "independent" in the context of a s. 203 Employment Rights Act 1996 Compromise Agreement. The second concerned the scope of the solicitor's retainer and is a criticism that they had not advised Mr Langley on the underlying merits of his case. The third set of allegations was that they had not advised him on the meaning and effect of the Compromise Agreement and the terms that he was signing and it was said that they should have given particular care and attention to him because he is not confident in reading and writing and has literacy issues. The claim

against the second and third defendant would therefore also partly turn on the facts of what instructions had Mr Langley given Trade Union Law and what the scope of their retainer?

17 If breach against any of the defendants has been established then the question is whether, but for the negligence, he would not have signed the Compromise Agreement and whether he had a real and substantial chance of securing greater payment from his employer than he did from the amounts provided in the Compromise Agreement and whether he had suffered economic loss.

THE FACTS

18 I make my findings of fact on the balance of probabilities and remind myself that the facts are for Mr Langley to prove, not for the defendants to disprove.

19 Mr Langley, who was born on July 1959, had worked as a binman in the fleet and refuse department of Birmingham City Council as a fulltime employee since October 1994. Before then he had been engaged in the same capacity as a casual worker. He was a member of the GMB and also Unite (formerly TGWU) trade union and became a GMB representative and shop steward some time around the mid-2000s, around 2007. He became a spokesman during a high-profile refuse collection strike across the city in 2011. He considered himself to be the face of the Birmingham bin men and was considered to be an effective press communicator during the strike and had the respect of his members and the wider workforce. The industrial action had considerable press interest locally and nationally.

20 The dispute was eventually settled at a meeting between all the recognised unions and Birmingham City Council with the press camped outside waiting for news. At the end of the meeting, when the terms had been agreed, Sharon Lea, a very senior local government employee who is now the Chief Executive of Birmingham City Council, suggested that Mr Langley be the one to go out and speak to the press and explain what had been going on in the meeting and he was the one to face the cameras and give the agreed joint press statement.

21 The press role that Mr Langley had previously performed ended with the strike and he did not and was not authorised to undertake press work on behalf of the union or Birmingham City Council thereafter.

22 He continued, however, to be a powerful figure and he described management as being fearful of him. In his words, he said, "The council never said boo to a goose to me," and he described occasions when managers had wanted physically to fight with him in the yard and had to be dissuaded by others. He was in a group of union negotiators which included Dan Kilgallon who were called "The Knuckleheads." They acquired their nickname because of their habit of banging the table in negotiations with management (and for their receding hairlines or short hair cuts). Mr Langley also saw himself as a rising star within the union. He was invited to London and met the then leader of the Labour Party, Ed Miliband MP and there was talk of his being offered a role as a GMB paid official at one point. He gave a considerable amount of time and commitment to the GMB and to his union members and it had been a stressful and high pressure role during the strike and dealing with the aftermath when they had gone back to work.

23 Birmingham City Council were dealing with the local authority funding cuts and austerity measures following on from the 2008 financial crisis and embarked on a number of cost-cutting initiatives in the next decade which involved loss of pay for the binmen of several thousand pounds per annum. An overtime ban was introduced in early May 2014 which

resulted in the loss of approximately £600 per month for some employees. Mr Langley's members were under financial pressure. He took his responsibilities to support and assist his members seriously and they were tough times indeed.

24 At the end of the previous year, 2013, Birmingham City Council decided to introduce a collection charge for residential garden waste of £35 per annum which had previously been a free service. It was controversial and unpopular and dubbed "the green tax" or the "garden tax" in the local papers. However, unfortunately, instead of residents paying for garden waste collection, a significant proportion of householders simply fly tipped or left out their garden waste across the city. The council arranged a special clean up on overtime for the binmen in early or late January 2014 to deal with the accumulated uncollected garden waste. The council did not advertise the collection so as to avoid encouraging residents to put out more garden waste for a free collection. Mr Langley was away at the time but heard about it whilst on holiday in Thailand.

25 In mid-May 2014, the council decided on another collection of fly tipped and left out garden waste over the weekend of 17 and 18 May. Again, it was unannounced to avoid people who had not paid for the service to take advantage. Even though the overtime ban was now in place, an exception was made so that the binmen were offered overtime to do the work to save on agency costs and give some of them at least an opportunity to earn some extra money.

26 The council local election was taking place the following week on Thursday 22 May 2014.

27 Mr Langley decided to speak to the press about the council collection of the fly tipped garden waste. He rang the Birmingham Mail on 15 May who ran it as a front-page story and he also gave an interview to West Midlands Radio the next day. His branch secretary, Paul Coombes, was present with him when he gave the interview but he had not been authorised or given permission by the GMB to speak to the press about it and under the GMB rule book only the regional secretary or GMB head office would be empowered to authorise him. Nor did he have permission from Birmingham City Council to speak out about it and he did not use the internal Birmingham City Council whistleblowing procedure.

28 In court, his evidence was that he had two issues with the green rubbish collection that May weekend. Firstly, he saw it as a political act by the council, placing it in breach of the pre-election purdah rules by using council employees to advantage the existing council members and ruling party. He reasoned that the clean streets would give the Labour Party a political advantage and encourage people to vote for them which he said he considered to be a breach of election law. Secondly, he was concerned that by breaching the overtime ban, it risked a budget overspend which could result in more cuts and possible redundancies later on.

29 I do not accept the explanation given by Mr Langley in court for his reason for speaking to the press. There is no mention of the election purdah rules by Mr Langley in the Birmingham Mail article, beyond his referring to the timing of the collection and describing the binmen having been given "secret orders". The concern he raises is of unfairness to residents who had paid the charge by the freeloading of 40,000 other residents and it was the paper that seems to have spun it as a ruling party electoral advantage story. The next day radio interview (for which there is a transcript in the bundle) shows that Mr Langley's concern was about the high handedness of the council towards his members. He describes the painful effect of the withdrawal of overtime only for the workers then to be offered some weekend working two months later. He used phrases such as:

> "Suddenly, when it suits them, they offer overtime."

and:

> "The lads are being cheesed off about being told when to jump and it's the way they've been treated the last four years."

30 In the internal investigation that followed on 3 June 2014, Mr Langley explained that he had telephoned Birmingham Mail not to provide information to them, but to see if they had any information about the fly tipping collection that they could give him, which is inconsistent with the account given in court and different also to the contents of the radio interview and his quotes in the newspaper.

31 On 16 May 2014, Birmingham City Council informed the GMB branch secretary, Paul Coombes, that they wished to suspend Mr Langley for speaking to the press without permission and that they saw it as potential gross misconduct under their disciplinary policy. It is a significant step for an employer to suspend a shop steward of a recognised trade union. Under the procedure, the ACAS code, and established good industrial relations, a recognised trade union shop steward could only be suspended after a meeting with a fulltime officer present. The GMB fulltime officer with responsibility for Birmingham City Council is Gill Ogilvie (Whittaker as she was then called).

32 Under the dual membership agreement between Unite and the GMB, Mr Langley could, as a member of both unions, choose which of them he would like to represent him. He chose the GMB.

33 Mr Coombes liaised with Ms Ogilvie after being told that Birmingham City Council had decided to suspend Mr Langley and I find that Mr Langley would have been kept informed by Mr Coombes who was also his friend as well as his branch secretary. It was decided to play for time, to try to delay the suspension meeting which they succeeded in doing for some six days and it took place on 23 May 2014. Mr Langley and Ms Ogilvie met before the meeting. He did not remember having ever met her before, but she thought that they had previously met or at least been at the same meetings. What is certain is that they did not know each other well. At the meeting, as predicted, Mr Langley was suspended on full pay pending an investigation for alleged possible gross misconduct.

34 Mr Langley's comments to the media had caused considerable embarrassment to the council who considered that the fly tipping collection exercise was a non-political act to comply with their waste collection obligations and had not been done for partisan political reasons but on the grounds of public health. Their reason for not advertising it was not to cover up wrongdoing but simply to avoid people taking advantage.

35 A meeting took place on 3 June as part of Birmingham City Council's investigation into possible gross misconduct by Mr Langley when Mr Langley was represented by Ms Ogilvie. She considered that Mr Langley's position was weak in that the council had strong grounds for arguing that he had committed gross misconduct by speaking out to the press as he had done and she did not consider his behaviour could be interpreted as either a trade union activity or a whistleblowing activity, which would be necessary in order to gain protection under employment legislation, but she did her best to argue in the hearing that as he was the GMB shop steward and as he had spoken in that capacity, it must follow that any come back on him for what he had said and done amounted to trade union victimisation. She also sought to argue that it was politically motivated by the council. It is clear from the minutes of the meeting that she was vocal and active in his defence during that meeting and as

persuasive as possible. However, when pressed, she gave a truthful answer and had to accept that Mr Langley had not been authorised to speak on GMB's behalf about the issue. I find, having read the notes of the meeting, that she worked hard to make the case for him, but it was difficult since the arguments were weak as she, and indeed, Mr Langley realised at the time.

36 After the meeting Ms Ogilvie and Mr Langley discussed the next steps together. Ms Ogilvie's advice was that if the matter were to proceed to a disciplinary hearing, Mr Langley's conduct would be likely to be found to be gross misconduct which could easily result in his summary dismissal with no notice pay. They agreed a strategy which was to make as much fuss as possible about his suspension, so that by keeping pressure on the council it would create a climate for a favourable agreed exit package. Ideally they were seeking a full redundancy package. Mr Langley and Ms Ogilvie also agreed that part of the strategy would be to try to delay a disciplinary hearing for as long as possible. It was important for Mr Langley to reach his 55th birthday in July 2014 when he would be entitled to take his pension and the longer he could remain on the council's books, the more pensionable service he would have and the more take home pay he would also receive. In Ms Ogilvie's view, based on her experience with dealing with Birmingham City Council and as an experienced trade union full time official, she considered that there was no way that the council would agree to reinstate Mr Langley and that the best that could be achieved for him would be some kind of termination package. She also considered that a tribunal claim would be weak. Even if successful, reinstatement was a very difficult remedy in employment tribunal proceedings if the tribunal considers that there is an element of blameworthy conduct by an employee, which she feared would be the case.

37 In furtherance of that strategy, Ms Ogilvie spoke to the press and succeeded in achieving front page coverage of Mr Langley's suspension in the local newspapers with the headline "Union official suspended over garden waste whistleblowing". She also liaised with the other trade unions to bring pressure to bear as set out in more detail below.

38 The outcome of the internal disciplinary investigation following the meeting on 3 June concluded in a report dated 3 July 2014 that Mr Langley had committed gross misconduct and should be subject to disciplinary proceedings. The report concluded that no evidence had been found of justifiable reasons for Mr Langley's statements to the press which had breached the Council's code of conduct to which he was bound under the terms of his contract of employment. Mr Langley's statements had caused significant operational difficulties, cost the council money, resulted in increased media coverage and reputational damage and brought the Council into serious disrepute and that Mr Langley's actions breached his obligation of trust and confidence.

39 It was the defendants' case that a negotiated termination payment and leaving the Council suited Mr Langley at that time as they understood that he was planning to move to Thailand to marry. This was a sensitive issue for Mr Langley in court as he explained that his dreams had come to nothing and he disputed that he had told any of the defendants of possible plans at that time and it was an area he was not comfortable discussing. However it was apparent from the transcript of the telephone calls between him and Ms Koester of Trade Union Law that he did tell her of those plans in February 2015 and it is likely that others knew of them too and that had been a long cherished ambition. It would appear that Mr Langley had discussed the possibility of moving abroad with a number of people in 2014 and 2015 and it is more likely than not that the prospect of leaving with an exit package might have suited his then hoped for lifestyle choices. I accepted his evidence that he did not himself tell Ms

Ogilvie directly about his plans, but I accepted her evidence that she would have known of them from others such as Mr Coombes or Steven Graham, another local GMB officer.

40 I find that Ms Ogilvie worked hard on a number of fronts to execute the agreed strategy and try to get the best deal possible for Mr Langley. During the period from May 2014 to the end of the year she had some health problems and was off sick for short periods, but it did not prevent her representing Mr Langley effectively and diligently. She met with other unions to co-ordinate a joint approach. She discussed with them the possibility of strike action in support of Mr Langley, but this was discounted as being unrealistic and it was thought that it would be unreasonable to ask the members of all the recognised unions to suffer the loss of pay that strike action would entail. Indeed, Mr Langley himself accepted that it was not a realistic option and he would not have wanted his members to go out on strike on his account. Ms Ogilvie worked closely with the branch secretary and met Mr Coombes on a number of occasions. She liaised with the HR department within the council. She arranged to speak directly to the council leader, Sir Albert Bore, on two occasions over the course of the following months. She also played a role, it is disputed exactly to what extent, in contacting Mr Langley's MP, himself a former Unite official, Jack Dromey whom Mr Langley respected enormously. Mr Dromey MP advised Mr Langley that there was absolutely no chance of the council agreeing to reinstatement and that the council would not have it. Mr Langley accepted that Mr Dromey had his best interests at heart and accepted his advice.

41 Ms Ogilvie was successful in delaying the disciplinary hearing and while Mr Langley remained suspended, he was receiving his normal take home pay and increasing his pensionable service and it provided the space for negotiations to be conducted before any difficult disciplinary hearing findings had been made. It was also important for Mr Langley not to be dismissed and with negotiations for an agreed exit strategy, there could be a resignation which would avoid humiliation.

42 Ms Ogilvie tried to secure a redundancy package for Mr Langley but it was unsuccessful. There were no redundancies being made from fleet and waste at the time and Birmingham City Council flatly refused Ms Ogilvie's request for Mr Langley to be transferred into a redundancy pool in a different area of the council so that he would be eligible for redundancy.

43 There was a conflict of fact between Ms Ogilvie and Mr Langley about how much contact she and the GMB had with Mr Langley after his suspension. Mr Coombes was not a witness in this hearing. The GMB could have had a second witness of fact but chose only to call Ms Ogilvie. Mr Langley invited the court to draw an adverse inference by the failure of the GMB to call Mr Coombes and to accept Mr Langley's evidence that he was neglected and ignored by his union once he was suspended. It is, perhaps, a surprising omission that Mr Coombes was not called as a witness as he may have been able to give valuable evidence that would either have corroborated what Ms Ogilvie's impression of the level of contact between Mr Coombes and Mr Graham and their member or corroborated what Mr Langley's evidence. But I did not hear from him and there were limited documents of close and regular contact between Mr Coombes or Mr Graham and Mr Langley, and I therefore accepted Mr Langley' evidence and conclude that the contact between them and him was less than ideal at a very stressful time for their member. For part of the period he was also signed off sick with stress.

44 But I also accepted that Ms Ogilvie assumed that Mr Langley would remain in close contact with Mr Coombes as his branch secretary and close confidant, and also Steven Graham, a

local officer, who both reported to Ms Ogilvie. She was the fulltime officer and it was the role of the lay officers closer to the ground to be in day-to-day contact with Mr Langley. Her role was to have the strategic overview, liaise with the other unions and implement the press strategy and to conduct the negotiations with the Council on Mr Langley's behalf.

45 Interim relief, in the form of an application under s.128 of the Employment Rights Act 1996 to an employment tribunal on whistleblowing grounds or under the Trade Union and Labour Relations (Consolidation) Act 1992 for trade union activities was not considered because the strategy decided upon was to leverage as much political pressure to get a good out of court settlement for Mr Langley. The aim was to keep the matter out of formal procedures and the legal arena because it would be too risky for Mr Langley given the assessment of the merits of the case. Ms Ogilvie wanted to avoid being boxed into employment tribunal proceedings while Mr Langley remained suspended on normal pay and there was a chance of a negotiated settlement pre-dismissal.

46 Ms Ogilvie was successful in obtaining a settlement offer from the council and in September 2014 they offered him early retirement with a lump sum of £6,000 to be taken from Mr Langley's pension. This was not acceptable to Mr Langley and he asked Ms Ogilvie to reject it, which she did. Negotiations continued and eventually the council made what it described as its final best offer in December 2014 of one year's tax-free salary, 12 weeks' notice pay, accrued holiday pay and a voluntary termination and an agreed reference that was as favourable to Mr Langley as it could possibly be, without being inaccurate or untruthful or in breach of the council's duty to any recipients of the reference (see *Spring v Guardian Assurance plc* [1995] 2 AC 296). In Ms Ogilvie's judgment this was genuinely the council's final and best offer and if Mr Langley were to refuse it, the disciplinary process would take its course which she considered would be likely to result in a dismissal that would be hard to challenge in the employment tribunal. Ms Ogilvie considered that the offer was the best achievable settlement and she and her colleagues in the GMB strongly advised Mr Langley to accept it.

47 Local officials, Mr Graham and Mr Coombes, were in close liaison and contact with Mr Langley from at least December 2014 onwards. The contemporaneous text messages between Mr Langley and Mr Coombes show that Mr Langley was pushing for a better offer, to delay the time for deciding and he was also seeking to augment his pension. He kept his officers' toes to the fire for as long as possible to obtain the best deal possible. He was in Thailand at the time and he and Mr Coombes communicated by text message and in phone calls. I find that Mr Langley was given clear advice by his union, but not subjected to threats or inappropriate pressure to accept the deal, but rather, he was provided with a realistic analysis of the merits of the offer: as Mr Coombes put it in his text:

> "Hello again Paul. Mate they want an answer by the 9th January. Tax free offer of the year's wages. If they don't get an answer they are going 2 proceed 2 full disciplinary. U do need to seriously consider this offer."

48 Mr Langley was due back in the UK on 16 January 2015 and agreed to discuss the details of the offer further with the GMB and wanted also to speak to his pensions adviser. The GMB agreed to obtain the actual figure for 1 year's gross salary for him so he could see exactly how much it would be. It is clear that he had accepted in principle that the deal would involve his leaving the council. The final offer was significantly increased from the first offer of a £6,000 month lump sum (taken from his pension) which Mr Langley had described as insulting and he had been scornful of Ms Ogilvie when she had suggested to him that it was reasonable.

49 On his return to the UK and after further discussions with his union, when he appreciated that the offer would not be increased further, he accepted it in principle. The year's gross salary termination payment was £20,849 together with 12 weeks pay in lieu of notice and outstanding accrued holiday pay.

50 The council's final offer represented a good offer compared with the risk of proceeding with the disciplinary hearing. It would be highly likely that in the counterfactual situation Mr Langley would have been dismissed for gross misconduct with all the public humiliation that would have entailed, with no notice pay, total loss of future salary and the disciplinary process would have been unlikely to have prolonged his period of employment (and salary) for more than a few weeks. He would have had poor prospects if he had gone to the employment tribunal and would have been likely to have lost his protected interest disclosure claim, his unfair dismissal claim, and if he had advanced a trade union victimisation or dismissal claim, that too was weak on merits. I shall deal with this in more detail below.

51 I accept that Mr Langley felt the pressure of the situation: who would not feel the pressure of making such a decision? He had worked all his life as a binman, followed by the enforced idleness of the period of suspension which resulted in his being signed off with stress and he faced the prospect of the loss of the status and responsibilities not only as a binman but also as a union lay officer. However, reading the contemporaneous texts and emails, and the account provided by Ms Ogilvie, he was neither threatened nor bullied into agreeing the terms offered. He was given relevant information to assist him in making an informed decision. It was explained that because the prospects of succeeding in a legal case were poor, the union's advice was that the deal on offer was reasonable. It was also explained to him that it was likely that the union would not fund a legal case if he rejected their advice and refused an offer that he would be most unlikely to better if it were to go to tribunal. He was entitled to know that, but it does not appear that it was conveyed to him in a bullying or oppressive way but, as a matter of fact. It was a relevant consideration in his decision of whether or not to accept the deal on offer. I note in passing that the GMB rulebook, which governs the contract of membership between a union member and his or her union, (rule 26) confers an extremely wide discretion on the union as to when and whether to instruct lawyers in any particular case.

52 The terms of the deal offered by Birmingham City Council were finalised and negotiated by the GMB in late January/early February 2015. Once the offer had been accepted in principle it became necessary to complete the formalities which is when the second and third defendants became involved, since pursuant to s.203 of the Employment Rights Act 1996, an employee cannot contract out of their employment rights and any such provisions are void unless certain formalities are observed in the conditions regulating settlement agreements set out in s.203(3) of the Act. One of those formalities (s.203(3)(c) is for a relevant independent adviser to give advice as to the terms and effect of the proposed agreement and, in particular, its effect on his or her ability to pursue their rights before an employment tribunal. By subsection (3A)(a) a person is a relevant independent advisor if they are a qualified lawyer, but not if they are employed by or acting in the matter for the employer or an associated employer (subsection (3B)(a).

53 Mr Graham asked Mr Langley if he had his own solicitors who he would like to instruct, but since he did not, the GMB agreed to refer the case to their solicitors, Trade Union Law and Mr Langley agreed to that firm being instructed to act for him in the transaction. Trade Union Law does not and did not act for Birmingham City Council and Ms Koester was not employed by Birmingham City Council.

54 On 9 February 2015, Trade Union Law was asked by GMB to represent Mr Langley in connection with the Compromise Agreement. There was no conflict between Mr Langley and the GMB and no difficulty or conflict for either Ms Koester or Trade Union Law in representing him and advising him as to the meaning and effect of the proposed settlement agreement terms. At the time everyone was fairly pleased with the outcome of the negotiation.

55 The third defendant, the solicitors' firm Trade Union Law, was set up and is wholly owned by the GMB and the Communication Workers Union following the liberalisation of the rules concerning ownership of solicitors firms. It is regulated by the Law Society and registered as its own limited liability partnership. In its capacity as a law firm, its job is to provide advice to its clients and represent the best interests of its clients. Ms Koester was one of their solicitors and an employee of Trade Union Law at the material time. Trade Union Law is entirely independent of Birmingham City Council.

56 Birmingham City Council legal department forwarded a copy of the draft Compromise Agreement that they had been prepared to Ms Koester on 9 February 2015. It was in final form having been closely negotiated by Mr Graham, GMB senior representative, at the end of January and included all the terms agreed down to the precise wording of the reference. Mr Langley and Mr Graham had also gone through the terms together on 30 January 2015.

57 Ms Koester was initially unsuccessful in speaking to Mr Langley to give him the legal advice necessary to sign off the Compromise Agreement having tried to ring him on 13 February. By 17 February she was being chased by the Birmingham City Council legal department who were keen for matters to be concluded. So she liaised with Mr Graham who arranged for Mr Langley to come into the GMB office the next day so that Ms Koester could give him the advice over the telephone then and, if he agreed, he could sign the Compromise Agreement in the office. On 18 February 2015, as arranged, Ms Koester gave Mr Langley the legal advice required in order to effect a s.203 settlement agreement over the telephone. The fact it took place in the GMB's office does not amount to intimidation and the fact that the GMB's office is situated within Birmingham City Council does not mean that there was a lack of independence from the council. The GMB office is a facility provided by the council for the union's exclusive use under a collective recognition agreement to enable the union to service its members and represent them. It does not make the union beholden to the council.

58 The scope of Ms Koester and Trade Union Law's retainer was to advise on the meaning and effect of the Compromise Agreement and they were not instructed to advise Mr Langley on the merits of the underlying case. Mr Langley's oral evidence was clear on this point but in any event there could have been no dispute as Ms Koester carefully explains her role in the telephone call and makes it absolutely clear that she is specifically not advising on his prospects of succeeding in a claim but merely advising on what the terms would mean if signed. The accuracy of the transcript of the telephone call was not in dispute.

59 The standard letters produced by the solicitors could have been clearer in explaining the precise scope of the retainer, but there was no misunderstanding in this case given the very clear and precise advice Ms Koester gave as evidenced by the transcript of the telephone call. The underlying merits were not discussed and no advice was given to Mr Langley about whether he would succeed in an employment tribunal if he were to reject the offer. Mr Langley knew the advice was procedural and he agreed to sign the agreement having been advised of its terms and effect and knowing that, once signed, he would give up his right to bring a claim in the employment tribunal in respect of the termination of his employment in

line with the clauses in the Compromise Agreement. However he did not sign the agreement then and there, but signed the Compromise Agreement on 27 February, in the nick of time, before the final deadline imposed by Birmingham City Council that the deal had to be wrapped up before the end of February.

60 The following year, in May 2016, Mr Langley had second thoughts about having left the council. His plans to spend more time abroad had not materialised and he sent a letter of claim to the defendants with the assistance of his McKenzie Friend, Joe Sykes who has assisted him throughout. Proceedings then followed.

LAW AND CONCLUSIONS

61 The GMB accepted that it owed a duty of care to Mr Langley, since it had voluntarily assumed responsibility from the moment it was first indicated that Birmingham City Council intended to suspend him. The duty of care is framed by the scope of the responsibility assumed. It was not in dispute that the GMB assumed responsibility for representing and advising Mr Langley in connection with his suspension by his employer and what might follow from that: the investigation and potential internal disciplinary proceedings. The GMB's role was to try and secure the best outcome for Mr Langley in consultation with him, whether that be through internal procedures, a press campaign, joint union pressure, and/or in negotiations with Birmingham City Council. It would partly depend on his priorities and what he wanted to achieve.

62 There is surprisingly limited authority on the precise standard of the duty of a trade union advising and acting for a member in an employment dispute with his or her employer. In the 1999 case of *Friend v IPMS* then Deputy High Court Judge Nicholas Underhill QC noted that the union "must in ordinary circumstances be obliged to use ordinary skill and care" absent any specific obligations conferred by the contract of trade union membership in the rules (para 15). It is common ground in this case that there are no specific obligations in the contract of trade union membership in this case.

63 Ms Grossman submitted that the duty was limited to practical advice and where the employment relationship had broken down, general financial remedy advice or an ordinary and non-specialist nature. Mr Langley considered that the trade union owed a "quasi-legal" standard as set out in paragraph 11 above.

64 *Friend* pre-dated the Employment Relations Act 1999 and the introduction of the right of accompaniment by a trade union official (or work colleague) in internal grievance and disciplinary meetings with an employer and the entitlement of accredited trade union officials to sign off compromise agreements in s.203 Employment Rights Act 1996. The role of trade unions in assisting their members in individual employment disputes with their employers has developed in the 21st century since *Friend*.

65 But in any event it is implicit in *Friend* that the standard being imposed is the standard of the ordinary skill and care to be expected of a trade union, which is an organisation dedicated to protecting the rights of its members. A trade union therefore has, and is reasonably expected to have, considerable skill and expertise in industrial relations and both collective and individual employment rights, which necessarily involves a degree of knowledge of basic employment law and of negotiating strategy and tactics. The standard of the duty owed by a trade union - when the tortious or contractual duty arises - including where, as here, it has assumed responsibility (with their member's consent) of representing and advising its member is to provide reasonable skill and care in the provision of practical

industrial relations and employment advice. It includes having the reasonable knowledge and experience expected of a trade union in both individual and collective negotiations in representing their members' interests. Where, as here, the trade union is recognised by a particular employer, the union's experience in dealing with that employer will be particularly valuable and provide a level of insight that would not be available to a solicitor. The duty would include a general understanding of employment, HR, and industrial relations issues, to be reasonably well informed about employment law in general terms, to have a reasonable level of skill and expertise in persuasion and negotiation, to be able to provide strategic and tactical advice on how to seek to resolve a situation in the best interests of its member.

66 However I reject the submission that a "quasi-legal" duty exists. Firstly it is a vague and imprecise term that eludes precise definition and therefore does not shed light on the scope of the duty. Secondly, the duty is not quasi – legal, but is the duty of care of a trade union. Although the trade union role is likely to involve advice, accompaniment or representation, which are often the activities of a lawyer, to describe it as a quasi-legal role (whatever that may mean) would be misleading and a distortion of the nature of the role of a trade union going beyond the trade union's tortious duty in assisting a member, where the duty exists.

67 Nor can it be said that the GMB owed Mr Langley a duty to apply for interim relief in the employment tribunal on his behalf, since the agreed strategy was not to litigate, but negotiate, which was a reasonable strategy about which no criticism can be made. I set out below further specific difficulties with such applications.

68 The claim against Ms Koester in her personal capacity was withdrawn by Mr Langley during the course of the hearing and it is therefore not necessary to set out or analyse the circumstances when an individual employee may be personally responsible in the tort of negligence and *Williams and another v Natural Life Health Foods Ltd* [1998] 1 WLR 830. Trade Union Law owed Mr Langley a duty of care to provide the advice of a reasonably competent employment lawyer on the matters on which they were instructed to advice and act under the scope of their retainer. The duty will be breached if the advice provided is advice that no reasonably well-informed and competent employment lawyer would have given. In the context of advice as to whether to accept settlement terms offered a claimant will usually need to prove that the advice is blatantly wrong in order to establish breach (*VG v Denise Kingsmill* above).

69 The scope of a solicitor's retainer is partly a question of fact: what had the parties agreed would be the matters on which the lawyers would advise and act? But it is also implicit in the solicitor's retainer that they will proffer advice which is reasonably incidental to the work that they have agreed to carry out. It is necessary to have regard to all the circumstances of the case to determine what is reasonably incidental (see e.g. *Minkin v Landsberg* [2016] 1 WLR 1489, *Denning v Greenhalgh Financial Services Limited* [2017] EWHC 143).

70 In terms of the prospects of the case, had Mr Langley refused the offer and taken his chances in the disciplinary hearing and, if necessary, the employment tribunal, I have noted above that the case on whistleblowing was weak. I should explain that conclusion in a little more detail. Mr Langley has sensibly focussed his attention on a possible whistleblowing claim as, unlike a claim for so-called ordinary unfair dismissal, damages for a whistleblowing claim are uncapped. Mr Langley did not pursue an argument that his behaviour amounted to trade union activities and nor was it alleged that S.98 Employment Rights Act 1996 (ordinary unfair dismissal) would have provided much protection to Mr Langley.

71 In order to succeed in a whistleblowing claim a claimant must first establish that he or she has made a "qualifying disclosure" as defined in s.43B Employment Rights Act 1996. The relevant categories in Mr Langley's case were that a criminal offence has been, is being or is likely to be committed (s.43B(1)(a)) or that a person has failed, is failing or is likely to fail to comply with any legal obligation (s.43B(1)(b)) – in either case referring to election law and the purdah requirements.

72 The difficulty for Mr Langley is that he did not make that allegation in either of his two interviews. The focus of the legislation is on his disclosure, which is not the same as a spin or slant that a journalist might seek to put on a comment. It is also interesting to note that there does not appear to have been any election law challenge in relation to the green waste collection on 17 and 18 May 2015, which would have, perhaps, been some evidence that an unsuccessful candidate considered there had been a breach of election law. Mr Langley has not explained how it is said that his comments came within either ss2-4 Local Government Act or s.39 Local Audit and Accountability Act 2104 or other relevant statutory provision or statutory code of practice.

73 In his interviews it appears more that Mr Langley was suggesting that the council's behaviour tended to show that it was not being thoughtful of its workers or the sensitivities around the introduction of the overtime ban, so quickly followed by a request to do weekend overtime.

74 But even if it could be said that the information disclosed by Mr Langley to the media was likely to show a breach of election law, there is no evidence that Mr Langley believed that it was illegal at the time, which is a necessary prerequisite for establishing a claim (see s.43B(1) ERA 1996). Mr Langley's ire was about the way his members were being treated, consistent with his role as trade union shop steward.

75 But assuming that Mr Langley was able to show that his disclosure tended to show a criminal offence or failure to comply with a legal obligation, and that he believed it to be the case, the third difficulty for Mr Langley of establishing it was a qualifying disclosure in accordance with s.43B(1) was whether such a belief would be reasonable.

76 However, let us assume he had cleared the necessary hurdles in establishing a qualifying disclosure. The next task is to prove that it was a protected disclosure (s.43C- H). Whilst a qualifying disclosure considers the information imparted, whether it is also a protected disclosure depends on to whom it has been disclosed. The difficulty for Mr Langley was that he did not use the internal procedure, did not disclose his concerns to his managers or a prescribed person but went straight to the press and he would therefore be reliant on ss.43G or H Employment Rights Act 1996.

"**43G Disclosure in other cases.**

(1) A qualifying disclosure is made in accordance with this section if—

(a). . . . .

(b) [the worker] reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) any of the conditions in subsection (2) is met, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(d) are—

(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,

(b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or

(c) that the worker has previously made a disclosure of substantially the same information—

(i) to his employer, or

(ii) in accordance with section 43F.

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—

(a) the identity of the person to whom the disclosure is made,

(b) the seriousness of the relevant failure,

(c) whether the relevant failure is continuing or is likely to occur in the future,

(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.

43H Disclosure of exceptionally serious failure.

(1) A qualifying disclosure is made in accordance with this section if—

(a). . . . .

(b) [the worker] reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) the relevant failure is of an exceptionally serious nature, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made."

77 As can be seen, those subsections include a number of additional hurdles. Suffice to say it would have been a claim fraught with difficulty and unlikely to succeed in establishing a protected disclosure which was a necessary prerequisite in a whistleblowing claim.

78 There is no doubt that his press interviews were causative of his suspension but in the absence of establishing that the disclosures were either qualifying or protected disclosures he would not have been able to avail himself of the protection of the Public Interest Disclosure Act and the amendments to the Employment Rights Act to protect whistleblowers.

79 The GMB strategy of playing it long, avoiding a disciplinary hearing, keeping Mr Langley on the payroll past his 55th birthday and beyond thus retaining his income whilst creating enough political pressure to facilitate negotiations for as good a settlement deal as possible so that he could resign and not be dismissed, was far from negligent but was beneficial to Mr Langley, in his best interests and better than would have been achieved by relying on employment legislation or that could have been achieved by relying on solely on employment legislation.

80 In terms of the criticism of not applying for interim relief under s.128 Employment Rights Act 1996, this too would have been a course, not only beset with difficulties, but likely to have been counter-productive. Firstly, interim relief applications have to be brought without delay and within seven days of the detriment complained of (s.129), which, in this case, would be within seven days of 16 May or 23 May 2015 (depending if it dated from intimation of, or actual, suspension). It would have given Mr Langley and the GMB precious little time to formulate an overall strategy and forced them into a legalistic approach. The employment tribunal is then required to arrange a hearing without delay on receipt of such an application. It would have therefore turbocharged the disciplinary hearing and boxed Mr Langley into employment tribunal proceedings and he would have ceded power to the legal process.

81 To succeed in an interim relief application a claimant must show that it is likely that she or he will succeed in the ultimate claim. Likely to succeed has been defined as meaning having "a pretty good chance". It is a high bar, higher than the balance of probabilities or more likely than not. On the facts of the case it is most improbable that Mr Langley would have been successful in an interim relief application since he would have had difficulty in showing he had a pretty good chance of succeeding in a whistleblowing detriment claim because of the difficulties in establishing that he had made either a qualifying or protected disclosure as discussed above.

82 If Mr Langley had been unsuccessful in an interim relief application, it would have left him in a vulnerable and exposed position, a worse position than if interim relief proceedings had not been brought. If he had succeeded in an interim relief application, it would have strengthened his case, but it would have been likely to have forced the council into a disciplinary hearing without delay and would not necessarily have resulted in his reinstatement.

83 If the disciplinary proceedings had taken their course they would have likely resulted in Mr Langley's dismissal. His only remedy then would have been in the employment tribunal where his prospects were slim. It is for those reasons I consider that it was not only not negligent, but a canny strategy by the GMB, to consider that the best strategy for Mr Langley was to keep the matter out of the internal disciplinary procedure and the employment tribunal whilst pushing hard for as large a severance package as could be negotiated. It is also relevant that it suited Mr Langley's future life plans at that time.

84 To return to the specific issues in the case and to summarise, the GMB gave reasonable advice on the merits of Mr Langley's possible claim were he to go to an employment tribunal and there was no breach of the duty of care that they had assumed towards their member in this regard. They also provided reasonable strategic and tactical advice in his case. They were not under any tortious duty to instruct lawyers on his behalf to conduct employment tribunal litigation, and the rule book did not provide any contractual duty to do so. But in any event, the strategy agreed with him had been to keep the matter out of the legal arena for sensible, strategic reasons.

85 I have found that there was no pressure on Mr Langley to sign the Compromise Agreement, but was merely given sensible advice as to the merits and de-merits of doing so. No evidence of collusion between the council and the GMB has been established to suggest that GMB was not seeking to act in their member's best interests and wanted him dismissed. He had been a valued, hard-working and committed union shop steward whose services would no doubt have been missed and it would be embarrassing for them for a leading shop steward to be dismissed and risked discouraging others from volunteering for this important role. I do not find that there was any conflict between the GMB and Mr Langley and there was therefore no conflict involved in Trade Union Law acting on Mr Langley's behalf when it was also instructed by GMB on other matters and is a firm co-owned by them.

86 A failure of pastoral care is not pleaded and is therefore outside the scope of this case and would involve considerably extending established principles. But on the facts of this case, overall it appears that the union kept in reasonable, and reasonably frequent, touch with their member and were attentive and considerate of him. They were far from neglectful, even if looking back, he expected something more assiduous. Although he complained that he felt out of the loop over the summer of 2014, there is no evidence that he was trying to contact them during this period.

87 There has been no breach of the GMB's duty of care towards their member and the claim against the GMB is not well founded and is dismissed.

88 The claim against the second defendant was withdrawn during the hearing. As to Trade Union Law, they were independent as defined in s.203 ERA 1996. They were independent of the employer, Birmingham City Council and as already stated there was no conflict of interest between Mr Langley and his union and therefore no difficulty in acting for Mr Langley whilst also on other matters being engaged by the GMB and being part owned by the GMB.

89 The solicitors were not instructed to advise on the merits of the claim and there has therefore been no breach of their duties under their retainer in this regard. They gave advice appropriate to the scope of their retainer which was the meaning and effect of the Compromise Agreement and the claimant had sufficient time to consider the terms offered and was not pressurised or coerced into agreeing the terms. There has been no breach of the ACAS code. Mr Langley had time from 23 December 2015 to think about whether it was in his best interests to sign the agreement and he decided that it was, signing the agreement over 2 months later on 27 February 2015. I am also satisfied that Mr Langley understood the meaning and effect of the agreement as it had been carefully explained to him by Ms Koester.

90 For the above reasons the claim against all three defendants is dismissed.

91 Since the defendants have substantially succeeded in defending the claims, it follows that their costs on the standard basis, to be subject to detailed taxation if not agreed (since there has been no costs management undertaken in this case) are to be paid by the claimant. The GMB informed the court that it will have regard to all the hard work, commitment and service that Mr Langley provided to the union as a shop steward when deciding how to approach its enforcement of the costs award against him.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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