Case No: A1/2003/1296

Neutral Citation Number: [2004] EWCA Civ 943
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
THE HONOURABLE MR JUSTICE RIMER
EAT/0454/02/TM

Royal Courts of Justice
Strand,
London, WC2A 2LL

Tuesday 20th July 2004

Before :

THE RIGHT HONOURABLE LORD JUSTICE AULD
THE RIGHT HONOURABLE LORD JUSTICE NEUBERGER
and
THE HONOURABLE MR JUSTICE HOLMAN

- -

Between :

DIANE HEATH	Appellant
- and -	
COMMISSIONER OF POLICE FOR THE METROPOLIS	Respondent

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Miss Cherie Booth QC and Mr Mohinderpal Sethi (instructed by Mr Marc Jones, Underwoods/Turbervilles) for the Appellant acting Pro Bono
Mr John Hand QC and Mr Oliver Segal (instructed by Directorate of Legal Services) for the Respondent

- -

Judgment
As Approved by the Court

Lord Justice Auld :

1. This is an appeal by Miss Diane Heath against a decision of the Employment Appeal Tribunal on 22nd May 2003 upholding a decision of an Employment Tribunal on 12th March 2002 that it had no jurisdiction to hear her complaint of unlawful sex discrimination against the respondent, the Metropolitan Police Commissioner, under sections 6(2)(b) and 41(1) of the Sex Discrimination Act 1975, since, as it related to alleged conduct by police members of a Disciplinary Board in the conduct of a quasi judicial proceeding, namely a disciplinary hearing under the Police (Discipline) Regulations 1985 (SI 1985/518), it entitled the Commissioner to immunity from action.

2. The appeal raises three main issues:

   i) the extent of the immunity to categories of claim other than in defamation;

   ii) whether proceedings before a Police Disciplinary Board constituted under the Police (Discipline) Regulations 1985 are judicial or quasi - judicial proceedings in respect of which its members are entitled to immunity from action; and

   iii) whether the doctrine of absolute privilege governing judicial or quasi-judicial proceedings prohibits claims to an Employment Tribunal of alleged unlawful acts of discrimination committed in the course of such disciplinary proceedings.

   Underlying all those issues is the question where the balance should fall between the public policy interest of protection of the integrity of judicial or quasi-judicial proceedings on which the long-established common law immunity is based and the need to provide effective protection to citizens against unlawful discrimination, a need now under-written by European Convention of Human Rights ("ECHR") and Strasbourg jurisprudence and also by EU legislation.

The facts

3. At the material time, Miss Heath was employed as a station reception officer, in a civilian capacity, at Hornsey Police Station in London. She complained that on a number of occasions in March 1999 a police inspector at the Station sexually assaulted her. On 15th April 1999 she made a formal complaint to an Employment Tribunal against the Commissioner, alleging that those assaults constituted unlawful sex discrimination under section 1(1)(a), 6(2)(b) and 41(1) of the 1975 Act. However, the hearing of her complaint was stayed pending consideration of a prosecution of the Inspector in respect of those allegations (a consideration that led to a decision by the Crown Prosecution Service not to prosecute) and, second, the outcome of police disciplinary proceedings against him in respect of them.

4. On 13th March 2001 there was an internal police disciplinary hearing into her allegations of sexual assaults, which was convened under the 1985 Regulations. It was conducted by a Board, consisting of three male commanders in the Metropolitan Police. Miss Heath gave

evidence in support of her allegations in response to questions by a male advocate instructed to prosecute the charges, and she was cross-examined by a male counsel, instructed on behalf of the Inspector. The Inspector also gave evidence.

5. On 5th June 2001 Miss Heath made a second complaint to an Employment Tribunal complaining that the members of the Police Disciplinary Board who had presided at the hearing on 13th March 2001 had, in their conduct of it, sexually discriminated against her. She claimed: 1) that she had felt intimidated because the membership of the Board was entirely male; 2) that her union representative, a woman, had to plead with the Board to allow her to sit at the back of the hearing room so as to give her female support; and 3) that the Inspector's male barrister, in asking her in cross-examination to demonstrate (while she was in close proximity to the Inspector concerned) how the Inspector had sexually assaulted her, humiliated her by asking her to open her jacket and squeeze her right breast with her left hand - without any objection from the Board members.

6. The Employment Tribunal directed a preliminary hearing to determine whether the police disciplinary hearing on 13th March 2001 was a judicial proceeding in respect of which members of the Police Disciplinary Board and the Commissioner had an absolute immunity in respect of complaints of unlawful sex discrimination under the 1975 Act from proceedings before it, the Employment Tribunal.

7. The Employment Tribunal, in a reserved decision, with extended reasons, of 12th March 2002, held that there was such immunity, for the following reasons: 1) there is an absolute privilege in relation to things spoken or done in the course of judicial proceedings so that, for example, an action for defamation will not lie in respect of them; 2) the reason for the privilege is the public interest in ensuring that proceedings before a court may be conducted without fear of collateral attack; 3) proceedings before a Police Disciplinary Board under the 1985 Regulations are judicial (or at least quasi-judicial) proceedings; 4) the same public policy interest in protecting the integrity of judicial proceedings applies to complaints of unlawful discrimination; and 6), in the circumstances, it was doubtful whether Miss Heath could rely on the barrister's cross-examination of her as a breach of her right to respect for her privacy under Article 8 of the European Convention of Human Rights ("the Convention"), but even if it could engage that right, it would be counter-balanced by the Inspector's interest in having his accuser's evidence tested in cross-examination before the police Disciplinary Board.

8. The Employment Appeal Tribunal, in its judgment of 12th May 2003, upheld the decision of the Employment Tribunal, both on the substantive issue whether the proceedings before the Disciplinary Board attracted absolute privilege and as to her inability to have recourse to Article 8. Mr Justice Rimer, giving the judgment of the Tribunal, expressed its conclusions on those two determinative matters in paragraphs 25, 26 and 28 of the judgment:

> "25. … we approach the present case on the basis that the essential features of the disciplinary hearing rendered it closely analogous to a judicial proceeding before a court of justice. There were admittedly some differences, but we do not regard them (either singly or collectively) as requiring us to conclude that the hearing was performing a merely administrative function, being one which would not enjoy absolute immunity for what was said and done at it. We

consider that the Employment Tribunal were correct in their conclusion that the disciplinary hearing enjoyed the same absolute immunity as do proceedings before a court of justice. We find no error of law in their conclusion."

"26. … Miss Heath's complaint about the disciplinary hearing is not so much as to what was said at it, but as to (i) the exclusively male constitution of the Board and (ii) as to what was not said at it, in particular the failure of the Board to control counsel's questions of her in cross-examination. If, however, the proceedings enjoyed absolute immunity, that immunity extended even to complaints built on foundations such as this. The immunity attaches not just to defamatory statements made in the proceedings, it attaches to all forms of action 'sought to be derived from what was said or done in the course of judicial proceedings …' (per Sellers LJ in *Marrinan v. Vibart and another* [1962] 3 All ER 380, 383B). Diplock LJ said the same at 385C. Mr Sethi [counsel for Miss Heath] made the point that the Sex Discrimination Act 1975 says nothing to the effect that tribunals will enjoy any such immunity in respect of claims brought under that Act in relation to the manner in which they conduct their hearings. We regard that argument as carrying no weight. The rule is a longstanding one of public policy which applies in respect of all actions sought to be founded on the alleged acts or omissions of the participants in proceedings to which the rule applies, and Parliament can be taken to have been aware of it when enacting the 1975 Act."

"28. In our view, the Employment Tribunal's conclusion [about Article 8] was right. Miss Heath had made a serious allegation against the inspector which, if well founded, could have had extreme consequences for him. They resulted in the contemplation of criminal proceedings, the making of a disciplinary investigation and, ultimately, the holding of a disciplinary hearing on a charge. Conviction could result in a serious penalty, perhaps the ruin of the inspector's career. The fact that Miss Heath made the complaints did not prove that they were well founded. The inspector was entitled to defend himself against the charge, and the proper conduct of his defence entitled him to test Miss Heath's evidence in cross-examination. If he were not to be at liberty to do so, he would be deprived of a fair hearing. It was probably inevitable that the cross-examination would have to deal with the alleged assaults themselves. Of course, we recognise that such cross-examination would be a sensitive matter, and that it would be likely to be upsetting to Miss Heath. We recognise also that a Board conducting such a hearing should be careful to ensure that any such cross-examination is conducted fairly and within proper bounds, although any control of it necessarily involves a difficult balancing exercise between the according of due respect to the sensitivities of the complainant and the right of the accused fully to test the case against him. Even if there was any question here of Miss Heath's article 8.1 rights being engaged, we agree with the Employment Tribunal that her rights were qualified by disciplinary hearing's obligation to accord full respect to the inspector's right to a fair hearing. Quite apart from this, we anyway cannot see how a consideration of Miss Heath's alleged

> article 8 rights was relevant. The Employment Tribunal had no jurisdiction to hear a claim based on any alleged breach of those, or any other, human rights. The only claim before it was one based on alleged discrimination under the 1975 Act. For reasons given, we regard the Commissioner as enjoying an absolute immunity from that claim. …".

The issues

9. The main grounds of appeal of Miss Heath, in respect of which Mummery LJ gave permission to appeal and which were developed in the skeleton argument originally lodged with the Court were that: 1) - the primary argument - the Police Disciplinary Board was not a judicial body, to which the absolute immunity rule attached; 2) in any event, the rule applied only to defamatory statements made in judicial proceedings and did not, therefore, extend to acts of unlawful discrimination; and 3) in the absence of any provision in the 1975 Act removing an Employment Tribunal's jurisdiction to hear such a claim, there is no sufficient need for the immunity so as to justify its application to complaints of unlawful discrimination; and 4) any such immunity would be contrary to Miss Heath's rights under Articles 6, 8 and 14 of the Convention.

10. However, in a "Supplemental" Skeleton Argument lodged with the Court a few days before the hearing of the appeal, it became apparent that the main thrust of the appeal was to be, not so much the first of those grounds - the lack of similarity of the Board's role with that of a traditional court - but the third, now expressed as whether there is a necessity to "extend" the rule to a case of sex discrimination. And a further ground that had figured in the original skeleton argument though not expressly in the grounds of appeal, was also given considerable prominence, namely, 5) that any extension of the rule would undermine the principle of effective judicial protection in Article 6 of the Equal Employment Directive (EC Council Directive 76/207). [1]

11. Put at its broadest, the central issue for the Court is whether the rule of absolute immunity from suit that attaches to judicial or quasi-judicial proceedings excludes complaints about unlawful discriminatory conduct in the course of such proceedings to other judicial bodies, including Employment Tribunals. Miss Cherie Booth QC, on behalf of Miss Heath, prefaced her submissions on that central issue by observing that it requires the Court to balance recognised principles of immunity from suit designed to encourage freedom of communication in judicial proceedings, by relieving persons who take part in them from the fear of being sued for something they have said or done in the course of them, with the principle that acts of unlawful discrimination should not go unchallenged. She maintained that the underlying reasons for the rule do not as a matter of domestic law justify it outweighing the countervailing interest in preventing any act of unlawful discrimination in the work-place, and that any "extension" of the rule in the context of such a claim would also:

    a) violate a claimant's rights to a fair trial and to respect for his or her private rights under respectively Articles 6 and 8 read with 14 ECHR and, as such

[1] This Directive is to be replaced in 2005 by transposition of Directive 2002/73 of the European Parliament and of the Council of 23rd September 2002

would be contrary to the court's duty as a public body, pursuant to section 6 of the Human Rights Act 1998; and

b) undermine the principle of effective judicial protection given to a claimant by Article 6 of the Equal Treatment Directive.

12. I turn now to the first of the five issues in the appeal

1 – The width of the absolute immunity rule

13. Miss Booth submitted that the rule only attaches to defamatory statements made in the course of judicial proceedings and, therefore, does not extend to protect acts of alleged unlawful discrimination in such proceedings. She maintained that the courts are unwilling to extend the number of circumstances in respect of which no action will lie, pointing to the observations of Lopes LJ in *Royal Aquarium & Summer & Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431, CA, at 451, and May LJ in *Hasselblad (GB) v Orbinson* 1985] QB 475, CA, at 607-8, that it was a privilege that should not be extended. However, in *Royal Aquarium* and *Hasselblad,* the issue was not whether the privilege was confined to defamatory statements, but whether, in defamation cases, it should be confined to proceedings in courts recognised by law. And it was towards that issue that Lopes LJ's and May LJ's words in *Royal Aquarium* and *Hasselblad* respectively went. In the former, the court declined to extend the rule to a meeting of the London County Council for granting music and dancing licences; and in the latter, it similarly declined to do so in respect of an alleged defamatory letter sent to the Commission for the European Communities investigating a complaint under Article 89 of the EC Treaty.

14. Miss Booth submitted, nevertheless, that:

i) although all or almost all the reported cases on this species of absolute immunity have been defamation cases, there is nothing in any of them to suggest that the rule is to be given broad application so as to bestow the immunity in respect of things said in judicial proceedings where the complaint is for something other than defamation, for example, as here, in respect of the conduct of the proceedings themselves;

ii) the public policy basis for the rule, namely a necessity for a balance in favour of the public interest in the fair and efficient administration of justice by the protection of witnesses in respect of their evidence in courts recognised by law with that of providing a remedy to the citizen to protect his good name, does not operate so as to give absolute freedom from suit in relation to unlawful discriminatory conduct in the course of police disciplinary proceedings;

iii) such conduct cannot be said to be *necessary* to elicit the whole truth in such proceedings, as is the freedom of a witness to speak in court uninhibited by the threat of a possible claim for defamation arising out of something said in evidence;

iv) on the contrary, if the rationale for absolute immunity in defamation suits is to reassure those engaged in litigation that they can speak freely without fear of later forensic attack for what they have said, it is equally, if not more, in the public interest not to deter those with complaints of unlawful discrimination from pursuing their legislative right to bring them;

v) the common law rule of absolute immunity should, therefore, be read subject to and limited by the 1975 Act, in particular section 17, which provides that a chief officer of police is to be treated as the employer of the constables in his force (here, the members of the Police Disciplinary Board) and hence as vicariously responsible for their conduct in that office; and

vi) there is no express provision in the 1975 Act excluding an Employment Tribunal's jurisdiction to hear such a claim, and where the draftsman wished to exclude an act that would otherwise have been within the Tribunal's jurisdiction, he so provided; see Part V, which governs general exceptions from Parts II to IV, or, for example, a provision comparable to section 41 of the Race Relations Act 1976, which excludes acts of discrimination which would otherwise be within Parts II to IV of the Act; see e.g. *Hampson v DES* [1990] ICR 511, HL, at 520-521.

15. In short, Miss Booth submitted that it cannot be assumed that Parliament intended the immunity to attach to unlawful discrimination cases and that only necessity could drive the Court to conclude that it must have intended. She cited as the first of two illustrations of that approach the reasoning of the High Court of Australia in *Gibbons v. Duffell* (1932) 47 CLR 520, a defamation case arising out of the report by a police inspector to his superior about a fellow officer. The Court (per Gavan Duffy CJ, Rich and Dixon JJ) held that the report was not the subject of absolute immunity, stating at 527-8:

> "How far absolute privilege extends in naval and military matters is by no means settled. To transfer it by analogy to the Police Officers who are parties to this action, so as to protect the defamatory statements declared upon involves a double extension of the decided cases. The truth is that an indefeasible immunity for defamation is given only where upon clear grounds of public policy a remedy must be denied to private injury because complete freedom from suit appears indispensable to the effective performance of judicial, legislative or official functions. The presumption is against such a privilege and its extension is not favoured (*Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson).* Its application should end where its necessity ceases to be evident."

But, as Mr John Hand QC, counsel for the Commissioner, pointed out, the claimed "extension" of privilege in relation to naval and military matters in that case was a quite different immunity from that, in play here, one of absolute immunity in suit for things said or done in judicial proceedings. It is also to be noted that, in rejecting such extension, the Court identified the public policy interest giving rise to the breadth of the latter.

16. And second, Miss Booth mentioned *Spring v Guardian Royal Insurance* [1994] ICR 596 HL, in which their Lordships rejected the argument that the defence of qualified privilege in

relation to alleged defamatory acts would be lost if the privilege was not extended to overcome common law proceedings in tort for negligent misstatement or in contract in respect of an inaccurate reference arising out of the same putative defamatory statements.

17. Mr Hand submitted, and I agree, that there is no basis for the proposition that the absolute immunity rule only attaches to defamatory statements. As the Employment Tribunal well described in paragraphs 9(o) to (q) of its extended reasons, and as the Employment Appeal Tribunal also found, it attaches to anything said or done by anybody in the course of judicial proceedings whatever the nature of the claim made in respect of such behaviour or statement, except for suits for malicious prosecution and prosecution for perjury and proceedings for contempt of court. That is because the rule is there, not to protect the person whose conduct in court might prompt such a claim, but to protect the integrity of the judicial process and hence the public interest. Given that rationale for the rule, there can be no logical basis for differentiating between different types of claim in its application. The width of its application in this respect has been judicially stated many times, most notably in: *Munster v Lamb* (1883) 11 QBD, 588, CA per Fry LJ at 607-608; *Marrinan v Vibart* [1963] 1 QB 502, per Sellers LJ at 535 and per Diplock LJ at 538-9.

18. The rule has recently been re-stated and emphasised in two cases in the House of Lords. In each the issue was different from that here. In the first, *Darker v Chief Constable of the West Midlands* [2001] 1 AC 435, it was whether the immunity should be extended to things said or done by a police officer in the investigative process as distinct from what he said or did in court. Lord Hope of Craighead, at 445H-446B, indicated, obiter, the width of the rule:

> "… when a police officer comes to court to give evidence he has the benefit of an absolute immunity. This immunity, which is to be regarded as necessary in the interests of the administration of justice and is granted to him as a matter of public policy, is shared by all witnesses in regard to the evidence which they give when they are in the witness box. It extends to anything said or done by them in the ordinary course of any proceeding in a court of justice. The same immunity is given to the parties, their advocates, jurors and the judge. They are all immune from any action that may be brought against them on the ground that things said or done by them in the ordinary course of the proceedings were said or done falsely and maliciously and without reasonable cause. …. The immunity extends also to claims made against witnesses for things said or done by them in the ordinary course of such proceedings on the ground of negligence."

In the second, *Arthur J S Hall v Simons* [2002] 1 AC 615, where the issue was whether the time had come to remove the immunity of advocates from suit, Lord Hobhouse of Woodborough identified the broad public interest policy behind the rule at 740G-H:

> "A feature of the trial is that in the public interest all those directly taking part are given civil immunity for their participation. The relevant sanction is either being held in contempt of court or being prosecuted under the criminal law. Thus the court, judge and jury, and the witnesses including expert witnesses are granted civil immunity. This is not just privilege for the purposes of the law of defamation but is a true immunity: *Roy v Prior* [1971] AC 470,

> especially per Lord Morris, at pp 477-478. This rule exists in the interests of the trial process, i.e. in the public interest. …"

See also per Lord Steyn at 679B-C and per Lord Hoffmann at 697B-698H.

19. It follows that, if the absolute immunity rule is not to apply to claims before an Employment Tribunal for unlawful sex discrimination, it cannot be based on the proposition that it attaches only to defamation claims. Accordingly, the exercise for this Court is not, as Miss Booth put it under various heads of her argument, whether the immunity should be "extended" to claims for unlawful discrimination, sex discrimination in particular, but whether such claims should be excluded from the general immunity that would otherwise attach to them. The fact that the immunity is a centuries old common law rule and that the 1975 Act does not re-state it in its context is nothing to the point. As Mr Hand pointed out, neither does the Defamation Act 1996, which, in section 14, expressly legislates for one category of absolute privilege (fair and accurate report of proceedings in public before a court). It likewise says nothing about this common law immunity. And, as he also commented, it could not be argued that an employer who gives evidence in a criminal trial against an employee on, say, charges of theft, is not covered by the rule in respect of any claim that might be made under the 1975 Act in respect of his evidence. So, in answer to his rhetorical question, why it should be any different for proceedings before the Police Disciplinary Board in this case, he said that the only possible candidate was whether they were sufficiently judicial for the purpose. That is certainly the next issue, but for the reasons he advanced and I have given, I would reject this first ground of appeal.

2 - Whether proceedings before a police disciplinary tribunal are sufficiently "judicial" to be protected by the rule – the "similarity question"

20. There is much authoritative jurisprudence on the degree of similarity required of a tribunal as to its constitution, function, procedures and powers with those of a traditional court to render the tribunal's proceedings "judicial" for this purpose, most notably *Royal Aquarium* and *Trapp v. Mackie* [1979] 1 WLR 377, HL. Miss Booth accepted that there are similarities between a police disciplinary tribunal and a traditional court which might, if that question were considered on its own, support a finding that the tribunal is a court to which the rule of absolute immunity attaches. However, notwithstanding her greater reliance on her third ground as to the need for the rule in this context, she did not abandon this original challenge.

21. The nature of the exercise in determining whether a body is to be regarded as "judicial" for the purpose of giving absolute immunity to those involved in its proceedings is not a technical or precise one. It is one of determining its *similarity* in function and procedures to those of a court of law. It is a matter of fact and degree, one, as Lord Atkin said in *O'Connor v Waldron* [1935] AC 76. HL, at 81, "not capable of very precise limitation". Thus, in *Royal Aquarium*, Lord Esher spoke, at 442 of:

> "an authorised inquiry which, though not before a court of justice, is before a tribunal which has similar attributes … [namely] acting … in a manner as nearly as possible similar to that in which a court of justice acts in respect of an inquiry before it."

And Lord Atkin in *O'Connor v Waldron* referred in the same context, and in confirmation of Lord Esher's proposition, to a tribunal that:

> "has similar attributes to a court of justice or acts in a manner similar to that in which such courts act".

22. In *Trapp v Mackie* Lord Diplock, after consideration of all or most of the relevant reported authorities over the near century since Lord Esher formulated the test of similarity, identified four aspects for consideration: 1) whether the tribunal is "recognised by law", 2) whether the issue is "akin to" that of a civil or criminal issue in the courts; 3) whether its procedures are akin to those in civil or criminal courts; and 4) whether the result of its procedures lead to a binding determination of the civil rights of a party or parties. However, at 383-384, he made plain after a detailed analysis of the evidence in the case going to the similarities under those four categories, that satisfaction of one of them would not on its own suffice to attract absolute immunity, and also that failure to satisfy one would not necessarily be fatal to it. The need for such flexibility is to be found in the public policy lying behind the rule with which he introduced his analysis at 379:

> "No single touchstone emerges from the cases; but this is not surprising for the rule of law is one which involves the balancing of conflicting public policies, one general: that the law should provide a remedy to the citizen whose good name and reputation is traduced by malicious falsehoods uttered by another; the other particular: that witnesses before tribunals recognised by law should, in the words of the answer of the judges in *Dawkins v. Lord Rokeby,* LR 7 HL, 744,753 'give their testimony free from any fear of being harassed by an action on an allegation, *whether true or false,* that they acted from malice'."

23. Similar considerations, including, in particular, flexibility of application of the various components of similarity to individual circumstances, are also to be found in the following words of Dickson J, giving the judgment of the Supreme Court of Canada in *Minister of National Revenue v Coopers & Lybrand* [1979] 1 SCR 495, at 504, in which he sought to define the distinctive characteristics of a quasi-judicial act:

> "… (1) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached? (2) Does the decision or order directly or indirectly affect the rights and obligations persons? (3) Is the adversary process involved? (4) Is there an obligation to apply substantive rules to many individual cases rather then, for example, the obligation to implement social and economic policy in a broad sense? These are all factors to be weighed and evaluated, no one of which is necessarily determinative. …
>
> In more general terms, one must have regard to the subject matter of the power, the nature of the issue to be decided, and the importance of the determination upon those … affected thereby. … The more important the issue and the more serious the sanctions, the stronger the claim that the power be subject in its exercise to judicial or quasi-

> judicial process. The existence of something in the nature of a *lis inter partes* and the presence of procedures, functions and happenings approximating [to] those of a court add weight to (3). But, again, the absence of procedural rules analogous to those of courts will not be fatal to the presence of a duty to act judicially".

24. Lord Diplock, in *Trapp v Mackie,* returned, at 383, when considering the fourth category of similarity in the case, to the important theme of the competing public policies:

> "In deciding whether a particular tribunal is of such a kind as to attract absolute privilege for witnesses when they give testimony before it, your Lordships are engaged in the task of balancing against one another public interests which conflict. In such a task legal technicalities have at most a minor part to play."

25. I turn now to the application in this case of Lord Diplock's four categories of similarity.

1 - Tribunal recognised by law

26. The first category of similarity is that the tribunal must be recognised by law, as was the Police Disciplinary Board in this case, having been established under the 1985 Regulations enacted under the Police Act 1964, s. 33, and the Police and Criminal Evidence Act 1984, ss. 94(5), 101 and 102. Miss Booth accepted that the Board fulfilled this condition, but said, as was evident from Lord Diplocks' analysis, that that was not enough in itself to render its proceedings judicial.

2- nature of issue akin to civil or criminal issue in the courts

27. The second category of similarity is that the issue for determination must be akin to the subject matter of civil or criminal suits in courts of justice and includes, in the former category, the right to dismiss, as was a possible consequence for the Inspector here. It is worth remembering the issue in the proceedings giving rise to Lord Diplock's analysis in *Trapp v Mackie,* which the House held to be judicial and protected by the rule of absolute immunity. It arose out of a statutory local inquiry conducted by a commissioner appointed by the Secretary of State, into the dismissal of Mr Trapp as headmaster of a school, in which Mr Mackie testified against him. Mr Trapp subsequently sought to institute proceedings for damages against Mr Mackie, alleging that he had given maliciously false evidence against him. The House held that the evidence was protected by absolute privilege, since the proceedings at the inquiry had been in the nature of an issue between Mr Trapp and the education authority, that the procedure adopted was indistinguishable from that of a court trying a contested civil action and the fact that the commissioner's conclusion did not bind until adopted by the Secretary of State was insufficient to exclude the protection.

28. The Employment Appeal Tribunal found in this case, at paragraph 19 of its judgment:

> "... Lord Diplock said that the inquiry Mr Kissen [the commissioner in *Trapp v Mackie*] was required to conduct was in the nature of an issue between the education authority and the dismissed teacher, and

> so was akin to the type of issues which daily arise in civil suits in courts of justice. Mr Sethi submitted that the issue before the disciplinary hearing in the present case was of a quite different nature. He said that all that the disciplinary hearing was doing was exercising an administrative function concerned with an internal industrial relations question as to the alleged misconduct of an officer. We cannot agree with that. In our view, the issue before the disciplinary hearing in the present case was closely analogous to the type of issue which arises in courts of justice. It was in the nature of the trial, under a procedure recognised by law, of a disciplinary charge, conviction on which could result in the visitation on the accused of one of a range of punishments, from dismissal to a caution. Alternatively, it could be regarded as akin to a criminal proceeding. Either way, its nature was, we consider, capable of resulting in the proceedings enjoying absolute privilege."

29. Miss Heath's case, as presented in her grounds of appeal, was that the issue before the Board was not one between adverse parties of a kind that comes before courts of justice; it was exercising an administrative function in relation to an internal industrial relations question as to the alleged misconduct of a police officer. The way Miss Booth put it in her submissions was that the Board, in its inquiry into Miss Heath's allegations against the Inspector, was acting administratively, albeit under an obligation to do so judicially, but that the nature of the issue was not judicial in the conventional sense.

30. It is trite law that the fact that a tribunal or similar body may be required to act judicially, in the sense of fairly, in deciding certain matters does not of itself make its function in those respects "judicial" if they are essentially of an administrative nature; see e.g. *Royal Aquarium,* per Fry LJ at 451-452 (council meeting considering grant of music and dancing licences); and *O'Connor v Waldron* [1935] AC 76, PC per Lord Atkin at 82 (a statutory inquiry into unlawful business cartels conducted by a commissioner with a view to ultimate report to a minister); and *Hasselblad (GB) v Orbinson* [1985] QB 475, CA, per Lord Donaldson MR, with whom O'Connor and May LJJ agreed, at 496 (an EC Commission investigation into anti-competition practices in which Commissioners who had not attended the hearing reached decisions on the strength of representations from member states not directly concerned).

31. Miss Booth also referred to *R v. Chief Constable of Merseyside Police, ex p Bennion* [2001] IRLR 442, CA. There, the issue was whether judicial review lay against a decision of a Chief Constable against whose force the claimant, a woman police officer, had made complaints of sex discrimination and victimisation, not to remit disciplinary proceedings against her under regulation 14 of the 1985 Regulations to another Chief Constable. Her complaint was that, in making that decision, he had not acted judicially The Court of Appeal held that, because of his operational responsibilities for his force, a chief constable hearing disciplinary proceedings against an officer was not in the same position as a judge conducting a trial, who had no disciplinary function over litigants.

32. Mr Hand submitted that the issue before the Board was precisely the sort of issue that characterises civil disputes in the courts and which, in *Trapp v Mackie,* was held to constitute such an issue. Also, he said, the submission sits ill with Miss Heath's outstanding

litigation against the Commissioner before the Employment Tribunal in respect of exactly the same conduct alleged against the Inspector (see paragraph 3 above). He suggested, quite rightly, in my view, that the EC Commission's procedures in the *Orbinson* case bore no resemblance to a judicial procedure or to that of the Board in this case. And he suggested, with some force in my view, that *Bennion* was of no assistance to Miss Heath, because the essential difference between it and this case is that the Chief Constable, unlike the hypothetical judge, is generally only named as a respondent in a discrimination case because he is vicariously liable for his officers' conduct, his (administrative) role in that litigation being titular or nominal.

33. The facts in *Bennion* are, in any event, so removed from those in this case, that I agree with Mr Hand that it is of no assistance to Miss Heath. In addition, the fact that a quasi-judicial tribunal is not strictly independent of the body or organisation inquiring into the conduct of one of its members is no bar to application of the absolute immunity rule, as is evident from *Dawkins v Lord Rokeby, Lincoln v Daniels* [1962] 1 QB 237, CA, (an inquiry by a Bench of an Inn of Court, sitting in private, into an allegation against one is of professional misconduct)); and *Addis v Crocker* [1961] 1 QB 11, CA, (Solicitors' Disciplinary Inquiry, also sitting in private).

34. In my view, the Employment Appeal Tribunal, for the reasons it gave, correctly regarded the issue before the Board as closely resembling the sort of issue with which civil or criminal courts are concerned, and the fact that it was of a disciplinary nature did not detract from that resemblance. It was, as the Tribunal said, "closely analogous to the type of issue which arises in courts of justice", or as Lord Diplock put it in *Trapp v Mackie,* "closely akin" to such issues. In the alternative, and in any event, as the Tribunal rightly added, it could be regarded "as akin" to that in a criminal judicial proceeding.

3 – procedure akin to that in civil or criminal courts

35. The third category of similarity is that the procedure adopted must also be akin to the procedure in civil or criminal courts. The Employment Tribunal, in its decision and extended reasons, dealt very fully with the many provisions in the 1985 Regulations. They provide, as one would expect for a procedure closely analogous to that of a civil or criminal trial, with all the usual stages and protections typical of such a proceeding, save that it is conducted in private, evidence is not taken on oath and the Board has no power to compel the attendance of witnesses or production of documents. The relevant provisions are to be found in regulations 10 and 18 to 23. In summary, they provide for: 1) advance disclosure of witness statements and investigatory report (reg. 10); 2) an order for attendance of the accused (reg. 18(1)), 3) legal representation on both sides and, if appropriate legal assistance to the Board (reg. 18(3), (7) and (4)); 4) oral evidence in chief and cross-examination (reg. 18(5) and (7)); 5) submission of no case to answer (reg. 18(6)); 6) determination on issues of admissibility (reg. 18(8)); 7) verbatim record of proceedings and production of it to the accused if he wishes to consider appeal (reg. 18(10)); 8) provisions for the admissibility of written hearsay evidence similar to those in the Rules of the Supreme Court then applicable (reg. 19(1) and (6)); 9) adjournments (reg. 20); 10) limited circumstances in which proceedings may continue in the absence of the accused (reg. 21); 11) right for complainant to be accompanied by a friend and to put questions to the accused via the officer conducting the hearing (reg. 22); and 12) application of the criminal burden and standard of proof (reg. 23).

36. It is not surprising that the Employment Appeal Tribunal, in its treatment of the issue, said, in addition to its observation in paragraph 19 of its judgment (see paragraph 28 above), that the proceedings before the Board were "akin to a criminal proceeding". It concluded, at paragraph 20:

> "… the procedure required to be adopted at the disciplinary hearing was …, in its essentials, akin to those adopted by courts of justice in trying civil or criminal cases. There were some differences, in that the evidence was not given under oath, nor were witness compellable. But the essential similarity with the procedure adopted by the courts of justice is clear."

37. However, Miss Booth challenged its sufficiency to meet the criterion of a judicial or quasi-judicial proceeding for this purpose on the basis that it would not give as fair a trial as would that in a court of justice or some other quasi-judicial tribunal. With Strasbourg authority behind her, she submitted first that such a disciplinary proceeding does not carry with it the right to a fair trial under Article 6 ECHR. She relied upon decisions of the European Court and the European Commission, including *X v UK* (1980) 21 DR 168, at 170; *Pellegrin v. France* (2001) 31 EHRR 52, at para 60; and *Frydlender v France* (2001) EHRR 52, at para 33. She referred, in particular, to the ruling of inadmissibility by the European Commission in *Wickramsinghe v UK* (1998) EHRLR 338 EcommHR, in which it stated that, although disciplinary proceedings may be conducted to the criminal standard of proof, that does not make them "akin to criminal proceedings". The Commission's reasoning in that case was that, "in general", disciplinary proceedings are not "criminal" for the purpose of Article 6.1 and 6.3, because professional disciplinary matters concern the relationship between professional associations and individuals rather than draw on law of general application. This lack of applicability of fairness in Article 6 terms, Miss Booth submitted, is a matter to which the Employment Appeal Tribunal paid insufficient regard.

38. The only candidate for an Article 6 right in this context was the accused Inspector, since he was the one on trial, not Miss Heath. But Mr Hand agreed, in the light of the Strasbourg jurisprudence, that he had no right of recourse to Article 6 in respect of the Board's procedures. However, Mr Hand maintained that the fact that Article 6 does not apply to disputes between public servants and the public bodies employing them, in whatever tribunal or court of law the dispute ends up, sheds no light on whether the proceedings of the Board and other quasi-judicial tribunals are sufficiently judicial to attract the protection of absolute immunity rule. An important criterion for this purpose, he submitted, is whether the procedures are fair in the ordinary sense of the word, which is a matter of fact and interpretation. And, as he observed, it has not been suggested on behalf of Miss Heath that there is anything unfair in the procedures prescribed by the 1985 Regulations.

39. Other aspects of the Board's procedures on which Miss Booth relied under this head included: 1) unlike in *Trapp v Mackie,* the Board was not an "independent … tribunal" because it was composed entirely of members of the police force; 2) it was not an "impartial tribunal" for the purpose of Article 6 because it had been appointed by the Metropolitan Police Commissioner; see *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700, HL; 3) unlike in *Trapp v. Mackie,* the proceedings were held in private and there was no provision for public announcement of their result; 4) the Board had no power to compel the attendance of witnesses or to require the production of documents, a factor in *Dawkins v. Lord Rokeby* that Lord Fraser of Tullybelton in *Trapp v. Mackie,* in his

consideration of that case, regarded, at 386E, as decisive; and 5) that certain judicial features were absent., including the Board's inability to take evidence on oath.

40. Of those matters found wanting by Miss Booth: a similar absence of one or more of them has not proved fatal to attachment of the rule in other cases, as the Employment Appeal Tribunal lucidly illustrated in paragraph 24 of its judgment. For example: 1) and 2) independence and/or impartiality of the tribunal in the sense of independence from those who appoint it – see e.g. *Lincoln v Daniels* and *Addis v Crocker* (in particular, the fact that it may not be impartial in the Article 6 sense, as considered in *Medicaments* is immaterial if, as is common ground, Article 6 does not apply to the Board's proceedings; 3) privacy of the proceedings - *Dawkins v. Lord Rokeby,* which concerned a military court of inquiry sitting in private, reporting to the Commander in Chief; also *Lincoln v Daniels* and *Addis v Crocker;* 4*)* no power to compel attendance of witnesses or require production of documents - *Lincoln v Daniels*; and 5) no power to take evidence on oath - *Dawkins v Lord Rokeby*.

41. As Mr Hand observed, on behalf of the Commissioner, those aspects of the Board's procedures that Miss Booth maintained were wanting in judicial terms, do not individually, or even when considered together, necessarily deprive its procedures overall of a judicial character. As Lord Diplock and Dickson J made plain in *Trapp v. Mackie* and *Minister of National Revenue v Coopers & Lybrand* respectively, full satisfaction of a check-list of typical features of court proceedings is not a pre-condition of attachment of the absolute immunity rule. If one looks here at those typically judicial features that are present in the Board's conduct of its inquiries that I have summarised, alongside those that Miss Booth identified as absent, the overall picture is that as stated by the Employment Appeal Tribunal, an "essential similarity with the procedure adopted by the courts of justice".

4 – outcome a binding determination of civil rights of the parties

42. The fourth category of similarity is that the legal consequences of the proceedings must constitute a binding determination of the civil rights of the party or parties, including the right to be reinstated or, as in *Trapp v Mackie,* a persuasive recommendation to the ultimate decision-maker in that regard. Miss Booth said that the consequences of the Board's conclusion could not have rendered the Inspector criminally liable or amount to a determination of any civil right. She acknowledged the Board had power to fine, but that apart from such penalty, all the others were more obviously employment orientated than indicating a judicial sanction. And she drew attention to the fact that the appellate route to an officer affected by a decision of the Board was first to the chief officer, then to the Secretary of State and then judicial review, suggesting an administrative rather than a judicial process before that final recourse to the High Court.

43. Mr Hand rightly commented that Miss Booth, in describing the Board's process as "administrative" by reference to and because of the means of appeal from its decisions, has confused the notion of an "administrative decision" in the context of administrative or public law with that when distinguishing an administrative decision from a quasi-judicial decision in the context of a claim for absolute immunity, which is governed by the four criteria of Lord Diplock in *Trapp v Mackie.*

44. There can be no doubt that the Board's powers in the 1985 Regulations, in regulation 23 to find the charges proved or not, and in regulation 24 to impose a wide range of penalties including dismissal, reduction in rank and/or pay, and fine gave it an authority to make binding declarations on the civil rights of the Inspector.

Conclusion

45. In my view, keeping Lord Diplock's and Dickson J's dicta well in mind, that this is not a technical exercise, but one of overall impression taking into account all the circumstances however categorised, the Employment Tribunal and the Employment Appeal Tribunal were not only entitled, but well-justified in finding that the Board, in its consideration of Miss Heath's allegations against the Inspector was a judicial body acting judicially. The latter, at paragraph 25 of its judgment (see paragraph 8 above) said by way of conclusion under this ground all that needed to be said, namely that "the essential features of the disciplinary hearing rendered it closely analogous to a judicial proceeding before a court of justice".

46. Accordingly, I would also reject this ground of appeal.

3 - The balance of competing public policies

47. As I have indicated, Miss Booth's primary argument was that, whether or not the Board's function and procedures are sufficiently similar to those of court to regard it is a judicial or quasi-judicial body, the underlying public policy reason for the absolute immunity rule does not outweigh the countervailing public interest in preventing any act of unlawful sex, or other, discrimination in the work-place. She prefaced her elaboration of that submission by referring the Court to Lord Hoffmann's re-visitation in *Taylor v Director of the Serious Fraud Office* [1991] 2 AC 177, HL of the public policy behind the rule of absolute immunity. The case was concerned in part with whether absolute immunity attaching to an undoubted judicial process should be extended to out-of-court statements taken as part of the process of investigating a crime or a possible crime with a view to a prosecution. So the House was concerned with an extension of the rule in that respect, not with a limitation of it to exclude its protection in relation to a particular form of collateral proceeding, for which Miss Both contended here. At 213E Lord Hoffmann said that judges had "rightly cautioned against further extension" of the rule "merely by analogy". And, at 214B-D, he emphasised that necessity lay behind the rule, citing with approval the following passage from the judgment of Brennan CJ, Dawson, Toohey and Gaudron JJ in the Australian High Court in *Mann v O'Neill* 71 ALJR 903, at 907, which also concerned a claimed extension of the rule to out-of-court statements, namely written complaints about a magistrate's competence:

> "It may be that the various categories of absolute privilege are all properly to be seen as grounded in necessity, and not on broader grounds of public policy. Whether or not that is so, the general rule is that the extension of absolute privilege is 'viewed with the most jealous suspicion, and resisted, unless its necessity is demonstrated.' Certainly, absolute privilege should not be extended to statements which are said to be analogous to statements in judicial proceedings

> unless there is demonstrated some necessity of the kind that dictates that judicial proceedings are absolutely privileged."

The issue in *Mann v O'Neill* and one of the issues in *Taylor* was, as I have said, whether the absolute immunity rule extended to out-of-court statements, and it was in that context that Lord Hoffmann in *Taylor* went on to say, at 21D-E:

> "Thus the test is a strict one; necessity must be shown, *but the decision on whether immunity is necessary for the administration of justice must have regard to the cases in which immunity has been held necessary in the past, so as to form part of a coherent principle*." [my emphasis]

See also per Lord Hutton at 220A-C.

48. Despite its different context, Miss Booth relied on the *Taylor* case as an apposite example for the purpose of this case of the proposition that the ambit and application of absolute immunity rule is grounded in necessity. She maintained that the Court should have that consideration in mind in a case such as this where, for the first time, the rule is confronted with another important public policy interest in eradicating unlawful sex or other discrimination in the work-place. She cited *Hall v Simons* as an instance where the House of Lords held that, in the light of changes in the law, and in the working practices of the legal profession, the public interest in the administration of justice no longer required advocates to enjoy immunity from suit in negligence.

49. Miss Booth submitted that, for the same reason – consideration of necessity – this Court should consider whether there are any public policy reasons of such strength as to necessitate its application or, as she put it, its "extension", to claims of unlawful discrimination before an Employment Tribunal. She maintained that there are none and that it would, therefore, be wrong in principle to apply the rule to cover proceedings under the Police Disciplinary Regulations.

50. In her development of that submission, Miss Booth relied on the following arguments:

i) Miss Heath's complaints are not directed to the preliminary investigation or findings of the Board, so they cannot be described as a collateral challenge to its findings so as to offend the principles of res judicata and certainty in litigation. Even if they were, Miss Booth suggested, prompted by the reasoning of their Lordships in *Hall v Simons,* that the principles of res judicata, issue estoppel and abuse of process and courts' procedural ability to strike out unsustainable claims would be sufficient to put a stop to claims that would bring the administration of justice into disrepute.

ii) Miss Heath is seeking to exercise a "free-standing" right conferred by domestic legislation implementing European Union Directives to complain, not about the Inspector whom she had accused before the Board of sexual assaults, but about the conduct of the members of the Board. In short, what she is seeking is a review of the conduct of her employer towards her complaint of sexual harassment.

iii) It is commonplace for Employment Tribunals to investigate the adequacy of internal disciplinary procedures, both in dismissal and in discrimination cases. And it has never been suggested that such scrutiny has undermined such internal administration of justice.

iv) The absolute immunity rule cannot be deployed to prevent disciplinary action by the Department of Constitutional Affairs against a judge or by the Bar Council or the Law Society against an advocate for misconduct such as sex discrimination in the course of a hearing.

51. Mr Hand emphasised the public policy principle, underlying the rule of absolute immunity, which, he said, must have been taken into account by Parliament when enacting legislation giving rise to the 1985 Regulations. It is in the public interest that those involved in judicial proceedings should be able to speak and act openly without fear of subsequent suit for such conduct, and such public interest applies particularly strongly to police disciplinary proceedings. He said that there was no basis upon which special provision should be made to exclude claims for unlawful discrimination, however important they have become, from the effect of that rule, or that, as Miss Booth suggested, it so outweighed the public policy interest behind the rule of maintaining the integrity of justice that it was necessary to dis-apply it in relation to such claims.

52. Looked at, for the moment, solely through the eyes of our domestic law, I have no hesitation in agreeing with Mr Hand's stance. The absolute immunity from suit is a core immunity in our system, critical to the integrity and effectiveness of our judicial system, which, save for a few well defined exceptions identified in paragraph 17 above, applies to all forms of collateral action however worthy the claim and however much it may be in the public interest to ventilate it. Claims of unlawful discrimination are clearly of that importance, but no more than many others, such as the citizen's right to protect his own good name or good character or to claim for conspiracy to injure or for misfeasance in public office, say, in giving evidence in a criminal trial resulting in the claimant's loss of liberty.

53. As I have indicated, Lord Hoffmann and a number of other distinguished jurists consider that necessity is the modern rationale for application of the rule when balancing it against competing interests. However, the question in the case of such a well established and generally applicable common law immunity is not, as Miss Booth suggested, whether it should be "extended" to relatively new statutory provisions giving citizens rights in respect of unlawful discrimination, but whether it is necessary to make special provision for them by removing the immunity in relation to such claims. The dicta of Lord Hoffmann in *Taylor,* of the Australian High Court in *Mann v O'Neill,* of Lord Hope in *Darker* and of Lord Hobhouse in *Hall v Simons* all proceed on the basis that the necessity for the core immunity and its wide application to claims of all sorts is established. Necessity as a consideration arose in those cases in relation to more peripheral issues, in the main as to outer limits of the judicial process giving rise to the protection of the rule, for example in the investigation of and preparation for trial. It was, as I have said, in that context that Lord Hoffmann, in *Taylor,* cautioned against *further extension* of the rule merely by analogy. In short, I do not consider, as a matter of our domestic law that focus on the rationale of necessity for the application of the absolute immunity rule assists Miss Heath's case.

54. For a sound and simple expression of the law and its application to the facts of the case, the following formulation of the Employment Tribunal, at page 9 of its extended reasons cannot be bettered:

> "(o) We are satisfied that there is absolute immunity attaching to the proceedings in a police disciplinary hearing in the same manner as would attach to proceedings in a court of justice. In this regard we see no distinction between statements made in the course of proceedings not being actionable for defamation as a matter of public policy and a principle based equally on public policy that a complaint of discrimination should not be permissible in respect of the conduct of such proceedings, whether in respect of the composition of the disciplinary panel itself or anything done or said in the performance of the functions by those taking part in such proceedings, where it can properly be said that the alleged acts or omissions are within their particular function.
>
> (p) Clearly the law as to judicial privilege has developed over time. It was originally intended no doubt for the protection of judges sitting in recognised courts of justice established as such. The object being that judges might exercise their functions free from fear that they might be called to account for any words spoken as judges. It is also clear that the doctrine has been extended to tribunals which exercise functions equivalent to those of an established court of justice.
>
> "(q) In the course of its development the doctrine of judicial privilege and/or immunity was developed with particular regard to actions for defamation. The statutory torts of discrimination did not exist when the doctrine was originally propounded, however the doctrine must be taken to apply equally to claims of discrimination as they apply to claims of defamation. These considerations are that immunity is necessary in order that the proceedings may be conducted in a manner which will achieve its purpose of ascertaining the truth, and a just result without fear that those taking part in the proceedings might be subjected to legal action for things said or done in the course thereof."

55. On the same theme, the Employment Appeal Tribunal should be given the last word under this ground of appeal in a passage that, for convenience, I repeat from paragraph 26 of its judgment:

> "26. …The rule is a longstanding one of public policy which applies in respect all actions sought to be founded on the alleged acts or omissions of the participants in proceedings to which the rule applies, and Parliament can be taken to have been aware of it when enacting the 1975 Act."

56. Accordingly, I would also reject this ground of appeal.

4 - Human Rights

57. Miss Heath relies on both Articles 6.1 and 8 (coupled with Article 14) ECHR.

Article 6

58. The case put on behalf of Miss Heath is that application of the absolute immunity rule to her claim for unlawful sex discrimination violates her right to a fair hearing under Article 6,1 because it denies her access to the Employment Tribunal.

59. The European Court, in *Tinnelly & Sons Ltd & Others v UK* Case C-20390/92 (1998) 27 EHRR 249, held that a clearly defined statutory right not to be discriminated against is a civil right within the meaning of Article 6.1. Although an Employment Tribunal has no jurisdiction to hear and determine complaints under section 7 of the Human Rights Act 1998 ("the 1998 Act"), as it is not an "appropriate tribunal" for the purpose, it is a public authority for the purpose of section 6(3) of the 1998 Act, and must act compatibly with the Convention rights set out in Schedule 1 to the Act. Miss Booth maintained that Miss Heath, in exercising her civil right to complain to an Employment Tribunal about unlawful acts of discrimination against her in the course of her employment, is entitled to the protection of Article 6 of the Convention. And to apply or, as she continued to put it, to "extend" the absolute immunity rule to prohibit complaints about such discrimination would infringe her implied right of access to court under Article 6.1. She cited by way of example *Golder v UK* (1975) 1 EHRR 524, in which the European Court held that the Secretary of State, who had, in accordance with a discretion given to him by the Prison Rules, refused a prisoner permission to consult a solicitor with a view to suing a prison officer for libel, had breached an implied right of access derived from Article 6.1, holding at paras 35 and 36:

> "35. … It would be inconceivable … that Article 6.1 should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.
>
> 36. … the right of access constitutes an element which is inherent in the right stated by Article 6.1 … [which] secures the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before the courts in civil matters, constitutes one aspect only… In sum, the whole makes up the right to a fair hearing. …"

60. The threshold question for Miss Booth's argument is whether, regardless of substantive or procedural nature of the absolute immunity rule, Miss Heath's claim for unlawful sex discrimination against the Commissioner engages Article 6.1 at all. The European Court in *Pellegrin v. France* GC-2854/95, ECHR 1999-II, fully reviewed its case-law concerning the applicability of Article 6.1 to public servants and laid down a new rule, which it has since confirmed in *Devlin v UK Case*…. (2002) EHRR 43, at para 25:

> "Under this test the only disputes *excluded from* Article 6.1 are those which are raised by public servants 'whose duties typify the specific activities of the public service in so far as the latter is acting as the

> depository of public authority responsible for protecting the general interests of the State or other public authorities …"

The Court referred to individuals in the public-service sector who 'wield a portion of the State's sovereign power' as being those whose disputes are likely to fall outside the ambit of Article 6.1."

61. The Court in *Devlin* did not consider that the claimant in that case, a rejected applicant for a post in the Northern Ireland Civil Service as an administrative assistant, the lowest non-industrial grade in the Service, could be said to meet the test of wielding a portion of the State's sovereign power. It held, therefore, that his claim engaged Article 6.1. Here, although Mr Hand did not concede the point, suggesting that it might require determination on the facts by the Tribunal, it looks to me as if Miss Heath, a civilian station reception officer, should fall in the same category. For reasons that I mention later in this judgment, at paragraph 69, whether or not she does may be academic.

62. But, as Miss Booth readily acknowledged, Miss Heath's right of access to an Employment Tribunal is not absolute. First, it is confined to overcoming procedural bars and immunities, as distinguished from rules as to substantive rights or the lack of them. And, as Lord Hope observed in *Matthews v Ministry of Defence* [2003] UKHL 4, [2003] 1 AC 1163, at para 53, the line between the two is not always easy to define. In that case the House held that the exemption provided to the Crown by section 10 of the Crown Proceedings Act 1947 from liability in tort to servicemen for injuries suffered in the course of their service before 1987, accompanied by certificates under section 10(1)(b) of the Act, was a substantive bar because Crown immunity was an integral part of the legal landscape in which Mr Matthew's cause of action arose. Lord Hope said at paragraph 53 of the speeches:

> "The detailed reasoning of the European Court in … [its jurisprudence] does not provide us with much by way of guidance as to how the dividing line between those two concepts is to be identified. It is not possible to find a clear ratio in these decisions which will lead to the right result in every case. So it is better to have regard instead to the underlying principles. … One can at least say that there is a plain and obvious difference in principle between a procedural bar which impairs or restricts the enjoyment or enforcement of a right on the one hand and a substantive bar which prevents an alleged right from ever coming into existence at all. What article 6.1 seeks to do is to protect the individual against anything which restricts or impairs his access to the courts for the determination of a civil right whose existence is at least arguable. But the precise scope and content of the individual's civil rights is a matter for each state party to determine. These are the broad Convention principles. They are likely to provide the best guide as to the side of the line on which any given case lies."

63. Second, the right is subject to limitations, themselves confined by well-established Strasbourg jurisprudence. Any limitation must not impair the very essence of the right; it must pursue a legitimate aim; and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

64. Miss Booth submitted that a domestic immunity against claims for unlawful sex discrimination is a procedural bar and, therefore it engages Article 6.1. She referred to the ruling, and reasoning for it, of European Court in *Fogarty v UK* [2001] ECHR 37112/97, that the grant of state immunity under the State Immunity Act 1978 is a procedural bar to the bringing of a claim before an Employment Tribunal alleging unlawful discrimination, and, therefore engages Article 6.1:

> "24. The Court recalls its constant case-law to the effect that Article 6.1 does not itself guarantee any particular content for 'civil rights and obligations' in the substantive law of the Contracting States. It extends only to contestations (disputes) over 'civil rights and obligations' which can be said, at least on arguable rounds, to be recognised under domestic law ….
>
> "25. Whether a person has an actionable domestic claim may depend not only on the content, properly speaking, of the relevant civil right as defined under national law but also on the existence of procedural bars preventing or limiting the possibilities of bringing potential claims to court. In the latter kind of case Article 6.1 may be applicable. Certainly the Convention enforcement bodies may not create by way of interpretation of Article 6.1 a substantive civil right which has no legal basis in the State concerned. However, it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6.1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if, for example, a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons. …
>
> 26. Section 6 of the Sex Discrimination Act 1975 … creates a statutory right which arises, inter alia, when an employer refuses to employ a woman on grounds of sex discrimination or by reason of the fact that she has already taken proceedings under the 1975 Act. Thus, the proceedings which the applicant intended to pursue were for damages for a cause of action well known to English law. The Court does not accept the Government's plea that because of the operation of State immunity she did not have a substantive right under domestic law. It notes that an action against a State is not barred in limine:" if the defendant State does not choose to claim immunity, the action will proceed to a hearing and judgment, …
>
> The Court is, therefore, satisfied that the grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar, preventing the applicant from bringing her claim before the Industrial Tribunal …."

65. As I have said, in *Matthews v Ministry of Defence* the House of Lords held that section 10 of the 1947 Act operated as substantive, not a procedural, bar to a claim for damages for personal injury, thereby depriving the claimant of a civil right to which Article 6.1 could engage. Lord Bingham of Cornhill, in paragraph 18 of his speech, said of the ruling in *Fogarty*:

> "This ruling must be understood in the context that the applicant had an express statutory right to compensation for victimisation and discrimination under the Sex Discrimination Act 1975 a right very closely allied to that which she had already successfully exercised against the same employer. Far from being indistinguishable from the present, this case is in my opinion categorically different."

66. However, the outcome in *Fogarty* is important for another reason. Although the European Court held that the discrimination claim engaged Article 6.1, it held that it was subject to limitations and that, in the circumstances, it was not disproportionate to deny her access to a court to pursue it:

> "33. The right of access to court is not, however, absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6.1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved. …"

The Court went on to consider the aim of the grant of sovereign immunity to a State, which it found to be a "legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty" (para 34). It then assessed whether the restriction was proportionate and concluded, on the facts and its international context, that it was (paras 35-37)

67. And in an earlier case concerning parliamentary privilege from suit in respect of statements in Parliament, *A v UK* (Application No. 355373/97), the European Court held that such privilege served the legitimate interest of preserving free speech in Parliament and in maintaining the separation of powers between the legislature and the executive, and that it was a proportionate interference with A's rights as it was designed to protect the interests of Parliament as a whole, not individual MPs and because victims of defamatory statements in Parliament are not entirely without redress .

68. However, here, submitted Miss Booth, the Court is concerned on the one hand with a clear statutory right to be free from unlawful discrimination, and on the other, with a procedural bar that the Employment Appeal Tribunal is purporting to develop incrementally to bar such a claim. The bar is not a rule of international law that exists to promote comity and good relations between States through respect for another State's sovereignty. Nor, as in *A v UK,* does it concern free speech in Parliament or the separation of powers. Its rationale is of a lesser order, the public interest in protecting the integrity of court proceedings and bringing finality to them, an interest which, she submitted, does not justify "extending" it to restrict Miss Heath's sex discrimination claim against her employer. She relied upon the same arguments for this purpose as she had done at common law under the heading of the balance

of competing public polices (see paragraph 49 above). She urged the Court, consistently with the 1998 Act, not so to "extend" the common law as to bar Miss Heath's claim.

69. Mr Hand also relied in rebutting this submission on his arguments on the balancing of interests (see paragraph 50 above), which he had put regardless of whether the matter was governed by Article 6.1

70. In my view, Miss Booth's invocation of Article 6.1, in the circumstances, adds little to her argument on the fixing of the balance of interests without it. Whether, for the purpose of Article 6.1 the rule of absolute immunity operates as a substantive bar to Miss Heath's claim in the circumstances to which it applies, so as to negative the civil right and thus not engage Article 6.1, or as a procedural bar serving to limit the claim, does not, in my view, affect the outcome of this case or others like it. In such a circumstance, one approach would be to adopt the approach of the European Court in paragraph 9 of its judgment in *A v UK,* namely not determine the precise legal status of the immunity at issue for the purpose of Article 6.1 and move straight to considerations of legitimate aim and proportionality. In *A v UK* the privilege or immunity under consideration was parliamentary; here it is that of the courts. Both are fundamental to our public interests, the one in our legislation and governance, the other in the integrity of our judicial system. Given the weight of high judicial authority in this country that the absolute immunity rule is not just a privilege but a "true immunity" – see e.g. per Lord Hobhouse in *Hall v Simons* at 740 G-H (see paragraph 18 above), I would be inclined to put it on the *Matthews* rather than the *Fogarty* side of the line, so as to negative a claimant's civil entitlement to pursue a claim for unlawful discrimination under the 1975 Act. If I am right about that, any debate about Miss Heath's status under the *Devlin* rule (see paragraph 60 above) would be academic.

71. But even if that were not a proper view of the legal status of the immunity for the purpose of considering access to the courts under Article 6.1, I have no hesitation, largely for reasons that I have already expressed in a number of different contexts in this judgment, in concluding that its purpose is legitimate and is necessary and proportionate in the public interest for the protection of the integrity of the judicial system. And I can see no basis or need in human rights terms for holding that the statutory recognition in the 1975 Act of eradicating unlawful discrimination in our system, however important it is, should outweigh it. Much of the reasoning of the Employment Appeal Tribunal in the context of the Article 8.2 issue, to which I am now about to turn, is equally applicable in the context of Article 6.1, looked at from Miss Heath's point of view, of access to the Employment Tribunal when set against the public interest in giving effect to the Inspector's *common law* entitlement to a fair hearing of her allegations against him before the Police Disciplinary Tribunal.

Article 8

72. The Employment Appeal Tribunal rejected the argument on behalf of Miss Heath that her claim engaged her right to respect for her private life under Article 8.1 or that Article 14 had any relevance. At paragraphs 27 to 28 of its judgment, it agreed with the Employment Tribunal's reasoning, at paragraphs 9(r) to (q) of its extended reasons that either the claim did not engage Article 8.1, or if it did so, it was more than outweighed as an Article 8.2 consideration by the need to provide a fair trial to the Inspector. I refer in particular to paragraph 28 of its judgment which I have already set out in paragraph 8 above.

73. The starting point for consideration of this part of the argument on behalf of Miss Heath is that an Employment Tribunal, though not an "appropriate tribunal" for the purpose of hearing and determining claims under section 7 of the 1998 Act, is a public authority for the purpose of section 6 of the 1998 Act and must act compatibly with the human rights in schedule 1 to the 1998 Act. The effect is that, before such a Tribunal and in an appropriate case, the common law absolute immunity rule (as distinct from a statutory provision that purposive interpretation under sections 2 and 3 cannot render compatible) might have to yield to human rights jurisprudence in the context of a particular statutorily given right, such as that against unlawful sex discrimination in the 1975 Act.

74. Miss Booth suggested that the questions of the Inspector's counsel in cross-examination of Miss Heath before the Board were so intrusive as to engage her right to respect for her private life under Article 8.1 and to discriminate against her under Article 14 in the exercise of them, citing in support *Lustig Prean* & Anor *v UK* (2000) 29 EHRR 548, para 64, and *Smith & Grady v UK* 2000) 29 EHRR 493, para 71 (in both of which it was held that intrusive questions about a person's homosexuality engaged the Article). Here, said Miss Booth, the complaint is not about the conduct of the Inspector, who was exercising, through counsel, his right to defend himself, but against her employer, who was, through the Board, investigating the complaint in an intrusive, unacceptable and disproportionate manner. She complained that the Employment Appeal Tribunal did not adequately consider the tension between the making of this complaint of unlawful discrimination, part of which involved consideration of Miss Heath's Article 8 right, and the common law rule of absolute immunity, invoked to prevent it being heard.

75. As to the Employment Appeal Tribunal's alternative holding that, if Miss Heath's claim did engage Article 8.1, it was outweighed by the Inspector's Article 6 right to a fair hearing, Miss Booth said that it was inconsistent with the Tribunal's own view, expressed at paragraph 27 of its judgment, that the Inspector had no Article 6 right to a fair hearing. And she referred to the European Court's observations in *A v UK,* at 78*,* that the broader an immunity, the more compelling must be the justification for it to be compatible with the Convention, and, echoing its ruling in *Fayed v UK* (1994) 18 EHRR 393, that, when examining the proportionality of an immunity, its absolute nature is not decisive.

76. Mr Hand responded shortly to these submissions by the following analysis. First, the complaint appears to be that Miss Heath's right to respect for her private life was infringed by the Board, in not preventing the cross-examination of her to which she objects as unlawfully discriminatory. And, second, the Employment Tribunal, faced with such a claim, which itself did not allege infringement of her Article 8 rights, should have ignored the established weight of authority against its jurisdiction to hear the claim on account of the absolute immunity rule, because to follow it would deprive her of her right to bring the claim. But, he submitted, Article 8 (read with Article 14) is not engaged at all, because it is only if Miss Heath had made a claim founded on an alleged infringement of Article 8 that a court could consider whether the common law rule depriving it of jurisdiction should be bent to accord with ECHR jurisprudence on that issue. Not only had she not done that, but even if she had done, the Employment Tribunal would have had no jurisdiction to entertain it.

77. He submitted in the alternative and in any event that, even if Miss Heath's Articles 8 and 14 rights were engaged, the Inspector had a right to a fair hearing, not in any technical Article 6

sense, but according to the fundamental principles of natural justice that are part of our common law. He maintained that the Employment Tribunal and the Employment Appeal Tribunal correctly found, for the reasons they gave, that the need to protect that right coupled with the public policy interest of preserving the integrity of the administration of justice behind the absolute immunity rule, provided a sufficient Article 8.2 exception to outweigh the Article 8.1 rights in the circumstances of this case.

78. For similar reasons to those that I briefly gave in relation to the Article 6 argument, and to those given by the Employment Appeal Tribunal on this issue (paragraph 8 above), I am in firm agreement with Mr Hand's second and alternative submission. Whether or not Article 8.1 was engaged here, a more than adequate case has been made for the necessity of application of the absolute immunity rule to Miss Heath's claim before the Employment Tribunal, namely for the protection of the rights and freedoms of others, as provided by Article 8.2 – for all practical purposes in the public interest identified so many times in this judgment.

79. Accordingly, I would also reject this ground of appeal.

5 - The Equal Treatment Directive

80. Miss Booth complained that the Employment Appeal Tribunal wrongly failed to consider the relevance of the Equal Treatment Directive (EC Council Directive 76/207), which requires Member States to take measures to implement the principle of equal treatment for men and women in relation to various stages of employment, including working conditions. Article 1.1 requires Member States to put into effect the principle of equal treatment as regards access to employment and working conditions. Article 5, which the European Court, in *Marshall v Southampton & South West Hampshire Area Health Authority (No 1)* 1986] IRLR 140*,* has held to have direct effect, requires Member States to take steps to abolish all laws contrary to that principle. It provides:

> "1. Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.
>
> 2. To this end, Member States shall take the measures necessary to ensure that:
>
> > (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;
> >
> > …
> >
> > (c) those laws, regulations and administrative provisions contrary to the principle of equal treatment when the concern for protection which originally inspired them is no longer well founded shall be revised; and that where similar provisions are

> included in collective agreements labour and management shall be requested to undertake the desired revision." [2]

81. Article 6 applies the principle of real and effective judicial protection by requiring Member States to:

> "… introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment … to pursue their claims by judicial process after possible recourse to other competent authorities."

82. Miss Booth referred the Court to *Coote v Granada Hospitality* – Case C-185/97 [1998] 3 CMLR 958, in which the European Court held that all the Articles of the Directive are to be read alongside the principle of effectiveness in Article 6. This means that Member States must take measures that are sufficiently effective to achieve the aim of the Directive by ensuring that the rights it confers can be effectively relied upon before national courts. This requirement of effective judicial control is of a piece with the fundamental principle enshrined in Article 6 of the Convention, of which the Court should also take account when considering the reach of Article 6 of the Directive; see *Johnstone v Chief Constable of the Royal Ulster Constabulary* (Case 222/84) [1987] 1 QB 129, where the Court said, at para 18 of its judgment:

> "The requirement of judicial control stipulated by that article reflects a general principle of law which underlies the constitutional traditions common to the member states. That principle is also laid down in articles 6 and 13 … [ECHR]. As the European Parliament, Council and Commission recognised in their joint declaration of 5 April 1977 (Official Journal 1977 No C 103, p.1) and as the court has since recognised in its decisions, the principles on which that Convention is based must be taken into consideration in Community law.
>
> 19 By virtue of article 6 of …[the] Directive, interpreted in the light of the general principle stated above, all persons have the right to obtain an effective remedy in a competent court against measures which they consider to be contrary the principle of equal treatment for men and women laid down in the Directive. It is for the member states to ensure effective judicial control as regards compliance with applicable provisions of Community law and of national legislation intended to give effect to the rights for which the Directive provides. "

See also *Coote,* at paras 21, 22 and 24.

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[2] to be revoked by Article 1.4 of Directive 2002/73

83. The essential question is whether, by one means or other, Article 5, read with Article 6, requires our common law rule of absolute immunity to yield to the right granted by the 1975 Act to bring a claim before an Employment Tribunal for unlawful sex discrimination. Mr Hand agreed that, so far as possible, the 1975 Act should be interpreted in a way consistent with the aims of the Directive. He also acknowledged that, though the Directive provides no independent cause of action, Article 5, when read with Article 6, has direct effect as "a shield" against emanations of the state so as to deflect the effect of domestic procedural rules that might operate as a bar to, or restriction on, the prosecution of a claim based on domestic legislation enacted in implementation of EU obligations and Directives.

84. Miss Booth argued that Article 6 would be deprived of an essential part of its effectiveness if the principle of equal treatment in Article 5 did not prevent the "extension" of the absolute immunity rule to discriminatory treatment in disciplinary proceedings. She drew attention to the provisions in Article 6 of the Directive, requiring the provision of national judicial remedies for breach of the principle of equal treatment, giving, she said, special status to the principle of effectiveness as to the adequacy of remedies than is usually the case in other community measures.

85. Accordingly, Miss Booth submitted that there is a duty on the state to ensure protection for a person who is a complainant and witness in disciplinary proceedings against a work colleague for sexual harassment in the work-place to ensure that he or she is not the subject of further harassment in the course of those proceedings. She maintained that acts of discrimination in internal disciplinary hearings can only be justified if they fall within the specific exceptions to the principle of equal treatment set out in the Directive itself. None of the derogations allowed for in the Directive apply in this case.

86. Miss Booth described this as a point of fundamental importance since, without such protection, a victim of such treatment might be deterred from pursuing his or her claim by judicial process, thus fatally undermining the effect in this respect of the Directive. She cited in support of this concern *Draehmpaehl v Urania Immobilienservice,* Case C-180/95 [1997] ECR I-2195 [1997] CMLR 1107 in which the European Court held, at para 40 of its judgment, that the Directive precluded a national rule since it:

> "may have the effect of dissuading applicants … from asserting their rights. Such a consequence would not represent real and effective judicial protection and would have no really dissuasive effect on the employer, as required by the Directive."

87. In summary, Miss Booth submitted that the application of the absolute immunity rule, which she characterised as a procedural bar, dissuades applicants from asserting their rights, fails to guarantee real and effective judicial protection, fails to have a real deterrent effect on the employer, and fails to provide an adequate sanction in relation to the damage sustained, all contrary to the requirements of the Directive. She said that not only does it make it more than "excessively difficult" to exercise the Community right, in breach of the principle of effectiveness, it also makes it "practically impossible" to do so, under the older and narrower EC principle. Accordingly, she submitted, application of the rule to the 1975 Act would not satisfy the requirements of an effective transposition of the Directive.

88. However, Mr Hand maintained that Article 6, despite its specific requirement for the introduction of national measures of enforcement of its principles, does little more than articulate in this context the general principle of EU law that, where the EU requires Member States to ensure an individual's rights, it must also provide him with an effective judicial remedy against infringement of those rights. He cited as examples of such "direct" effect in this context, *Marshall* and *Draehmphael*, where a "cap" imposed by domestic law on compensation was dis-applied because it conflicted with Articles 5 and 6. He submitted, however, that Article 6, like all or most directly effective EU rights, is not absolute in the sense of prohibiting any qualification or restriction. He referred to well settled EU jurisprudence, notably that considered by the ECJ in *Preston & Ors Wolverhampton Healthcare NHS Trust & Ors* (Case C-78/98) [2001] 2 AC 515, which concerned time limits in domestic legislation, that they are subject to some qualifications. Some are designed to apply specifically to the exercise of the right in question, such as a limitation period, and others of general application to the exercise of rights by way of civil litigation, for example, rules of estoppel, abuse of process, compromise of claims, sovereign immunity etc.

89. It is important to consider the application of the absolute immunity rule alongside the Directive, not only as a generality, but also in the circumstances of each case to see, as Miss Booth submitted, whether it renders the exercise of that right excessively difficult or practically impossible. That is, the purpose of the national rule must be examined and weighed against the degree of restriction on the enforcement of the Community right; see e.g. *Perbroeck, Van Campenhout & Cie v Belgian State* [1995] ECR I-4599 and *Van Schindel & Van Veen v Stichtung Pensionenfonds voor Eysiotherapueten* [1995] ECR I-14705, at paras 19-22.

90. In *Preston* the Court said, at para 31, that:

> "[i]n the absence of relevant Community rules, it is for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and are not framed in such a way as to render impossible in practice the exercise of rights conferred by Community law (principle of effectiveness). …".

91. The first matter is whether and to what extent our common law rule of absolute immunity should be governed by the Directive in respect of claims for unlawful sex discrimination made under the 1975 Act. As to the Act itself, the Court should construe it, if possible, so as to accord with the interpretation of the Directive whether or not: 1) it followed or, as in this case, preceded the Directive (*Webb*, Lord Keith of Kinkel at 186D-E, *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case 106/89) [1990] ECR I-4135); 2) it has direct effect in relation to the employment relationship; and 3) the employer against whom the claim is made is an emanation of the state, as is the Chief Constable in this case (*Johnstone*, at para 56); see also *Marshall v Southampton & South West Hampshire Area Health Authority (Teaching) (No 2)* (Case C-271/91 [1993] ICR 893, ECJ, at paras 35-38.

92. Here, in the context of the absolute immunity rule, we are concerned with a restriction or qualification of general application. As to its impact on the effectiveness of the right to equal treatment that the Directive requires Member States to ensure equal treatment in the work-place, it is important not to confuse such procedural or jurisdictional qualifications with issues as to the scope of the EU right generally, namely in what factual circumstances would it be infringed, as in *Coote* (which concerned acts of employers in retaliation to equal treatment proceedings) or as to whether the domestic provision operates to deprive a successful claimant in respect of a EU right of his or her full and appropriate remedy, for example *Von Colson & Kamann v Land Nordhein-Westfalen* 14/83 [1984] ECR 1891; *Draehmpaehl*; and *Marshall v Southampton & South West Hampshire Area Health Authority(No 2)* (C-271/91) [1993] ECRI-4367; [1993] 2 CMLR 293.

93. In my view, there are no grounds on which it could be said that the Directive should displace the absolute immunity rule of general application in play in this case simply because it is sought to re-visit proceedings before another tribunal by way of a claim to an Employment Tribunal for unlawful sex discrimination by those conducting those proceedings. If the Directive were to have that effect, so as to dis-apply this core judicial immunity, it would follow, by parity of reasoning, that it should operate so as to dis-apply other similar rules of general effect, for example, sovereign immunity, res judicata, abuse of process, compromise of claims and estoppels. Now, while eradication of unlawful discrimination, particularly in the work-place, is an imperative, it is not of such overriding importance in comparison with other fundamental norms of our law and judicial process that claims for it alone should hold sway in the manner suggested by Miss Booth.

94. In my view, however pointed the terms of the Directive as to national action, they are no more absolute than the EU renders other Directives' requirements which, as EU jurisprudence has established, allow of qualification where Member States within the margin of their appreciation, consider it necessary, for procedural or other reasons in the wider public interest, to qualify or restrict in certain limited circumstances. Nor would it seem to me to make sense to single out unlawful discrimination in this EU context - albeit with the cross-reference to Article 6 ECHR - for a more rigorous regime of enforcement over national laws giving effect to important public policy interests than Strasbourg jurisprudence requires in the context of human rights.

95. On the issue of effectiveness, therefore, I end by returning - and without apology: 1) to the strong public policy interest for the absolute immunity rule and its breadth; and 2) the illustration of the need for it, provided by the reasoning of the Employment Appeal Tribunal in paragraph 28 of its judgment when drawing the balance in the human rights context between the competing public interests at play in this case (see paragraph 8 above).

96. As to the principle of equivalence, it is self-evident from the state of our law that it is satisfied. As I have said, the immunity has always been available in all civil actions (save for a few well-defined exceptions), whether deriving from statute or the common law; see, in particular, *Royal Aquarium,* per Lord Esher MR at 442 and per Lopes LJ at 451; *Marrinan v Vibart* [1963] 1 QB 502, per Sellers LJ at 535 and per Diplock LJ at 538-9; *Darker v Chief Constable of West Midlands* per Lord Hope of Craighead at 435H-436B (see paragraph 18 above) and *Hall v Simons*, per Lord Hobhouse of Woodborough at 740G-H (see paragraph 18 above). Given such equivalence, there is no jurisprudential support for Miss Booth's implied proposition that an Employment Tribunal should, by dis-applying the

absolute immunity rule, provide for a more favourable jurisdictional rule in the case of EU-derived rights than apply to domestic law rights.

97. Accordingly, I would also reject this ground of appeal, and, would, therefore, dismiss Miss Heath's appeal.

98. Since drafting this judgment, I have seen Neuberger LJ's thoughtful dissent on one aspect of my conclusion, namely as to the first of the three complaints of Miss Heath, that she felt intimidated because the membership of the Disciplinary Board was entirely male. Neuberger LJ appears to base his dissent on that aspect on the basis that it is a complaint against the Commissioner for his selection of an all-male Board, not for something said or done by members of the Board in the conduct of its inquiry, and, that, therefore, it is an unjustified extension of the immunity principle.

99. I have to confess that that consideration never occurred to me when preparing the draft of my judgment, largely because, as I said in paragraph 11 of it, I took the main thrust of Miss Heath's complaint to be at its broadest, whether the rule of absolute immunity from suit that attaches to judicial or quasi-judicial proceedings excludes complaints about unlawful discriminatory conduct in the course of such proceedings. And, as I have said, in paragraph 50(ii) of this judgment, Miss Booth's primary submission was that Miss Heath was seeking to exercise a "free-standing" right conferred by domestic legislation implementing European Union Directives to complain about the conduct of the members of the Board. In short, what she was seeking was a review of the conduct of her employer, the Commissioner, acting through the Board in the conduct of the inquiry into her complaint of sexual harassment, not about his selection of its members.

100. To the extent that Miss Heath included a reference in her grounds of complaint to the Employment Tribunal, about the all-male composition of the Board, it seemed, and it still seems, to me one of three cumulative aspects of her complaint – in part, scene-setting - about the effect on her of the conduct of the proceedings. As Neuberger LJ has commented in paragraph 113 of his judgment, this case is an instance in which it may not be easy to divorce the complaint (if it is a discrete one) about selection of the membership of the tribunal from what actually happened during the hearing before the tribunal. This is particularly so where, as here, there are discrete and, in my view, undoubtedly connected complaints about what happened at the hearing. It is, as he went on to say, in paragraph 115, "a fine line" between, on the one hand, inquiring whether the selection of the Board involved sexual discrimination because of the nature of the complaint about the conduct of the inquiry, and, on the other, as to what happened, or may have happened, as a result of its make-up.

101. In my view, it is also a very dangerous line to draw. If Miss Heath had objected to the all-male constitution of the Board at any stage because of the nature of her complaint before it and/or of the conduct of counsel or of the members of the Board of the proceedings, the Board would have had to rule on the matter. Any such ruling would undoubtedly have been covered by the immunity and could only have been challenged through the domestic appellate route or by way of judicial review. It would undoubtedly have been immune from proceedings by way complaint of sexual discrimination before an Employment Tribunal. If the make-up of quasi-judicial tribunals are to become vulnerable to challenge of such a nature and by such means, whether through the medium of vicarious responsibility of those

who appoint them or otherwise, the necessary immunity of a tribunal in respect of its conduct of judicial or quasi-judicial proceedings will be all too readily circumvented. Accordingly, and with respect, I cannot agree with the conclusion of Neuberger LJ in this respect.

Lord Justice Neuberger:

102. In paragraph 5 of his judgment, Auld LJ has summarised the three allegations upon which Miss Heath's complaint of 5th June 2001 to the Employment Tribunal ("ET"), was made. Those allegations were:

i) Miss Heath had felt intimidated because the membership of the Police Disciplinary Board ("the Board") was entirely male;

ii) Her union representative, who was a woman, had to plead with the Board to attend the hearing, in order to give Miss Heath female support;

iii) Without objection from the Board, the Inspector's male barrister asked her questions which were of such a nature that they were embarrassing, in a sexually related way, for her to answer.

103. As Auld LJ has also explained, the ET concluded, following a preliminary hearing, that the claim had to be dismissed on the basis that the respondent, the Commissioner of Police for the Metropolis ("the Commissioner"), was immune from suit in relation to all three allegations. The Employment Appeal Tribunal ("EAT") upheld that decision, for reasons set out in paragraphs 25, 26 and 28 of a judgment given by Rimer J, those paragraphs being extensively set out in paragraph 8 above.

104. So far as the second and third allegations upon which Miss Heath's claim is based, I consider that the conclusion reached by the ET and the EAT was correct, notwithstanding the submissions to the contrary advanced by Miss Cherie Booth QC on Miss Heath's behalf. It is unnecessary for me to set out my reasons in this connection, because I could not improve on the discussion and analysis in the judgment of Auld LJ, with which I agree.

105. However, I have reached the conclusion that the decision of the ET and the EAT cannot be upheld so far as the first allegation on which Miss Heath's complaint was based. The immunity upon which the Commissioner relies attaches to all actions "sought to be derived from what was said or done in the course of judicial proceedings": per Sellers LJ in *Marrinan -v- Vibart* [1963] 1 QB 528 at 535, and, as the ET said in paragraph 26 of its judgment, Diplock LJ said the same at 537-538.

106. In *Darker -v- Chief Constable of the West Midlands* [2201] 1 AC 435, Lord Hope said, in the course his speech at 445H to 446B:

> "[The] immunity … extends to anything said or done by [all witnesses] in the ordinary course of any proceedings in a court of justice. The same immunity is given to the parties, their advocates,

> jurors and the judge. They are all immune from any action that may be brought against them on the ground that things said or done by them in the ordinary course of the proceedings was said or done falsely or maliciously and without reasonable cause."

107. The same point was made by Lord Hobhouse in *Arthur J S Hall -v- Simons* [2002] 1 AC 615 at 740F-G, where he said that "in the public interest all those directly taking part [in the trial] are given civil immunity for their participation", an immunity which he described as "not just privilege", but "a true immunity". The observations of Lord Steyn at 679A as to "the immunity enjoyed by those who participate in court proceedings" and of Lord Hoffmann at 697B are to much the same effect.

108. Particularly as Miss Heath's first allegation is not a complaint directly against the Board, but against the Commissioner, it appears to me hard to bring a complaint about the constitution of the Board within the ambit of the principle embodied in those observations. The selection of the membership of the Board was, *ex hypothesi*, determined by the Commissioner, or by someone on behalf of the Commissioner, before the Board existed, let alone before the Board carried out any of its judicial, or quasi-judicial, functions.

109. My conclusion is reinforced by recent authoritative explanations as to the reason for the immunity. In *Hall -v- Simons* at 697C, Lord Hoffmann said:

> "The policy of this rule is to encourage persons who take part in court proceedings to express themselves freely. The interests of justice require that they should not feel inhibited by the thought that they might be sued for something they say."

110. To much the same effect, in the same case at 679B, Lord Steyn explained the immunity as being:

> "founded on the public policy which seeks to encourage freedom of speech in court so that the court will have full information about the issues of the case. For these reasons they prevent legal actions based on what is said in court."

111. In those circumstances, I consider that upholding the decision of the ET and the EAT in relation to Miss Heath's first ground of complaint would not involve a proper application of the immunity principle as established and justified by the authorities. In my judgment, the decisions of the ET and EAT on this issue would involve a "further extension" of the immunity principle, which should be "resisted unless its necessity is demonstrated", to quote from a passage in the judgment of the Australian High Court in *Mann -v- O'Neill* 71 ALJR 903 at 907, cited with approval by Lord Hoffmann in *Taylor -v- Director of the Serious Fraud Office* [1991] 2 AC 177 at 214B-D.

112. In my view, there appears to be no good reason for extending the immunity principle so as to apply to a challenge by an employee to her employer's selection of the membership of a judicial or quasi-judicial tribunal which is to deal with a complaint made by her against a fellow employee.

113. I accept that there are arguments to the contrary, as the present case shows. Once the tribunal has conducted the hearing, and, possibly, even more, after it has delivered its decision, it may not be easy to divorce the complaint about the selection of the membership of the tribunal from what actually transpired during the hearing before the tribunal, particularly where, as here, there are discrete, albeit perhaps connected, complaints about what happened at the hearing. In my judgment, however, that potential difficulty is not enough to justify an immunity to cover a claim, such as that embodied in Miss Heath's first allegation, even in the absence of the impact of the European Convention on Human Rights and the Equal Treatment Directive. In the present instance, at least, I have heard nothing in oral argument and seen nothing in any of the documents to suggest that there should be any difficulty in dealing with Miss Heath's complaint if it is limited to the first ground.

114. It is true that Miss Heath's complaint in relation to the composition of the Board can be said to be related to what actually happened at the hearing, in the sense that the consequence of the all-male composition only impacted on her at the hearing. To that extent, therefore, I accept that her complaint as to the composition of the Board can be said to be connected with the conduct of the hearing, and therefore to fall within the ambit of the established immunity. However, it appears to me that, particularly bearing in mind the observations of Lord Hoffmann in *Taylor* and the Australian High Court in *Mann*, and, indeed, the impact of the Convention, and, even more, the Directive, the point which carries the day is that the essential nature of the act complained of by Miss Heath is the selection of an all-male Board. I accept that there is this difficulty, namely that a vital ingredient of her complaint is the effect of the Board's composition on her at the hearing, and this could be said to involve to some extent an inquiry as to what transpired at the hearing.

115. In my view, the answer to that point is that it serves to limit the permissible ambit of Miss Heath's complaint about the composition of the Board. She cannot complain about the details of what actually happened at the hearing, but I do not see why she should not be able to contend that the selection, by or on behalf of the Commissioner, of an all-male Board, in the circumstances of her complaint, represented sexual discrimination against her. I accept that there is a fine line between inquiring whether the selection of an all-male Board, in the circumstances of this case, involved sexual discrimination, because of the nature of the complaint and an alleged inevitable feeling of intimidation on her part, and actually inquiring as to what happened at the hearing as a result of the Board being all-male. However, in my judgment, it is neither artificial in principle nor difficult in practice to draw a distinction between the two types of complaint, and it should not be impossible, or even difficult, to confine evidence and argument in relation to Miss Heath's complaint about the composition of the Board to matters which are, at least in my judgment, outside the scope of the immunity.

116. Having provided a copy of this judgment in draft to Auld LJ and Holman J, I have considered, in draft form, their reasons for adopting a different view. While the points they make have undoubted force, they have not, ultimately caused me to change my view. The only point they make which I should perhaps specifically mention is that Ms Heath could have objected to the constitution of the Board at the time of the hearing. Assuming, which is probably correct, that she could have made such a complaint, I do not consider that it would call into question the conclusion I have reached. If, in principle, she is entitled to raise a claim in the ET for sex discrimination against the Commissioner because of his selection of the members of the Board, it would seem very odd that she should be deprived of that right because she would have had the opportunity of challenging those members face

to face in circumstances where she could well have felt embarrassed, and indeed have been unaware of her right (if she had one) to challenge the constitution of the Board, where she was without legal representation, and, indeed, as far as I know, without prior notification, and at any rate without the right to any prior notification, of the constitution of the Board. Furthermore, an objection to the constitution of the Board at the time of its selection is far more telling than a challenge to the constitution of the Board once it is assembled, with all the parties, witnesses, and legal representatives ready to proceed with the hearing.

117. Further, it seems a somewhat odd process of reasoning to suggest that, because she had an additional right to challenge the constitution of the Board in circumstances where her challenge could not be reviewed because it would have been subject to the immunity so clearly articulated in the judgment of Auld LJ, she should thereby be deprived of her anterior right, not subject to such immunity, to challenge the selection of the Board.

118. In expressing this conclusion, I am not suggesting that, when the relevant facts are examined, Miss Heath's first ground of complaint will be established, or will even be shown to be capable of being established. That remains to be determined. The point on which I take a different view from Auld LJ, is that I do not consider that it is open to the Commissioner to claim immunity from suit in relation to Miss Heath's claim in so far as it is based on the fact that the composition of the Board was exclusively male.

Mr Justice Holman:

119. In my view, for the reasons given by my Lord, Auld LJ with which I agree, absolute immunity attaches to everything said and done, or omitted to be done, by the members of the board during the course of the disciplinary hearing on 13th March 2001. The immunity protects not only the members of the disciplinary board themselves, but also the Commissioner, as their employer, from any vicarious or quasi vicarious liability for the acts or omissions of the board.

120. The judgment of my Lord, Neuberger LJ raises the discrete and interesting question whether the Commissioner could, however, be separately and discretely liable, not vicariously for any act or omission of the board, but in respect of his own act (or that of his delegate) in appointing three males as the composition of the board. As Neuberger LJ has said, that act was necessarily done before the board existed and before it could have carried out any judicial or quasi-judicial function.

121. In this regard, it is important to observe that this case has proceeded so far before all three tribunals (i.e. the Employment Tribunal, the Employment Appeal Tribunal and now this court) on a preliminary point. There has been no investigation of the facts and I note that in paragraph 118 in his judgment Neuberger LJ stresses that "… I am not suggesting that, when the relevant facts are examined, Miss Heath's first ground of complaint will be established, or will even be shown to be capable of being established." The suggestion is, however, that in the circumstances of the applicant's underlying complaint against the inspector (i.e. a complaint by a female of indecent assault upon her by a male), the selection and appointment of a board comprising three males was, or may have been, by that fact alone a discriminatory act.

122. In my view, however, the appointment of three males does not stand, on the facts and history of this case, as a freestanding matter of complaint. It is true that Miss Heath's original application to the Employment Tribunal dated 5th June 2001 says, under the heading "Please give details of your complaint", "On entering the hearing I felt extremely intimidated due to the fact that three male commanders were chairing the board." But she continues by describing the particular events of the hearing of which she complains, and then continues "At no stage, did any of the three male board members object. In attending this disciplinary board hearing I was made to feel intimidated and humiliated by the lack of knowledge and compassion …. displayed." Within the complaint as a whole, the fact that the members of the board were all male is an important part of the context, and adds force to her specific complaints. But in my view it does not, and could not, form a sole ground of complaint, nor was it so argued before the Employment Tribunal. They formulated their Decision as follows:" … there is no jurisdiction to hear the applicant's complaint of sexual discrimination since it relates to alleged conduct by members of a disciplinary board in the conduct of a disciplinary hearing …" The focus is on the conduct and they could not have formulated their decision in that way alone if, in truth, the composition of the board had been identified as a sufficient ground on its own, rather than as the context of the other grounds.

123. In her amended notice of appeal to the Employment Appeal Tribunal, the applicant formulated her grounds of appeal as follows: "The grounds upon which this appeal is brought are that … the Tribunal erred in law in deciding that members of a police disciplinary panel are protected by absolute judicial immunity from suit arising out of their alleged sexually discriminatory conduct in the course of internal disciplinary proceedings." The grounds of appeal to this court are to similar effect.

124. In my view, therefore, once the other grounds of complaint are screened out by absolute immunity, there is no discrete and freestanding ground of complaint left for consideration based upon the composition of the board alone.

125. There is, however, a more fundamental answer to the point identified by Neuberger LJ. It seems to me that the members of the board, like any other court or tribunal, must have had the power (acting judicially) to recuse themselves individually or collectively. Take an obvious example. Suppose, when the applicant or the inspector or some other witness entered the room, one of the board realised he knew her/him well. He would have to have recused himself notwithstanding earlier appointment by the Commissioner. So also if it was pointed out during the hearing (and accepted) that a member of the board had acted so unjudicially as to disqualify himself from continuing. By parity of reasoning, it would have been open to the applicant to raise with the board for consideration by them whether it was appropriate and permissible, or was of itself discriminatory and impermissible, that the case (in all its circumstances) should be heard by three males. I do not underestimate the courage it would have required for her to make such a challenge, and one can only speculate as to what the conclusion and ruling of the board would have been. But unquestionably their ruling would have protected, not just them but also the Commissioner, by reason of immunity.

126. For these reasons I do not consider that there is any discrete issue or point on which this appeal succeeds and, like my Lord, Auld LJ, I would dismiss the appeal in its entirety.

127. Since preparing this short judgment I have seen the additional paragraphs (98 – 101) of the judgment of Auld LJ in which he comments upon the judgment of Neuberger LJ. I believe that Auld LJ's reasons are substantially the same as my own and I agree with them.

128. I have also seen the additional paragraphs 116 and 117 of the judgment of Neuberger LJ but I do not change my view. I do not accept that the process of reasoning is somewhat odd. Indeed, I consider it an important constitutional principle that (subject to judicial review or any process of appeal) the final arbiter of the appropriateness of the composition of a duly appointed or allocated tribunal should be the tribunal itself.

Order:-

1. Appeal dismissed

2. Appellant to pay the Respondent's costs of the appeal to the Court of Appeal, such costs to be subject to a detailed assessment, if not agreed.

(Order does not from part of the approved judgment)