CO/5225/2009

IN THE HIGH COURT OF JUSTICE

ADMINISTRATIVE COURT

R (on the application of Graham Nassau Gordon Senior-Milne (formerly Milne))
(claimant)
v

The Parliamentary and Health Service Ombudsman
(defendant)

NOTICE OF RENEWAL – SECTION 3

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Introduction – the functions and powers of the court

1. This application concerns a refusal by the Parliamentary and Health Service Ombudsman (the Ombudsman) to assess whether a complaint made to her by the claimant provided prima facie grounds for her to carry out an investigation. The basis of the application is not that the Ombudsman wrongly decided that there were no prima facie grounds for her to carry out an investigation, but that she refused to decide at all whether there were prima facie grounds, on the basis that the complaint was outside her jurisdiction. This is a refusal to make a decision and constitutes a continuing breach (it is a state of continuing to not do something) for the purpose of applying time limits.

2. In this context the only question that needs to be considered is *'Was the complaint valid?'* or, in other words, *'Did the complaint meet the requirements of s.5 Parliamentary Commissioner Act 1967?'* If the answer is *'Yes'* then the Ombudsman is bound by law to assess it and the court is bound by law to order her to do so.

3. The question *'Was the complaint valid?'* needs to be answered by reference to the two following questions:

    a. Was the complaint within the within the Ombudsman's jurisdiction?

    b. Was the complaint made within the Ombudsman's time limits? (but see following)

    It is only in relation to these two grounds that there is any dispute between the claimant and the defendant; that is, there is no dispute as to whether the claimant's complaint met the other requirements of s.5. But in fact the only reason given to the claimant's MP for the rejection of the complaint was lack of jurisdiction (application bundle p. 59-60); the time limit argument was introduced by the defendant's solicitor only after the application for judicial review was submitted. To clarify, the question of time limits was raised and discussed at the time the complaint was made but the complaint was not rejected on that basis. So the defendant's solicitor is seeking to introduce a reason which was not given at the time.

    Nonetheless, with regard to the Ombudsman's 12 month time limit, it is quite clear that the claimant could not assess whether the FSA had good reasons for asserting that the GAR liability was properly disclosed to policyholders during the demutualisation until they told the claimant what those reasons were. They did not do this until 29/3/2006 (their letter to Sir Alan Beith of that date). The simple question is *'How could the claimant make a complaint to the Ombudsman before he had the information which allowed him to decide that a complaint was justified?'* Obviously, he couldn't. Put it the other way round. What if the claimant had complained to the Ombudsman that the FSA had failed to take steps to ensure that the GAR liability was properly disclosed to policyholders during the demutualisation and the FSA had then turned round and given the claimant good reasons for their assertion to that effect? Clearly, the claimant's complaint would have turned out to be groundless. Not only that but it is doubtful whether the claimant's MP would have supported a complaint to the Ombudsman until he had received a definite answer from the FSA to substantiate their assertion that the GAR liability was properly disclosed.

    So, not only is the time limit issue irrelevant but it could not form the basis of a valid argument even if it was relevant. On this basis the only question that needs to be addressed in relation to this

application is of whether the claimant's application was within the Ombudsman's jurisdiction.

4. In this context, it is clear that it is for the Ombudsman (not the court) to assess the merits of the complaint made to her. The only thing the court needs to do is to assess whether the claimant's complaint was valid under s.5 and, if it was, then the court must order the Ombudsman to assess it.

5. In considering the merits of the claimant's complaint to the Ombudsman the court has acted outside its powers; that is, unlawfully. A judicial review is a review of the manner in which a decision was made (or, in this case, the reasons for not making a decision at all), not a review of the merits of the decision itself. As the defendant says (para. 37) the court is not entitled to substitute its views for those of the Ombudsman (but, of course, the Ombudsman has refused to form a view), so both the claimant and the defendant agree that the court has acted unlawfully in doing what it did.

'A reasonable prospect of success'

6. Let me re-iterate that the function of the court in this application is to assess whether the claimant has a reasonable chance of establishing that his complaint to the Ombudsman was within her jurisdiction; it is not the function of the court (and the court has no power) to assess whether the complaint to the Ombudsman provided prima facie grounds for her to carry out an investigation (that is the Ombudsman's function and the court has no power to substitute its own judgement in the matter); it is not the function of the court (and the court has no power) to assess whether the FSA properly supervised the Scottish Widows demutualisation; it is not the function of the court (and the court has no power) to assess whether the directors of Scottish Widows and Lloyds TSB committed criminal offences; it is not even the function of the court to determine whether the complaint actually was within the Ombudsman's jurisdiction (how can it be when the court has not seen all the evidence that the claimant would submit at a hearing to consider that point?), merely whether the claimant has a reasonable chance of establishing that it was.

Within the Ombudsman's jurisdiction

7. The court should note that the claimant's complaint was not limited to the FSA's supervision of the demutualisation circular dated 19/11/1999 which Scottish Widows sent to its policyholders, as claimed by the defendants, but related to the FSA's supervision of a transfer of long term business, which is what the demutualisation was, with emphasis on the supervision of Scottish Widows' GAR liabilities during that process. The issuing of a policyholder circular is a key part, but still a part, of that demutualisation process. This point is important in relation to the question of whether the claimant's complaint was within the Ombudsman's jurisdiction, as explained below.

8. In paragraph 2 of his annex, Mr. Kaye says *'Supervision of the demutualisation of SW was a "conduct of business regulation function" and not a "prudential regulation function" and accordingly the matter did not fall within the jurisdiction of the PO.'* It appears that Mr. Kaye is not stating the reasons given by the Ombudsman for refusing to consider the claimant's complaint, he is making an assertion of fact that the claimant's complaint was outside the Ombudsman's jurisdiction. If Mr. Kaye is making an assertion of fact, then this assertion is directly, categorically and unequivocally contradicted by the words of the Ombudsman's own report on the Equitable Life crisis, as referred to in the application (pp. 24-25 – see following paragraph also). The report even

makes **specific reference** to transfers of long term business being within the scope of the regulator's prudential regulation functions. So this is not a matter where there is room for doubt or argument. It is a simple matter of fact that a transfer of long term business falls within the regulators prudential regulation functions and not the regulator's conduct of business regulation functions.

9. Part II of the Ombudsman's report into the Equitable Life crisis explains that the main purpose of prudential regulation (and of grounds for intervention by the regulator) is the protection of Policyholders' Reasonable Expectations or PRE (part II, p. 24, para. 88). One of the circumstances cited in the report where the regulator might intervene to protect PRE is in a *'transfer, merger or restructuring'* (part II, p. 93, para. 435). The Scottish Widows demutualisation was a transfer of long-term business and therefore fell within the scope of the regulator's prudential regulation functions. It's as simple as that. In addition, and as the defendant acknowledges (para. 39), prudential regulation is governed by the Part II of the Insurance Companies Act 1982 and it is sections 49 and 50 in that part that govern transfers of long term business, as stated by the Ombudsman herself in her report on Equitable Life (part II, p. 62, para. 286) – and, indeed, section 49 requires a company to send out a statement to policyholders explaining the terms of the scheme (i.e. transfer). It follows (it could not possibly be clearer) that the supervision of the acts of a regulated company in relation to a transfer, and specifically the issuing of a policyholder circular (dealt with by s.49), fall within the scope of the regulator's prudential regulation functions. It is **nonsensical**, it files in the face of the facts, and common sense**,** to argue that the single most important act of a regulated company in a transfer (putting the proposal to the policyholders by means of a policyholder circular) is somehow outside those functions.

10. Let me summarise the key facts as follows:

   a. The defendant agrees that Part II of the Insurance Companies Act 1982 concerns prudential regulation (para. 39). This is a fact.

   b. Sections 49 and 50, which cover transfers of long term business, are in Part II of the Act (page 31 of the application bundle). This is a fact.

   c. Section 49 requires companies proposing to undertake such a transfer to send out a policyholder circular outlining the terms of the transfer scheme (page 31 of the application bundle). This is a fact.

   d. Mr. Kaye concludes that a transfer of long term business and the sending out of a policyholder circular under s.49 do not fall within the regulator's prudential regulation functions.

   Note that the items listed above are supported by documentary evidence already before the court as referred to.

11. Mr. Kaye states (his para. 9) that *'The claimant knew from the outset what stance the PO was taking, namely of jurisdiction. The fact that they may have been wrong in this stance does not make the matter one of deliberate concealment, quite the contrary. Moreover the claimant knew that his letter of 16 Feb 09 to the PO was also likely to be met by a mere acknowledgement.'* I would comment as follows:

a. In the first place, it makes no difference whatsoever whether the claimant knew or did not know what stance the 'PO' (Ombudsman) was taking; **if the Ombudsman was wrong then the Ombudsman was wrong (period) and the claimant's knowledge of the Ombudsman being wrong does not make that wrong right.**

b. In the second place, it is correct to say that the mere fact that someone says something wrong does not automatically make them a liar, but when someone says one thing in one breath and the exact opposite thing in the next that does make them a liar. There can be no question on this point. In this case the Ombudsman said that the claimant's complaint relating to a transfer of long term business was outside her jurisdiction. A few months later she made clear and unequivocal statements in her report on the Equitable Life crisis to the effect that transfers of long term business are within her jurisdiction (as explained above and in the claimant's application). In fact, the claimant's bundle includes a document sent by the Parliamentary Ombudsman to the European Commission (p. 42) before the claimant made his complaint to her, so there is no possibility that the she made a false statement to the claimant and found out the truth afterwards. So the conclusion is inevitable; the Ombudsman lied.

c. In the third place, while Mr. Kaye says *'The fact that they may have been wrong in this stance does not make the matter one of deliberate concealment, quite the contrary'*, it is clear that the mere fact of saying something has no bearing on the truth of what has been said because, clearly, if someone says something that they know to be wrong then they are, by definition, concealing the truth. What matters, therefore, is the state of a person's knowledge when they make a statement. **You cannot make an assertion about an intention to conceal by making a wrong statement with no reference to the state of knowledge of the person making the statement, but this is exactly what Mr. Kaye has done.**

d. In the fourth place, Mr. Kaye says *'Moreover the claimant knew that his letter of 16 Feb 09 to the PO was also likely to be met by a mere acknowledgement.'* **Does this mean that if I know that I am going to be stonewalled, that when I am stonewalled I am not being stonewalled?**

Time limits for making an application for judicial review

12. Mr. Kaye states that *'Although the claimant asserts that the PO is guilty of a "continuing breach"… time runs for the purposes of Judicial Review from the time when the grounds to make the claim first arose (CPR 54.5)'*. This is not the full picture. A refusal by a public body or official to do something that it, he or she is legally obliged to do constitutes a continuing breach; the state of not doing the thing which ought to be done continues until that thing is done. This is unarguable. And at any time during the period of the continuing breach a claimant can apply for a judicial review to compel the public body or official to do that thing. Or is it the case that if a public body or official fails to do a thing for a certain time, that failure becomes unchallengeable by way of judicial review – the law allows the wrong to become permanent?

13. On this basis the Ombudsman's refusal, on spurious grounds, to assess the claimant's first complaint of October 2006 constitutes a continuing breach; it is a continuing refusal to do a thing

which the Ombudsman has a legal obligation to do (i.e. assess a complaint validly made to her under s.5 Parliamentary Commissioner Act 1967), so an application in respect of that complaint would be valid even if submitted today.

14. Similarly, the Ombudsman's refusal to respond substantively to the claimant's second complaint of February 2009 also constitutes a continuing breach, so, again, an application in respect of that complaint would be valid even if submitted today.

15. With regard to the question of concealment, the doctrine provides that time only runs from the date when the deliberate concealment of a material fact is or ought reasonably to have been discovered. This doctrine unquestionably applies to proceedings against private parties, but Mr. Kaye appears to be asserting that the doctrine does not apply to public bodies in judicial review proceedings. This would mean that the law relating to judicial review effectively sanctions (because there are no sanctions against) deliberate concealment of material facts by public bodies or officials. Can this really be the case?

16. <u>But even if the doctrines of continuing breach and concealment do not apply</u>, under CPR 3(1)(2)(a) the court may extend or shorten the time for compliance with any rule, such as where the public importance of the case justifies doing so. Essentially, my complaint to the Ombudsman involves £1.5 billion and affects over 1 million people - and this is just in relation to Scottish Widows. If the GAR problems across the UK life industry are taken into account (as they would have to be in a full and proper investigation by the Ombudsman) then the amount involved is in the region of £14 billion and the number of people affected runs into many millions; I would estimate that at least 10 million people are affected. On what possible basis can an application that involves such sums of money and such numbers of people possibly be considered <u>not</u> to be of public importance?

17. I must admit that I am unable to follow the logic that Mr. Kaye has applied here, assuming that he is aware of CPR 3(1)(2)(a) and has considered that rule accordingly, as he is bound to do. At what point does a matter like this become of public importance? How much money and how many people have to be involved to make it so? 1 million people? 2 million? And what about the monetary value? £1 billion? £2 billion? How about 10 million people and £14 billion? Does that pass the threshold?

18. But we must go even further. Where an important public official (and not just some obscure administrative functionary but an ombudsman, the most important ombudsman of all, the Parliamentary Ombudsman no less, whose sole function as such is to protect the public from 'unremedied injustice') lies to a member of the public (that is, one of the very people she is supposed to protect) and refuses to carry out her legal obligations with respect to a complaint that is serious enough to have been referred to her by an MP, is that not a matter of public importance? So, how about where this important public official lies to a member of the public and refuses to carry out her legal obligations with respect to a matter affecting 10 million people and involving £14 billion? Are we over the threshold yet?

19. <u>But even if the doctrines of continuing breach and concealment and CPR 3(1)(2)(a) do not apply,</u> what about the overriding objective? Do justice and common sense dictate that the potential detriment to the defendant arising from any delay in submitting the application is so serious that I should be denied a remedy as a result? What possible detriment might the defendant suffer? Has

the Ombudsman's ability to defend herself been diminished one iota by the delay? No, of course not (just look at the 100 page plus Summary Grounds). So, on the one hand there is no detriment whatsoever to the defendant but, on the other hand, the claimant has been denied a remedy. Is this just? Why does Mr. Kaye refuse to exercise his discretion in circumstances where there is no possible detriment to the defendant but where such a refusal will cause very great detriment to the claimant? In what way can extending the time limit in this case be a threat to good administration? Surely, a greater threat to good administration arises from allowing a public official (and, I repeat, not just some obscure administrative functionary but an ombudsman, the most important ombudsman of all, the Parliamentary Ombudsman no less, whose sole function as such is to protect the public from 'unremedied injustice') to lie to and then stonewall a member of the public?

20. In this context I would like to draw the court's attention to Cain v Francis [2008] EWCA Civ 1451 at 73: *'It seems to me that, in the exercise of the discretion, the basic question to be asked is whether it is fair and just in all the circumstances to expect the defendant to meet this claim on the merits, notwithstanding the delay in commencement. The length of the delay will be important, not so much for itself as to the effect it has had. To what extent has the defendant been disadvantaged in his investigation of the claim and/or the assembly of evidence, in respect of the issues of both liability and quantum? But it will also be important to consider the reasons for the delay. Thus, there may be some unfairness to the defendant due to the delay in issue but the delay may have arisen for so excusable a reason, that, looking at the matter in the round, on balance, it is fair and just that the action should proceed. On the other hand, the balance may go in the opposite direction, partly because the delay has caused procedural disadvantage and unfairness to the defendant and partly because the reasons for the delay (or its length) are not good ones.'* Although it is the Limitation Act 1980 that is being considered here, the general legal principle is universal; the court must weigh the detriment (why else does it have the discretion to set aside time limits in the first place?) to the claimant which will arise from applying a time limit against the detriment to the defendant which will arise from not applying it. If there is no detriment to the defendant other than to pay the compensation or suffer the sanction which they should, in justice, pay or suffer anyway, then the claim must be allowed to proceed. To do otherwise is a fundamental denial of justice. In short, does the overriding objective override or not?

21. You see, this is what happens when people set arbitrary time limits in the interests of what they conceive to be 'good administration'. They subsequently tie themselves up in all sorts of knots trying to justify their arbitrary time limits whenever the application of those time limits has an unjust result. Call it law if you like, but it certainly isn't justice, and it is the claimant's view this sort of carry on brings the law into disrepute. What do you expect when people can plainly see judges trying to justify obvious injustices? Is it not an obvious injustice to deny a claimant a remedy on the grounds of delay when that delay has caused no detriment whatsoever to the defendant? I hardly need to ask the question. I repeatedly see judges saying that some rule needs to be applied in the interests of good administration (which they often call 'fairness'), even though the result of doing so might 'appear' to be unjust in certain cases (there is no 'appearance' of injustice for the people on the receiving end of such decisions). But these judges are approaching the matter from the exact opposite direction from which they should be approaching it. Overall justice is achieved by the sum of achieving justice in all individual cases, even if this means not applying the same inflexible standard in all cases; overall justice is not achieved by setting up an arbitrary rule and then ignoring the unjust consequences of the application of that rule in individual cases. This

cannot be denied.

22. **In order to reject my application on the basis of failure to comply with time limits, it is therefore necessary to ignore or overrule:**

    a. **the doctrine of continuing breach;**

    b. **the doctrine of concealment of a material fact;**

    c. **CPR 3(1)(2)(a), which allows the court to extend or shorten the time for compliance with any rule;**

    d. **the Overriding Objective;**

    e. **the rules of natural justice as explained in Cain v Francis [2008] EWCA Civ 1451.**

    Mr. Kaye has done all these things – and all, it seems, in the name of 'good administration'.

Costs/wasted costs

23. The defendant's 'Summary Grounds for Contesting the Claim' run to over 100 pages and contain detailed arguments; a mere glance inside the document proves that. The word 'summary' is therefore a misnomer since the document is clearly not the Summary Grounds required by CPR 54.8(4)(a)(1) to be submitted in response to the service of the claim form, but is the Detailed Grounds required to be sent only after notification of permission to proceed (CPR 54.14(1)(a). In submitting their Detailed Grounds when they were required by CPR to submit Summary Grounds, the defendant is in breach of CPR and has clearly wasted costs, given that Summary Grounds should run to no more than one or two pages, not over 100.

24. The defendant's Summary Grounds consist largely of arguments relating to the merits of the claimant's application to the Ombudsman. These are irrelevant, as made clear above, and the defendant has wasted costs accordingly.

25. The defendant's Summary Grounds contain a false statement (para 105(b)) concerning the applicability of the FSA's ICOBS handbook which the defendant's solicitor must have known was false when she made it. In the first place, it is clear that the defendant' solicitor made no effort to check whether these rules were actually in force in 1999/2000 (was this obvious fact not apparent to Mr. Kaye?) and, in the second place, it is easily discernible, by reading the very first paragraph of the handbook* (which concerns applicability, as one would expect) that the handbook is completely irrelevant. The defendant's solicitor's has not only lied (trained lawyers do not miss such things) but her arguments in this respect are also clearly irrelevant and therefore constitute wasted costs. And does not lying to the court constitute perjury or, at least, an offence, given that the Summary Grounds include a statement of truth?

    *ICOBS 1.1 states: *'This sourcebook applies to a firm with respect to the following activities carried on in relation to a **non-investment insurance contract** [my emphasis] from an establishment maintained by it, or its appointed representative, in the United Kingdom.'*

26. Bearing in mind the fact that the merits of the claimant's complaint to the Ombudsman are

irrelevant to this application, it is also clear that the defendant's solicitor has put forward arguments about what constitutes sufficient disclosure of contingent liabilities when she clearly has no knowledge whatsoever of the relevant financial reporting requirements, namely Financial Reporting Standard 12 (FRS 12), which undeniably form the guiding principles which should have been followed in the preparation of the policyholder circular.

The defendant's solicitor has tried to argue that certain words used in the demutualisation circular of 19/11/2009 did make clear the existence of a contingent liability in respect of GAR policies. Firstly, however, the words she quotes (para. 17) are not those which the FSA themselves quoted as being the words which they believed made the existence of that liability clear (so she is contradicting what the FSA said) and, secondly, saying that if the contingent liabilities allocated to the With Profits Fund materialize they could *'deplete the entire amount of the Additional Account'* is meaningless in a situation where the existence, nature and extent of the contingent liabilities allocated to the With Profits Fund have not been disclosed in the first place. If you do not disclose the existence of a known, specific liability, saying that general, unspecified liabilities (*'**any** [my emphasis] additional cost of meeting guaranteed benefits'* – p.23 of the circular) could have such and such a consequence is rather like saying *'A meteor may hit this town tomorrow'.* The listener will entirely discount such a statement because you have not told them that there is actually a meteor heading in the direction of the town; they will have no understanding of the risk. However, if you say *'There is a meteor heading in our direction and it may hit this town tomorrow'* the listener obtains a proper understanding of the risk. So to obtain a full understanding, the listener (or reader in this case) must be made aware of the specific risk. One could go further, and I do go further, and say that to make a statement about general possibilities without identifying a **known**, specific risk amounts to deliberate concealment of that known, specific risk. In short, they knew of a specific risk and did not disclose it. So the words quoted by the defendant's solicitor, far from amounting to disclosure, amount to concealment in the context in which they were written (i.e. failure to disclose the specific risk). This is even before we consider financial reporting requirements. In summary, Financial Reporting Standard 12 (FRS 12) requires disclosure of the following in relation to contingent liabilities:

a. the nature of the liability

b. the amount involved

c. the directors' assessment as to whether the liability will crystallize.

In this context the question is whether a policyholder, having read the circular, would have understood:

a. that Scottish Widows had a contingent liability of GBP1.5 billion in respect of GAR policies at that time?

b. that if the Equitable Life case, then before the Court of Appeal, went against Equitable Life then the GBP1.5 billion put aside by Scottish Widows in the 'Additional Account' would not be paid to ordinary policyholders as stated on page 23 of the Demutualization and Transfer Policyholder Circular of 19/11/1999 but would be paid to GAR policyholders instead?

c. what the assessment of the directors of Scottish Widows was as to the likelihood of the

liability crystallizing?

The answer to these questions is clearly 'No'. In the first place, the fact that there was a specific contingent liability of £1.5 billion was not disclosed at all in the policyholder circular or any set of accounts. In the second place the Equitable Life case was not even mentioned in the policyholder circular. In the third place, there was no disclosure of the directors' assessment as to whether that specific contingent liability would materialise. How could there be when it wasn't even mentioned?

So, the defendant's solicitor was trying to argue about the adequacy of disclosure of a contingent liability without even being aware of the existence of a financial reporting standard on the subject. Her arguments are, I am sorry to say (but it's the truth), quite simply garbage.

27. PD54 8.6 states that costs will not normally be awarded against the claimant, yet Mr. Kaye has decided to do so. While Mr. Kaye may have discretion to award costs, he only has discretion to do so to the extent that costs have been properly incurred. It is evident from what has already been said that the majority of the defendant's costs have not been properly incurred and, in fact, that the defendant has incurred these costs knowing that they were doing so improperly.

28. Mr. Kaye has awarded costs on the basis of his assessment of the merits of claimant's complaint to the Ombudsman (that it did not provide sufficient prima facie grounds to justify an investigation by the Ombudsman) but Mr. Kaye has acted unlawfully in doing so. He has compounded that unlawful act by awarding costs in relation to it (i.e. the costs incurred by the defendant in putting forward irrelevant arguments about the merits of the claimant's complaint to the Ombudsman which he, Mr. Kaye, should not have considered).

29. Further, the Overriding Objective obliges the court to deal with cases justly. Surely this means that if the court is going to specifically punish a claimant by an award of costs, that punishment must be proportionate and fair. How does Mr. Kaye know that an award of over £3,000 against the claimant is proportionate and fair? After all, £3,000 is nothing to some people but would be a crippling amount to many. The fact of the matter is that:

    a. the claimant is unemployed;

    b. the claimant is insolvent and has debts of over £17,000 – these liabilities exceed his assets;

    c. the claimant's regular income amounts to about £500 per month (£200 of this is an allowance from his mother);

    d. most of the claimant's income goes in servicing his debts.

    This means that Mr. Kaye is punishing me by forcing me into bankruptcy.

30. To summarize what has happened (and speaking in the first person):

    a. In 2002 I became a whistleblower on the basis of written advice from the Ethical Advisory Service of the Institute of Chartered Accountants in England and Wales (bear in mind that I initially just reported the claimant's concerns to the claimant's own management, who refused to investigate them).

    b. I was hounded out of my job as a result and have been out of a permanent job ever since.

c. Having already had one heart attack in late 2001, I suffered two further suspected heart attacks during the claimant's employer's campaign to force me out of the claimant's job (i.e. I was rushed to hospital by ambulance - a 45 minute drive - on the instructions of a doctor). I suffered from extreme stress and depression during this period and became addicted to sleeping pills and tranquillizers. I have permanently lost my ability to deal with stress and still suffer from depression. A Social Security Appeals Tribunal ruled that I was disabled as a result of my mental condition.

d. I have no realistic prospect of ever obtaining a permanent job again.

e. This means that I sacrificed my career in order to become a whistleblower – to do something I believed to be right – in the public interest. You will note that I was not pursuing any wrong done to me personally here (such as harassment or personal injury); I was pursuing a public interest issue because I believed that I had a duty to do so.

f. I lost my home, my wife, my family, my job, my health and my career prospects.

g. I approached various authorities who I believed had a duty to act in relation to the whistleblowing matter. They all fobbed me off. One of these authorities was the Parliamentary Ombudsman, who lied to me four times in a row.

h. I would ask the court to consider my options at this point by putting itself in my shoes. What would you have done in my place at his point? Walked away? I did not do this because I believe that, at the end of the day (and the use of that phrase is appropriate here), freedom and justice (<u>your</u> freedom and justice) depend on those who refuse to walk away. In short, people like you, who want a quiet life and will not put their heads above the parapet, depend on people like me who will. Please, don't say thank you; I wouldn't have it any other way (Well I would, but I was landed with this muck and will have to see it through). I don't respect you but I do understand your weakness.

i. As a <u>last resort</u> I approached the courts and asked them to do justice simply by telling the Ombudsman to consider the claimant's complaint; that is, to do something that it is her clear legal duty to do. I asked no more than that.

j. Mr. Kaye <u>punishes</u> me (and let's be clear, it is a punishment) for doing this by forcing me into bankruptcy, going against the normal practice stated in CPR in relation to costs.

31. It is clear from the above that, at a conservative estimate, at least 75% of the defendant's cost are wasted costs – and, even ignoring PD54 8.6, the remaining 25% should be disallowed anyway because the defendant has deliberately wasted the 75%. It is not the claimant who should be punished but the defendant. If you think about it, as things stand Mr. Kaye is making me pay for the defendant's perjury!

Judicial bias

32. It is clear that Mr. Kaye has not only acted unlawfully in that he has allowed himself to be swayed by irrelevant considerations (the merits of the claimant's complaint to the Ombudsman), but it is also clear that he shown deliberate bias (on the question of jurisdiction for instance, where he has

simply flown in the face of the facts). He has, in fact, acted with calculated malice. How do we know that Mr. Kaye has acted with malice? Well, in a sense judges are employed to harm people, but it is state-sanctioned harm backed by the threat of state violence, so, in a judicial context, the mere fact of a judge doing something to harm someone is no proof of malice in itself. But if a judge deliberately does something he knows to be unlawful in the knowledge that he will cause harm to another person, then that clearly amounts to acting with calculated malice. So how do we know that Mr. Kaye knew that he was acting unlawfully? Mr. Kaye is a QC. He is familiar with the Civil Procedure Rules. He knows what the purpose of a judicial review is. He knows what the court's powers are. He knows what is relevant and what is not relevant to the application in this case. He is fully aware that in submitting detailed grounds at this stage which consist largely of irrelevant arguments and irrelevant supporting material, that the defendant's solicitor has deliberately wasted costs and sought (successfully) to sway the court by illegitimate means (including outright lies). There can be no question, in such circumstances, that Mr. Kaye has acted with calculated malice and I therefore ask that Mr. Kaye remove himself from any further involvement in this application; failing which, I ask that he be removed.

Justice must be seen to be done

33. It is unarguable that justice must not only be done but it must be seen to be done. The court must therefore ensure that there is no possibility of it being swayed by irrelevant considerations relating to the merits of the claimant's complaint to the Ombudsman (as Mr. Kaye quite clearly has been). As stated above, and as agreed by the defendant (para. 37), it is the Ombudsman's function to assess the merits of complaints made to her and the court has no power to substitute its own views. For this reason I ask:

    a. that all irrelevant material should be struck from the defendant's Summary Grounds for Contesting the Claim;

    b. that the judge who does this (not Mr. Kaye, who has already demonstrated his partiality) has no subsequent involvement in the case;

    c. that the material is struck out in such a way that no judge subsequently involved in the case can gain knowledge of it.

    Unfortunately, the irrelevant material is sewn broadcast throughout that document and it would not be possible to strike it out and leave a reasonably coherent argument. It is therefore necessary to strike out the entire document. Accordingly, I ask the court to strike out the entire document.

    It would be a gross miscarriage of justice to allow this material to remain when its capacity to illegitimately sway the court has been proved. When I say 'proved' I mean that Mr. Kaye has stated in writing that has been swayed by this material.

Conclusion

34. Finally, and even though the merits of the claimant's application to the Ombudsman are not relevant to this application, I would ask the court to bear in mind the fact that the claimant's MP, Sir Alan Beith, considered the claimant's complaint to be sufficiently well-founded to justify him referring it to the Ombudsman. Sir Alan also referred the claimant's complaint to the Treasury

Select Committee and the FSA and he also undertook to petition Parliament as well. He would not have agreed to do these things without good reason. I have established that Mr. Kaye has acted with malice in deciding against me; Sir Alan Beith had no motives (either for or against me) in deciding to support me. So who is right?

35. Lord Woolf, a former Lord Chief Justice, said: *'Only too often the litigant in person is regarded as a problem for judges and for the court system rather than the person for whom the system of civil justice exists.'* To tell the truth, I suspect that this is the real reason that I am being punished because I know that Mr. Kaye would not have acted in the way he has had I been represented by a senior QC. I know it, Mr. Kaye knows it and any other person reading this paper knows it.

36. I put the reader on notice that I will start or am considering the following:

    a. an appeal against costs to the Court of Appeal;

    b. a complaint to the Office for Judicial Complaints against Mr. Kaye;

    c. a complaint to the Bar Council about Mr. Kaye;

    d. an action for damages against the defendant's solicitor (in person, not the firm) on the basis that she owes me a duty of care;

    e. a private prosecution against the defendant's solicitor in relation to knowingly making false statements in the Summary Grounds;

    f. a complaint to the Law Society about the defendant's solicitor;

    g. a private prosecution against the Parliamentary Ombudsman for misconduct in public office;

    h. an action for damages against the Parliamentary Ombudsman for malfeasance in public office;

    i. additionally or otherwise as I see fit.

Statement of truth

I believe that the statements I have made in this document are true.

Graham Senior-Milne