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Case No: QA-2022-000117

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST
ON APPEAL FROM DEPUTY MASTER FINE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/05/24

Before :

MR JUSTICE LINDEN

- -

Between :

MARIA JOAO DE AZAVEDO CAMACHO	**Appellant/ Claimant**
- and -	
OCS GROUP UK LIMITED	**Respondent/ Defendant**

- -
- -

Anton van Dellen (instructed by direct access) for the Claimant
Victoria Jolliffe (instructed by DWF Law LLP) for the Defendant

Hearing date: 9 May 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 16 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE LINDEN

Mr Justice Linden:

Introduction

1. This is the Claimant's appeal from an Order of Deputy Master Fine dated 11 May 2022, summarily dismissing her claims of defamation, harassment contrary to the Protection from Harassment Act 1997, and unlawful means conspiracy. Julian Knowles J granted her renewed application for permission at a hearing on 20 October 2023. Although the Claimant also sought permission to appeal against the dismissal of her harassment claim, this was refused.

2. The Deputy Master's basis for dismissing the defamation claim was that, in the light of the decision of the Court of Appeal in *Friend v Civil Aviation Authority* [1998] IRLR 253, the Defendant had an unanswerable defence of consent. In *Friend*, the Court of Appeal held that an employee whose terms and conditions included a disciplinary procedure had impliedly consented to the republication of defamatory statements about him for the purpose of determining disciplinary proceedings against him. The Deputy Master held that *Friend* also applied to criticisms of the Claimant made by colleagues in the course of the Defendant's investigation of a workplace grievance against her pursuant to its grievance procedure, and it is this ruling which is challenged in the appeal,

The Claim

3. The Defendant is a facilities management company which provides services including cleaning. At all material times it employed the Claimant as a Soft Service Manager pursuant to a written contract of employment dated 10 July 2018 ("the Contract"). This provided, so far as material, as follows:

> *"20.1 The Employee is subject to the Company's disciplinary and grievance procedures, copies of which are set out in the Employee Handbook and which are also available on the Group intranet. These procedures do not form part of the Employee's contract of employment."*

4. Clauses 20.3 and 20.4 of the Contract provided:

> *"20.3 In the event that the Employee may wish to raise a grievance in relation to any employment matter, then any such grievance should be set out in writing detailing the grounds for the grievance and submitted to the Employee's Line Manager in the first instance other than in circumstances where the grievance specifically relates to any act or failure to act on the part of the Employee's Line Manager, in which case the grievance should be submitted directly to the HR Department.*
>
> *20.4 Should the matter not be concluded to the satisfaction of the Employee, then the Employee shall have the right of appeal. Any such appeal should be submitted directly to the HR Department who will then be required to arrange for the appeal to be dealt with as appropriate and in accordance with the Company's grievance appeal procedure."*

5. The Employee Handbook also stated that *"The policies set out in this handbook do not form part of your contract of employment and may be amended at any time"*, and there was provision for employees to be notified of any such changes. The Handbook included a Disciplinary Policy and Procedure, and a Grievance Policy. The Grievance Policy began by stating that:

> *"The aim of this policy is to provide a clear framework by which individuals can raise a grievance relating to their employment and duties at work which will be dealt with fairly and without unreasonable delay. The Company aims to investigate any formal grievance raised, hold a meeting to discuss it, inform the employee in writing of the outcome and provide a right of appeal if they are not satisfied."*

6. The Grievance Policy defined a grievance as *"a problem, complaint or concern with regards to [the employee's] employment"* and examples of issues which might cause grievances were given ranging from terms and conditions of employment, to working environment, to organisational change, to work relations, bullying and harassment and discrimination.

7. In the usual way, the Policy provided for an informal resolution stage and then for a formal grievance process in the event that the grievance was not resolved to the satisfaction of the employee. The formal stage required the employee to set out their grievance in writing and send it to a manager at the appropriate level whereupon an independent grievance manager would be appointed and the employee would be invited to a hearing to explain their grievance. As far as investigation of the grievance was concerned, it was stated that *"After the hearing the grievance manager may need to investigate any points raised"*, and there was a more general warning that once a grievance had been submitted *"management may still wish to investigate it even if the employee decides that they do not wish to pursue it"*. The grievance manager would then decide on the appropriate action to be taken, and advise the employee of their decision.

8. At Stage 3 there was provision for the employee to appeal if they disagreed with the grievance manager's decision as to the action to be taken. This was stated to involve a hearing with another independent manager, after which a final decision would be communicated to the employee.

9. The Grievance Policy provided that group grievances would be dealt with in essentially the same way as individual grievances. It also provided that the employee had a right to be accompanied at every stage of the procedure and there was a statement that the Defendant would not tolerate victimisation of an employee who raised a grievance, who was the subject of a grievance, or who was a witness to a grievance.

10. Under the heading *"Roles and Responsibilities"* the Policy provided that:

> *"Grievance and appeal managers should:*
>
> *• Be impartial*
>
> *• Ensure the procedure is being followed correctly*

> • *Actively look for a realistic solution that will satisfy the employee*
>
> • *Be willing to tackle unacceptable behaviour*
>
> • *Provide relevant feedback"*

11. It also provided that:

> *"An employee should:*
>
> • *Attempt to resolve any grievance informally*
>
> • *Not make false or malicious grievances*
>
> • *Be honest and committed to reaching an outcome that is realistic within this procedure"*

12. The Grievance Policy also stated that:

> *"The grievance policy does not apply to disciplinary matters. In cases where a grievance highlights a misconduct allegation, the manager dealing with the complaint should consult with HR to determine the appropriate action…"*

13. In December 2019, two of the Claimant's colleagues, Mr Esso (a Cleaning Supervisor) and Mr Loukaides (a Cleaner), lodged grievances against her in which they complained about the way that she treated them. Their grievances were investigated and, in the course of the investigation, various colleagues of the Claimant were interviewed. These included Mr Meite (a Cleaner), who was interviewed on 20 January 2020, and Ms Mancera (a Domestic Cleaner), who was interviewed on 24 February 2020.

14. The Claimant's pleaded case is that oral statements which Mr Meite and Ms Mancera made to their interviewers were defamatory of her. It is not necessary to set the statements out, but her pleaded case on meaning is that:

    i) Mr Meite's statements meant that the Claimant always shouted, was arrogant, intimidating and abusive, was a poor manager, treated employees badly, had humiliated others, swore at employees and had driven an employee out of work.

    ii) The natural and ordinary meaning of Ms Mancera's statements was that the Claimant shouted, was intimidating and abusive, was a poor manager and treated employees badly.

15. [7] of the draft Amended Particulars of Claim also pleads that it is to be inferred that the notes of their oral statements were read by *"a substantial but presently unquantifiable number of readers in this jurisdiction"*. However, Dr van Dellen confirmed at the hearing before me that the only publications relied on by the Claimant were the oral statements made by Mr Meite and Ms Mancera in the course of the two interviews in question.

16. There were then disciplinary proceedings against the Claimant based on the evidence which had emerged during the investigation of the grievance against her. These were initiated on 8 June 2020 and they resulted in her dismissal on 25 June 2020 on the grounds of gross misconduct based on findings of bullying and breach of trust and confidence. The Claimant appealed against her dismissal but her appeal was rejected.

17. The present proceedings were issued on 19 January 2021 and the Particulars of Claim were filed on 11 April 2021. They were eventually served on 5 May 2021. As noted above, the Claimant alleged defamation and harassment contrary to the 1997 Act. There was also a claim in unlawful means conspiracy which the parties agreed was parasitic upon the first two causes of action, as these were said to be the unlawful means. There were eight defendants to the Claim, the first seven of whom had been colleagues of the Claimant and had made statements in the course of the grievance process which were critical of her. Ms Mancera was named as the second defendant and Mr Meite as the sixth. Their allegedly defamatory statements about the Claimant were also alleged to have been part of a joint course of conduct which amounted to harassment of her. The other employees were not accused of defamation but they were alleged to have made statements which formed part of the joint course of conduct amounting to harassment. The Defendant employer was named as the eighth defendant and was alleged to be vicariously liable for the statements of the first to seventh defendants.

18. On 19 May 2021 the Claimant then indicated, by the service of draft Amended Particulars of Claim, that she wished to discontinue her claims against the first to seventh defendants. Her pleaded case otherwise remained materially the same in that she alleged defamation/harassment/unlawful means conspiracy by the named employees on the same basis, for which she contended the Defendant was vicariously liable. The Claimant did not, however, file a notice of discontinuance as she had indicated she would.

The decision of the Deputy Master

19. By the time of the hearing before the Deputy Master there were two contested applications before the court. The first was an application by the Claimant, dated 31 August 2021, to amend her Claim Form and Particulars of Claim so that the sole defendant would be the Defendant. The second was an application by the Defendant, dated 21 December 2021, to strike out and/or for the dismissal of the Claim on the basis that the Claimant's pleaded case disclosed no reasonable grounds for bringing the Claim (CPR r3.4(2)(a)) and/or the Claim had no real prospect of success (CPR r24.3(a)), and for an order that the claim against the first to seventh defendants be discontinued and the Claimant pay the costs.

20. Upon the Claimant undertaking to file and serve a notice of discontinuance of her claims against the employee defendants, the Deputy Master Fine upheld the Defendant's application for summary judgment and therefore dismissed the Claimant's application to amend. She also ordered the Claimant to pay costs in the sum of £35,000.

21. I was provided with a "transcript" of the Deputy Master's ex tempore judgment. As the hearing took place remotely there were apparently gaps in the recording, some of which were filled in by agreement between the parties but others could not be. The

result is a document which is not as fluent as, no doubt, the oral judgment was. However the Deputy Master has approved it as a record of her reasoning.

22. The judgment shows that the Deputy Master considered that the question was whether the two interviews on which the defamation claim was based *"fall within the Friend principle"*. She noted that Mr Richard Spearman KC (sitting as a Deputy High Court Judge) in *Parris v Ajayi* [2021] EWHC 285 (QB) at [104]-[106] had declined to decide points of law as to the scope of this principle in the context of an application for summary judgment where the facts were materially in dispute, but she found that this was a case in which the key facts were not in dispute. She also noted that in *Kostakopolou v Warwick University* [2021] EWHC 3454 (QB) at [69] Sir Andrew Nicol had confirmed that *Friend* remains good law, and she went on to conclude as follows:

> *"Finding that these interviews were conducted as part of the initial grievance which became disciplinary proceedings and launched disciplinary process and, therefore, within the purview of disciplinary proceeding, the Eighth Defendant has an unanswerable defence based on consent and as set out in Friend an employer accepts the disciplinary code. ... consents to re-publication, truth or falsity of complaint."*

23. The reasoning which led to this conclusion was as follows:

> *"There were two grievances, interviews conducted as part of grievances launched disciplinary proceedings. Confirmed in Friend, very common way of launching disciplinary procedures. Grievances were not made by either of the two named Defendants (the Second and Sixth Defendants) and I find that in light of the fact that these were used in disciplinary proceedings and that they were part of the investigations by the Eighth Defendant, namely interviews in order to investigate complaints about the Claimant and whether she should be disciplined, it falls firmly within Friend....It would be completely wrong for an employer to be vicariously liable if the employer investigates a complaint against an employee. The Claimant in this case accepted the company's disciplinary and grievance procedures and therefore the defence in Friend applies. The Claimant accepts that she cannot sue if the statements were made in the context of disciplinary proceedings. I find these documents were integral to disciplinary proceedings."*

24. I note that the Deputy Master accepted that the two interviews took place in the course of an investigation of grievances brought about the Claimant by two other employees. The evidential basis for her suggestion that they took place in order to investigate *"whether [the Claimant] should be disciplined"* is unclear but I was told that this may refer to parts of the interview with the Claimant in relation to the grievance about her. This took place on 29 January 2020 and it appears to have been explained to her that the notes of the interview may be used in further investigations. The notes also record a reference by the Claimant to the fact that she had been suspended. Ms Jolliffe confirmed that there is no suggestion that the two interviews relied on by the Claimant took place as part of disciplinary proceedings against her or pursuant to the Defendant's disciplinary procedure. However the possibility that, subject to the outcome of the grievances, there might be such proceedings in due course was contemplated at the relevant time given the nature of the issues in those

grievances. Disciplinary proceedings were not in fact initiated until 8 June 2020, as I have said.

25. The Deputy Master went on to observe that the Claimant's real complaint was about the manner of her dismissal and was properly the subject matter of an unfair dismissal claim in the employment tribunal (see *Johnson v Unisys Ltd* [2003] AC 518) rather than a defamation claim. She said that the Claimant was attempting to circumvent the fact that she had insufficient continuous service to bring an unfair dismissal claim, and that was *"clearly wrong"*. The harassment claim was dismissed for want of particularity and/or because there was no evidential basis for the Claimant's case that there had been a joint course of conduct. The unlawful means conspiracy claim also fell to be dismissed given that there was no arguable case that there had been any unlawful means.

The defence of consent

26. There are helpful accounts of the defence of consent in *Clerk & Lindsell on Torts* 24th Edition at 3-47 and 21-198 and *Gatley on Libel and Slander* 13th Edition at 20-006 to 007 which, in advance of the hearing, I asked the parties to consider alongside certain additional authorities to those which had been referred to by them in their skeleton arguments. As Slesser LJ said in *Chapman v Ellesmere* [1932] 2 KB 431, 463:

> *"This defence is based upon the doctrine of volenti non fit injuria. In the words of Salmond on Torts "No act is actionable as a tort at the suit of any person who has expressly or impliedly assented to it.""*

27. In the case of defamation, the tortious conduct is the publication of the defamatory imputations and it must therefore be shown that the publication of these imputations was agreed to, or acquiesced in, by the claimant. The authors of *Gatley* say this at 20-006:

> *"It is a defence to an action for defamation that the claimant consented to the publication of which he now complains by participating in or authorising it. Thus, if the claimant has consented, expressly or impliedly or by conduct, to the publication of the words substantially as they were used, ...there is a good defence to the action; but the proof of consent must be clear and unequivocal."*

28. At 20-007 they acknowledge that, in *Stocker v Stocker* [2015] EWHC 1634; [2015] EMLR 24 at [28], Warby J (as he then was) said that it may be too stringent a statement of the law to say that there must be authorisation of the publication of *"the words substantially as they were used"*, which was the formulation adopted by Lord Denning in *Moore v News of the World* [1972] 1 QB 441 at 448A/B. Arguably it would be enough that there was consent to the publication of the allegations, as opposed to the specific defamatory words, of which complaint is made by the claimant.

29. As Tugendhat J said in *Tesla Motors Ltd v BBC* [2011] EWHC 2760 (QB) at [84]:

> *"it is most unusual for a defence of consent to be raised in the context of libel or a related causes of action. One reason for this is that the law on consent*

> *generally requires that the person alleged to have given the consent should have done so freely and with full information. Moreover, consent when given is generally not for an unlimited period, and may be withdrawn at any time. And even if it is for a fixed period, as for example it may be under a contract, it does not necessarily follow that it is wholly irrevocable."*

30. Drawing on this passage, in *Otuo v Watch Tower Bible and Tract Society of Great Britain* [2017] EWHC 2186 at [1], Sir David Eady said that the defendant *"must show that the claimant has unequivocally consented to the publication of the defamatory allegations with full knowledge"*. This question will generally turn on issues of disputed fact. It would therefore be very unusual for there to be a case where the defence is so clearly established that it can be disposed of at the pre-trial stage.

31. The authors of *Gatley* go on, at 20-007, to state that the defence is a narrow one. As a result, it will not apply, for example, where there is publication to a wider audience than was consented to or envisaged, or where the claimant is under a duty to republish the matter complained of. A person who authorises publicity for a book does not authorise every statement which is made to publicise it. A person who appears on a "talk show" to rebut rumours consents to the rumours being repeated for that purpose but does not necessarily consent to them being repeated by listeners who phone in, and so on.

32. It is against this background that the decision of the Court of Appeal in *Friend v Civil Aviation Authority* (supra) should be analysed.

The decision in Friend v Civil Aviation Authority

33. Captain Friend was subject to a disciplinary complaint that his conduct had disrupted his working relationships with his colleagues. The evidence against him included criticisms of him which were set out in written memoranda, twelve of which were written before disciplinary proceedings were initiated, and two of which were compiled in the course of those proceedings. After a 4 day hearing which ended on 1 October 1992, an internal disciplinary panel recommended that the complaint against him should be dismissed. Notwithstanding this, he was dismissed by letter dated 1 December 1992. He appealed against this decision and his appeal was dismissed on 16 June 1993.

34. Captain Friend's claim in defamation was based on the 14 memoranda but, for reasons of limitation, it was confined to the republications of the memoranda in the disciplinary proceedings on and after 1 October 1992 i.e. from the fourth day of the disciplinary hearing to the conclusion of the appeal process. He did not claim in relation to the original publication of the memoranda by their respective authors.

35. The contention of the CAA which found favour with the Court of Appeal was that:

> *"by reason of Captain Friend's contractual acceptance of the CAA's terms of service (including their disciplinary code) and of his voluntary invocation of the internal appeal procedure, he cannot sue in respect of the re-publications complained of, all of which were made in the course of the internal disciplinary proceedings, since by such acceptance he consented to such re-publication, thus*

furnishing the defendants in both actions with the defence of volenti non fit injuria and leave and licence."

36. In accepting that the CAA was entitled to rely on this defence *"substantially for the reasons given by"* counsel for the CAA, Mr Moloney, at [30] Hirst LJ noted that Mr Moloney had emphasised that:

> *"…the sole causes of action sued upon are re-publications in the course of the various stages of the disciplinary proceedings, and stressed that it is only in relation to them that his argument based on consent applies. It would not apply to the original publication of the documents by their respective authors."*

37. Hirst LJ referred to passages from *Clerk & Lindsell* and *Gatley* which showed that the principle of volenti, or leave and licence, applies in the defamation context, and he described the judgment of Slesser LJ in *Chapman v Ellesmere* (supra) at 463-465 as *"the locus classicus on the topic"*. He said that Captain Friend's submission that a person cannot consent to a malicious untruth, and that *"natural justice does not include malice"* was:

> *"40…….based on a basic misconception as to the nature of disciplinary proceedings. Inevitably they are launched as a result of some kind of accusation or complaint against an employee, and their essential purpose is to decide whether that accusation is true or false, for which purpose the accusation or complaint must inevitably be re-published to the disciplinary tribunal and those responsible for hearing any subsequent disciplinary or appeal proceedings.*
>
> *41. Natural justice comes into the picture in order to ensure that their adjudication is fairly carried out.*
>
> *42. It necessarily follows that an employee who accepts a disciplinary code such as the CAA's as part of his contract of employment consents to the republication of the accusation or complaint as part of that process, otherwise there is no way in which, for his own protection as well as for the protection of the interests of his employer, the truth or falsity of the accusation or complaint can be fairly established."*

38. Hirst LJ added that *"in this branch of the law the decision turns on the particular facts"* and that this point was illustrated by *Chapman v Ellesmere* where:

> *"44.. the plaintiff's assent stemmed from the closing words of rule 17 [of the Rules of Racing of the Jockey Club], under which the stewards were authorised to publish in the Racing Calendar their decision respecting the matters referred to earlier in the rule (eg to grant or withdraw a licence to a trainer). That is precisely what the stewards had done. If, on the other hand, they had published an inaccurate or untruthful account of their decision, then that would have been outwith the authority granted by rule 17, and therefore not within the scope of the plaintiff's assent.*
>
> *45. In the present case, by contrast, Captain Friend's consent to the publication of the accusation or complaint to those involved in the disciplinary adjudications is on the basis that nobody can know for certain*

> *whether that accusation is true or false until it has been re-published to, considered by, and adjudicated upon by those persons at the various stages of the disciplinary process."*

39. Hirst LJ confirmed that the original publications of the memoranda by their respective authors were in principle actionable as they were *"made outside the ambit of the disciplinary proceedings, and therefore in no way subject to his consent"*.

40. Brooke LJ agreed with Hirst LJ but he also gave a short judgment in which he accepted that generally there would need to be evidence of a special express consent before a person could be held to have consented to the publication of malicious libels on themselves:

> *"70……..however, the disciplinary process to which [Captain Friend] assented when he accepted employment with the CAA necessarily involved the publication to the relevant officers of the authority of the documents that related to a disciplinary charge that was being investigated. Without access to those documents the authority could not conduct a fair inquiry.*
>
> *71. It is only the publication of the documents for the purposes of the inquiry of which Captain Friend makes complaint, and this publication is covered by his consent….."*

41. He agreed with Hirst LJ that it was only the limitation period which prevented the original publication of the memoranda from being actionable and added that:

> *"71. Similarly, if the authors had given evidence at the inquiry itself which Captain Friend considered to be defamatory of him, they would only have been protected by qualified privilege, which would be rebutted by a successful plea of malice, since proceedings at such an inquiry do not attract absolute privilege. The scope of the consent is therefore a limited one…."*

42. Millett LJ (as he then was) said that he agreed with both judgments.

Authorities since ***Friend***

43. There have been various references to *Friend* in subsequent decisions. Unsurprisingly, none of these has cast doubt on its correctness and, in *Kostakopolou* (supra) at [69], Sir Andrew Nicol rejected an argument that the position had been altered by subsequent legislation, including the Human Rights Act 1998, when he held that *Friend* remains *"good law"*. The cases have, however, recognised the narrowness of the scope of the Court of Appeal's decision in that it applied to *"repetition….during and for the purposes of the disciplinary proceedings"* (per Eady J in *Spencer v Sillitoe* [2003] 1651 at [31]) or publication in the course of the disciplinary procedure *"such as was necessary for the fair conduct of that disciplinary process"* (per Tugendhat J in *Crossland v Wilkinson Hardware Stores Limited* [2005] EWHC 481 at [67]). So agreement to a disciplinary procedure does not give a general licence to publish defamatory statements about an employee in the course of disciplinary proceedings. There may still be issues, in a given case, as to the whether e.g. a gratuitous or irrelevant publication is within the scope of the consent which the employee has given, as Ms Jolliffe appeared to accept.

44. In *Crossland* the claims in libel and malicious falsehood were based on words set out in a document called the Abergavenny Store Review ("ASR") which was then discussed at a meeting which was part of the defendant's grievance procedure, after a grievance had been lodged by the claimant, as well as at a disciplinary hearing. At [70] Tugendhat J said:

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

45. He went on to say that repetitions of what was said in the ASR at the grievance meeting and the disciplinary hearing were, however, covered by the defence of consent: [71].

46. In *Parris* at [93]-[108] Mr Spearman recognised the limited scope of the decision in *Friend*. However, at [105] he said that he would not rule out the possibility that a publication might be covered by the principle even if it initiated the chain of events which resulted in a disciplinary process. He said:

> *"The reason for this is that it appears to be common ground that any complaint by an employee against a fellow worker is one for which the employee's employer is in principle vicariously liable. If that is right, and if the publication of the complaint was only protected by qualified privilege (which would be defeated by malice), no employer could safely receive any such complaint without exposing the employer to liability in defamation for the same, because the employer could never know at the time whether the complaint was malicious. That would have a chilling effect on the airing and resolution of grievances at work, which would be inimical to good employment relations and practices.*"

47. At [106], however, Mr Spearman said that this was an issue of law which was not sufficiently certain to be determined summarily and which ought properly to be based on actual findings of fact. He therefore declined to decide the point. As Ms Jolliffe pointed out, because there were material disputes of fact as to the timing and context of certain publications relative to the disciplinary proceedings, Mr Spearman also declined to decide other arguments put forward as to the application of *Friend*, although he thought that they may well prove to be right. These included an argument that the reasoning in *Friend* does not depend on whether the disciplinary process is contractual but on whether it is one to which the employee consented: see [103].

The appeal

48. The sole ground of appeal is that it was an error of law to extend the *"immunity"* or *"exemption"* for defamatory statements made in the course of disciplinary proceedings which was identified in *Friend* to defamatory statements made during the investigation of grievance proceedings. This was how Dr van Dellen pleaded the Claimant's case and it was the focus of his skeleton argument which contended that Friend only applies to publication within the ambit of a disciplinary procedure. He also relied on [106] of the judgment of Mr Spearman in *Parris* where he said that the

scope of the *Friend* principle was a point of law which was not sufficiently certain to be determined on a summary basis without actual findings of fact.

49. At the hearing Dr van Dellen accepted that the words in clause 20.1 of the Contract - "*The Employee is subject to the Company's disciplinary and grievance procedures"* - meant that the Grievance Policy applied to her, but he argued that this did not mean that she consented to the defamatory statements of which she complains:

    i) Firstly, clause 20.1 went on to state expressly that these procedures did not form part of her contract of employment. Insofar as Ms Jolliffe was relying on the Grievance Policy having contractual effect she was wrong about this: the contract between the parties expressly provided that it did not. In his reply, however, Dr van Dellen said that he accepted that it was not necessary for the consent of the employee to a given publication to have contractual effect. Moreover, he had conceded before the Deputy Master that the effect of clause 20.1 was that there was consent to the disciplinary procedure. such that *Friend* would apply to publications in the course of that procedure. The logic of this concession was that there was also consent, for present purposes, to the grievance procedure such that the issue was really what such consent entailed or implied.

    ii) Secondly, even on the basis that there was consent to the Grievance Policy in the relevant sense, the Policy expressly provided that employees should not make false or malicious grievances and should be honest and committed to reaching an outcome that is realistic etc. This Dr van Dellen described as *"a carve out"*. The Claimant therefore did not consent to the making of statements which were false or malicious in the context of the Grievance Policy. Dr van Dellen emphasised, by reference to *Chapman v Ellesmere* (supra) that the principle is one of consent to the publication complained of, and he submitted that the consent must *"fully cover the publication complained of"* (a phrase used by Lord Hanworth MR at 450).

50. Ms Jolliffe submitted that, as a matter of law, there was nothing in *Friend* to preclude its application more widely than in the context of disciplinary procedures. Nor was the present case like *Parris*, where there were material factual disputes which required to be resolved before an issue of law was determined. The present case was one in which the facts on which the defence of consent was based were uncontroversial: it was accepted that the statements complained of were made in the course of two interviews which were carried out as part of the investigation of the grievances of two other employees about the Claimant pursuant to the Defendant's Grievance Policy. There was no other basis for the defence than the terms of the Contract and, in particular, clause 20.1 which stated that the Claimant was *"subject to the Company's disciplinary and grievance procedures"*, and the terms of the Grievance Policy itself.

51. As far as the question whether there was consent at all is concerned, Ms Jolliffe submitted that there was no requirement that the defence be based on an agreement which has contractual force, as Mr Spearman had been inclined to agree in *Parris*. If contractual consent is required, she contended that clause 20.1 was contractually binding although she had not come prepared to make submissions as to the effect of the statement that the procedures *"do not form part of the Employee's contract of employment"*. In any event, the logic of Dr van Dellen's concession that there was

consent to the disciplinary procedure was that it was conceded that there was also consent to the grievance procedure, and the Deputy Master had therefore been entitled to proceed on the basis that this was not an issue.

52. As to what was consented to in relation to the Grievance Policy, Ms Jolliffe submitted that, by analogy with *Friend*, the Claimant had agreed that a grievance procedure was available to employees and that the Defendant had a right to investigate whether a given grievance was well founded. Where the grievance brought by a colleague and was about the behaviour of the Claimant, consent to the Grievance Policy necessarily entailed agreement to the interviewing of employees as part of the investigation, and those employees making defamatory statements about the Claimant in the course of those interviews.

53. Ms Jolliffe relied on the passage at [105] of Mr Spearman in *Parris*, which I have recited at [46] above. She accepted that in this case there would be vicarious liability for the statements made by Ms Mancera and Mr Meite and she submitted that there would be very real difficulties for employers if they were liable in defamation for any false or malicious evidence which was given in the course of the investigation of a grievance about a colleague. Even if the defence of qualified privilege would apply, the employer could not know, at the time when the statements were made, whether they were malicious. Moreover, the employer should not be put to the expense of defending claims even if ultimately those claims failed.

54. As to Dr van Dellen's "carve out" argument, Ms Jolliffe submitted that once consent to the publication is established, malice is irrelevant. She pointed out that, as a matter of construction, the statement in the Grievance Policy that false and malicious grievances should not be made (see [11], above) applied to the employee who raised the grievance, rather than witnesses who gave evidence in the course of the investigation of that grievance. She also submitted that this part of the Grievance Policy did not affect the scope of the consent which the Claimant had given: it merely indicated that there would be consequences for any employee who brought a grievance which was malicious, false or dishonest.

Discussion

55. In my judgment the debate between the parties about the scope of "the *Friend* principle", and whether it applies to grievance procedures or is limited to disciplinary procedures, is potentially distracting. Although this phrase may be convenient shorthand, the decision in *Friend* was the result of the application of existing general principles in relation to the defence of consent rather than the Court of Appeal establishing a new principle which may or may not apply in other contexts. Moreover, the general principles applied in *Friend* require express or implied consent to the particular publication complained of, rather than classification of a case as being about, for example, disciplinary procedures or grievance procedures, or the pinpointing of the moment in time when the statement was made relative to the initiation of the relevant procedure.

56. Furthermore, in *Friend* the Court of Appeal expressly made the point that each case will turn on its facts as to whether there was consent and, if so, what was consented to. As I have pointed out, even where the employee has agreed to a disciplinary procedure this will not necessarily entail consent to gratuitous or irrelevant

defamatory statements made in the context of that procedure. It would depend on whether the statement complained of was within the scope of the consent given by the employee (see [43] above). The issue in the present case was therefore better addressed by asking whether, on the agreed facts, a court would be bound to find at trial that the Claimant consented to the oral publication of the statements by Ms Mancera and Mr Meite when they were interviewed on 24 February and 20 January 2020. The issue in the appeal is whether the Deputy Master was wrong to find that a court would be bound to reach this conclusion, and this issue turns on the interpretation of the Contract and the Grievance Policy, which is a question of law.

57. For present purposes, I will assume that Dr van Dellen is right to concede that the consent required for the purpose of the defence need not be contractually binding, just as it need not be for the purposes of the defence of volenti non fit injuria more generally. I will also assume that the express statement in clause 20.1 of the Contract, that the grievance procedure does not form part of the Employee's contract of employment, does not affect the present analysis: it is merely intended to signify that the Grievance Policy is not enforceable in contract. But this then raises the question what the Claimant consented to by agreeing to the Contract.

58. On any view, the facts of *Friend* are a long way from the present case. There, Captain Friend had entered into a contract which incorporated a disciplinary code. That code set out the standards of conduct which were expected of him and the procedure by which any disciplinary issues relating to him would be determined, and those standards enforced. There was therefore no real difficulty in holding that it was implicit that he agreed to the publication, in the course of the disciplinary process and for the purposes of the fair determination of the issues in that process, of allegations against him which were being considered by his employer. He was necessarily to be taken to have agreed to this because the process would otherwise be inefficacious in achieving its aim of ensuring that those allegations were fairly adjudicated, which would be contrary to both his interests and those of his employer. Even then, as Brooke LJ emphasised, the scope of the consent in *Friend* was limited. There was no consent to the statements in the original memoranda which had led to the disciplinary proceedings and Brooke LJ said that evidence given in the course of the inquiry itself would have been actionable.

59. As is quite apparent, the nature of a grievance policy in the context of employment is different to that of a disciplinary policy. Typically, as here, a grievance procedure gives an employee an opportunity or a right to raise a grievance about any aspect of their employment – not just issues which may result in criticism of their conduct or performance - and to ask for their grievance to be determined by a manager. The purpose of the policy itself is not the determination of allegations against the employee who raises the grievance and it is not directly or specifically concerned with the enforcement by the employer of standards of conduct or performance required of the employee, although some grievances may result in such issues being raised and allegations made. Given that a grievance procedure may or may not involve the determination of allegations against the employee, it is far less clear that they necessarily give general consent to defamatory allegations being made about them in the course of such a procedure merely by agreeing that it is available in the workplace, whether that be in the context of a grievance which they have raised or a grievance raised by a colleague.

60. One can see the argument, accepted in *Crossland* as I have said, that in a given case the lodging by an employee of a grievance, pursuant to an agreed grievance procedure, about a statement which has been made about them, is likely to carry with it the implication that they have agreed to the republication of that statement for the purposes of determining their grievance. In such a case, as Tugendhat J pointed out, they know the terms of the statement and they have asked or agreed that the complaint about it will be investigated. This is likely necessarily to entail agreement that it can be repeated for the agreed purpose. And there may well be other cases where, on the evidence, the fact and terms of an agreed grievance procedure and/or a grievance raised by an employee necessarily means that they have agreed to a given publication of a defamatory statement about them in the course of determining that grievance. But the present case is some way removed from that.

61. Here, assuming that the grievance procedure was consented to by the Claimant, as I read the Contract and the Grievance Policy, what she agreed with the Defendant was that she could raise a grievance and that it would be investigated pursuant to the applicable procedure. The statement in clause 20.1 of the Contract that she was *"subject to"* the specified procedures is apt to refer to the disciplinary procedure, which regulated her conduct at work, but it is apparent from the terms of clauses 20.3 and 20.4 that the grievance procedure conferred a right or an opportunity on *"the Employee"* (i.e. the Claimant) to raise a grievance which would be subject to the Grievance Policy. This Policy was almost entirely concerned with how her grievance would be investigated and determined. The effect of the section on victimisation, referred to at [9] above, arguably meant that she agreed that she would not victimise a colleague who brought a grievance but it is difficult to see how the Contract entailed or implied that the Claimant agreed anything about the rights of others to bring hypothetical grievances about their employment, whether concerning the Claimant or otherwise, still less unequivocally agreed anything about what could be said or published in the context of such grievances. Those were not matters which were required to be agreed with the Claimant, nor matters over which one would expect her to be able to exercise any power or control by withholding her consent.

62. Bearing in mind that it is for the Defendant to provide evidence of consent by the Claimant, it would follow from this analysis that there is no evidence of consent to the publications which are the subject of this Claim. However, even if, contrary to my view, the words *"subject to"* in clause 20.1 of the Contract meant that the Claimant agreed that others would also have the right to raise a grievance under the Grievance Policy, including a grievance about her, the Grievance Policy merely provided that management may wish or need "*to investigate any points raised"* by a grievance. It would not follow from these words that she consented to others making defamatory statements about her in the course of the investigation. It could not realistically be said that, by signing the Contract, the Claimant consented to these matters freely and with full information given that this was at a point when the subject matter of the hypothetical grievance was unknown and, therefore, nor could it be known what statements about her would or may be made in the course of the investigation of that grievance. Thus, even if the Contract and the Grievance Policy provide evidence of consent to statements made by witnesses in the course of a grievance investigation, such evidence is highly equivocal.

63. In addition, there is force in Dr van Dellen's argument that the statement, in the Grievance Policy, that employees should not make false or malicious grievances, undermines the Defendant's case. My analysis of the arrangements between the parties would suggest that this is not a "carve out" i.e. an exception to otherwise general consent given by the Claimant: in my view she did not consent to anything in relation to grievances brought by others and/or statements made in the course of investigations of such grievances. I also agree with Ms Jolliffe that the principle is intended to apply to the person who raises - *"makes"*- the grievance rather than to a witness in the investigation of the grievance. But the point is this: even if the Claimant consented to others raising grievances under the Grievance Policy, that was on the basis that the Policy said that they should not make false, malicious or dishonest grievances. It is therefore difficult to see that she unequivocally consented to the raising of such a grievance about her. If she did not, it would be surprising if she nevertheless unequivocally consented to witnesses making false, malicious or dishonest statements about her in the course of the investigation of any grievance which was investigated under the Grievance Policy.

64. I understand the argument, eloquently expressed by Mr Spearman at [105] of his judgment in the *Parris* case, that there will be difficulties and inconvenience for employers if the consent argument does not run but, as Ms Jolliffe recognised, these are policy arguments. In effect, they suggest that it is desirable that an employee consents to the making of defamatory statements in the course of a grievance procedure. But, on their own, these arguments do not establish that the employee has in fact expressly or impliedly consented. Moreover, these difficulties should not be overstated. On the one hand they prove too much: the Court of Appeal in *Friend* accepted that the statements which led to the disciplinary action would be actionable, so the risk is there in any event. On the other, statements made in the course of a grievance investigation are necessarily made in a context in which the employer is investigating the matter and has an opportunity to determine whether or not they are false or malicious. They are made to a limited audience. If they are unreliable they will be rejected. There may therefore be difficulty in pleading *"serious harm to the reputation of the claimant"* for the purposes of section 1(1) of the Defamation Act 2013 (see PD 53B [4.2](3)). Even if this is possible, the defence of qualified privilege will apply subject to pleading and proof of malice by the claimant. An employee who issues proceedings will also be at risk of costs etc. This is not to say that there is no cause at all for concern, but these points do serve to diminish the risk of multiple claims arising out of grievance investigations.

Conclusion

65. For all of these reasons I am therefore satisfied that the Deputy Master was wrong to hold that the Defendant had an unanswerable defence of consent. Dr van Dellen accepted that the consequence of this conclusion would be that the defamation claim could in principle be pursued and he confirmed, again, in answer to concerns raised by Ms Jolliffe, that this meant the case based solely on the oral publications by Mr Meite and Ms Mancera at the interviews on 20 January and 24 February 2020 respectively. He also confirmed that he was not suggesting that the claim in unlawful means conspiracy could be pursued. This would be inconsistent with the Deputy Master's finding, albeit in the context of the harassment claim, that there was no evidence of a joint course of conduct between any of the employee defendants.

66. At the end of the hearing it was agreed that I would need to decide whether the Claimant's application for permission to amend should be allowed and that the parties would provide written submissions on this question with a view to a decision on the papers unless it became apparent that a hearing was necessary. I will also direct that written submissions on other consequentials are provided at the same time insofar as they are not agreed.