



JUDICIARY OF  
ENGLAND AND WALES

**THE RT. HON. LADY JUSTICE GLOSTER DBE**  
VICE-PRESIDENT OF THE COURT OF APPEAL, CIVIL DIVISION

2 October 2017

**Re: Recorder Donald Peter Herbert OBE**  
**Reference: 25979/2016**

### **Introduction**

1. As a Judge nominated under Regulation 9 of the Judicial Discipline (Prescribed Procedure) Regulations 2014 SI 2014 No, 1919, I have been asked by the Judicial Conduct Investigations Office ('the JCIO') to consider under Rule 25(b) of The Judicial Conduct (Judicial and other officer holders) Rules 2014 ('the 2014 Rules') a complaint concerning Recorder Herbert ('Recorder Herbert' or 'the Recorder'). Recorder Herbert is a fee-paid Employment judge as well as a fee-paid Immigration Judge.

### **Factual background**

2. In summary, the facts are as follows.
3. On 10 April 2017, a member of the public, Richard Greenhill, made a complaint ('the second complaint') to the JCIO about Recorder Herbert. The complaint concerns an article published online by The Guardian on 6 April 2017. The article referred to the Recorder's involvement in disciplinary proceedings arising from complaints - one of which was made by Mr Greenhill ('the first complaint') - about a speech he had made in 2015 criticising the Election Commissioner's decision to declare Lutfur Rahman's election as mayor of Tower Hamlets void. The article quoted part of a letter from the Recorder to the Lord Chief Justice (and the Lord Chancellor) criticising the outcome of the disciplinary process. Mr Greenhill also contends that Recorder Herbert promoted the article by tweeting a link to it.

4. The events which occurred prior to the second complaint were as follows.
5. At a public event on 30 April 2015 the Recorder gave a speech criticising the Election Commissioner's decision to declare void the election of Lutfur Rahman as mayor of Tower Hamlets. In his speech, the Recorder had said: "Racism is alive and well and living in Tower Hamlets, in Westminster and, yes, sometimes in the judiciary."
6. As a result, two complaints were made to the JCIO about the Recorder's conduct in making the speech. The first complaint was brought by Mr Justice Stuart-Smith, Presiding Judge on the South Eastern Circuit, who brought a You Tube video of the recorder's speech to the attention of the JCIO. The second complaint was the first complaint brought by Mr Greenhill. Consequently, the Recorder's conduct was subject to an investigation.
7. The investigation was initially carried out by Lord Justice Underhill and subsequently, as a result of a request by the Lord Chief Justice, by a disciplinary panel chaired by Mrs Justice Elisabeth Laing. It concluded that the Recorder was guilty of judicial misconduct and that the sanction should be that he be given formal advice. It also expressly recommended that

"A suitable senior person apologises formally to [the Recorder] for the attempts to put pressure on him not to sit in November 2015, in circumstances where (a) no report had been made to the Lord Chief Justice asking him to exercise his power to suspend and (b) the complaint was not sufficiently serious to warrant suspension."

8. Following that investigation, in a letter dated 3 April 2017 the Lord Chief Justice wrote to the Recorder in the following terms (so far as relevant):

"The Constitutional Reform Act 2005 vests disciplinary powers in relation to the judiciary jointly in the Lord Chancellor and the Lord Chief Justice. We are assisted in this responsibility by the Judicial Conduct Investigations Office (JCIO).

As you know, your conduct has been subject to an investigation following complaints made about your speech at a public event on 30 April 2015 during which you criticised the Election Commissioner's decision to declare void the election of Lutfur Rahman as Tower Hamlets' mayor.

Having considered advice from Underhill LJ in his capacity as Nominated Judge and your representations, the Lord Chancellor and I decided to refer this matter to a disciplinary panel in accordance with regulation 13 of the Judicial Discipline (Prescribed Procedures) Regulations 2014. The panel found that your actions amounted to misconduct and recommended that you should receive formal advice as to your future conduct.

We have considered the panel's findings and your representations carefully. While we acknowledge that lack of preparedness for your speech was probably a contributory factor, we accept the findings of the panel that it was inappropriate for you, after referring three times to the fact that you were a part-time judge, 'to say, in a public speech, of a decision by a fellow judge, that the parties (who were BME people) were not regarded as British, otherwise the decision would not have been made, that they should not place their faith in a justice system which had not been designed for them but should take direct action instead.' - Para 111 of the panel's report.

We agree with the panel's recommendation that formal advice is the appropriate disciplinary sanction. **In future, if you intend to speak publicly on a potentially controversial subject such as one that concerns a judicial decision, you should think carefully about what you intend to say and avoid making comments which could put the reputation of the judiciary at risk of damage. In particular, you should avoid making comments which an objective observer would infer to mean that you are accusing a judicial colleague of making a decision on grounds of race.** [My emphasis.]

In the interests of transparency regarding disciplinary matters, it is our policy to publish a statement on the JCIO website. The following statement will be placed on the website shortly after the date of this letter.

A spokesperson for the Judicial Conduct Investigations Office said:

"Mr Donald Peter Herbert OBE, a Recorder of the Crown Court, a fee-paid Employment Judge and a fee-paid Immigration Judge, has been issued with formal advice after making a public speech criticising the Election Commissioner's decision in 2015 to declare Lutfur Rahman's election as mayor of Tower Hamlets void. A disciplinary panel found that the Recorder's comments were inappropriate and put the reputation of the judiciary at risk, which amounted to misconduct. The Lord Chief Justice and the Lord Chancellor agreed. The Lord Chief Justice has written to Mr Herbert with formal advice regarding his future conduct as a fee-paid judge."

You can contact the Judicial Appointments and Conduct Ombudsman (JACO) if you feel that this matter has not been handled properly. Please note that the Ombudsman can only consider a complaint about the handling of this matter. He has no power to investigate the conduct issue itself....."

9. No apology was made in the terms recommended by the Disciplinary Panel.

10. As may be seen, the formal advice was very clear that if, in future, the Recorder intended to speak publicly on a potentially controversial subject such as one that concerned a judicial decision, he should think carefully about what he intended to say and avoid making comments which could put the reputation of the judiciary at risk of damage. In addition, he was told that, in particular, he should avoid making comments which an objective observer would infer to mean that he was “accusing a judicial colleague of making a decision on grounds of race”.
11. On 5 April 2017, the Recorder wrote to the Lord Chief Justice in the following terms:

“Re: Misconduct Finding

Thank you for your letter dated 3rd April 2017 the contents of which are noted.

You will of course be aware that I have already taken legal action to challenge the actions of the MOJ, and by definition the actions of the JCIO and some members of the High Court Judiciary. **I unfortunately regard the recommendation of the disciplinary panel and your decision taken together with that of the Minister of Justice as forming a pattern of differential treatment based on my race as well as victimisation.**

Your decision fails to deal with my unlawful suspension in November 2015, and the deliberate breach of the Judicial Equality and Diversity policy that specifically prohibits bullying and harassment. (October 2014). A small group of High Court Judges assisted by the JCIO deliberated sought to orchestrate my removal from office knowing they had no intention of seeking my suspension by filing a report with you as required by the rules. I regard that as a deliberate act of discrimination and victimisation. Your silence in this regard is an embarrassment, and undermines the confidence that the public ought to have in judicial independence and BME Judges right to be treated equally under the law.

Neither you, nor the Minister of Justice has decided to take any action against the JCIO and the members of the High Court Judiciary for alleged misconduct. I regard that as an abdication of your responsibility as Lord Chief justice. **The message is clear, that BME Judges are to be referred for disciplinary misconduct proceedings on spurious grounds whilst white High Court Judges are above the law. They can act with impunity.**

This question has been studiously avoided by those in authority at the Ministry of Justice since November 2015 and only dealt with to some extent

by the disciplinary panel after repeated submissions by me on the subject. The disciplinary tribunal managed to suggest that I be offered a belated apology, which is a recommendation you have chosen to ignore. Any apology offered now, some eighteen months after the incident would be a case of "too little too late". My experience mirrors that of many in the African Caribbean, Asian and Muslim communities where perceived errors attributable to us are exaggerated whilst our contributions to the system, and the abuse of our rights by others are ignored.

**I fundamentally disagree that what I said posed any risk to the reputation of the Judiciary. On the contrary your decision and that of the Minister herself, coupled with the actions of the panel combine to leave me in no doubt this is an example of direct race discrimination and victimisation.** The tolerance of racial bias, harassment and victimisation against me in this process is a far greater threat to the reputation of the Judiciary than anything I may have said in Tower Hamlets.

Currently the MOJ is seeking to avoid any responsibility by hiding behind the cloak of judicial immunity within a number of employment tribunal actions brought by myself and several Judicial colleagues. It is certainly foreseeable that you will seek to do the same to escape the consequences of your actions being scrutinised under the Equality Act 2010.

Currently no one is supposedly above the law, neither yourself, nor the Minister of Justice. If you have the courage of your convictions then you should not seek to hide behind such immunity. The culture and practices of the MOJ and High Court Judiciary however does not fill me with confidence that either you or the Minister of Justice will open yourselves up to any public scrutiny before an Employment Tribunal.

I have fought for many years to achieve racial justice in the United Kingdom for BME communities. After some twenty years sitting as a part time Judge I will not surrender my principles to artificially preserve the image of some parts of the senior Judiciary that are tarnished by racial bias. At a time when powers are being returned to the United Kingdom Judiciary as a result of @50 being triggered this action bodes ill for the future of the Judiciary's ability to act fairly in the UK on equality and diversity issues.

I will help to ensure that my treatment and that of my BME Judicial colleagues is highlighted in international forums where diversity and equality is scrutinised, and where the reputation of the English Judiciary is falsely upheld up as representing good practice. From the experience of BME communities it has never enjoyed that reputation.

Your record, that of the Minister of Justice, and of the MOJ on race equality and diversity is sadly lacking as you yourself have recognized from time to time. The Parliamentary review by David Lammy M.P. being the latest example of the lip service paid to challenging racial bias since 1995 by the MOJ generally, including the inaction of Sentencing Guidelines Council when faced with serious disproportionality of sentencing on grounds of race. I will

therefore have to challenge what I believe is an unlawful decision taken to protect the unlawful activity and bias of some members of the High Court Judiciary and the JCIO. For the avoidance of doubt I regard this letter as a “protected act” under The Equality Act 2010.

I will take whatever legal action I deem necessary to expose the absence of equal treatment under the law. Fortunately, I do not stand alone in this struggle and enjoy the support of several BME and progressive organisations. Given the publicity that you intend to give your decision on the MOJ website it is appropriate and necessary that my response is also placed within the public domain.” [My emphasis.]

12. On 6 April 2017 the JCIO published an announcement in the terms set out in the Lord Chief Justice’s letter dated 3 April 2017.
13. On 6 April 2017 The Guardian newspaper published an article in the following terms (so far as material):

### **“Judge disciplined over speech saying racism 'alive and well' in judiciary**

JCIO has written to Peter Herbert with formal advice after comments he made following removal of Tower Hamlets mayor ...

Peter Herbert, a part-time judge and chair of the Society of Black Lawyers, has been disciplined by the Judicial Conduct Investigations Office for making a public speech on a political issue.

The decision to write to him with formal advice about his misconduct follows criticisms he made of the election commissioner's decision in 2015 to remove the mayor of Tower Hamlets, Lutfur Rahman, from office.

Herbert, who has been awarded the OBE, is a barrister and sits as a recorder in the crown court, as well as being a fee-paid employment judge and a fee-paid immigration judge. The disciplinary action was endorsed by the lord chief justice, Lord Thomas of Cwmgiedd, and the justice secretary, Liz Truss.

The JCIO said Herbert had "been issued with formal advice after making a public speech criticising the election commissioner's decision in 2015 to declare Lutfur Rahman's election as mayor of Tower Hamlets void. A disciplinary panel found that the recorder's comments were inappropriate and put the reputation of the judiciary at risk, which amounted to misconduct."

Issuing formal advice is not the lowest level of punishment available to the JCIO after finding that a judge has committed a disciplinary offence.

In his speech, Herbert had said: "Racism is alive and well and living in Tower Hamlets, in Westminster and, yes, sometimes in the judiciary."

In April 2015, following an investigation into a disputed vote, the election commissioner barred Rahman from holding public office for five years.

Herbert responded to the JCIO disciplinary hearing by suing the Ministry of Justice for alleged race discrimination at an employment tribunal. That case, it is understood, has yet to be heard.

In a letter sent to the lord chief justice this week objecting to the disciplinary process, Herbert said: "**I unfortunately regard the recommendation of the disciplinary panel and your decision taken together with that of the minister of justice [Truss] as forming a pattern of differential treatment based on my race as well as victimisation .....**

**"The message is clear, that BME judges are to be referred for disciplinary misconduct proceedings on spurious grounds whilst white high court judges are above the law. They can act with impunity ...**

**"I fundamentally disagree that what I said posed any risk to the reputation of the judiciary. On the contrary your decision and that of the minister herself, coupled with the actions of the panel combine to leave me in no doubt this is an example of direct race discrimination and victimisation"** [My emphasis.]

Herbert has received the support of Doreen Lawrence, the mother of the murdered teenager Stephen Lawrence. She said last year that the case against Herbert demonstrated that "no matter what your achievements or expertise, your experience is no better than a young black man on the street who is seen as a threat to the justice system simply on account of the colour of their skin".

14. It can be inferred from the substance of the article that the Recorder provided The Guardian with a copy of his letter to the Lord Chief Justice since extracts from three paragraphs (namely those which I have highlighted in bold) were directly quoted in the article.
15. On the same day Recorder Herbert tweeted a link to the Guardian article under his hashtag with his own comment: 'High Court Judges [sic] unlawful activity condoned by Truss & Chief Justice. Racism still "alive"? That statement was not a quote from The Guardian article or a statement which had been made in it.

16. On 10 April 2017, Mr Greenhill made the second complaint. In substance he complained that:

- The statement reported by The Guardian to have been made by Recorder Herbert in a letter to the Lord Chief Justice amounts to a public repudiation of the outcome of his previous complaint and an attack on the character of the Lord Chief Justice and the Lord Chancellor
- It is reasonable to assume that Recorder Herbert's letter was disclosed to The Guardian at his instigation.
- Irrespective of whether he instigated disclosure of the letter, Recorder Herbert promoted The Guardian's article by tweeting a link to it on 6 April along with the comment: "High Court Judges unlawful activity condoned by Truss & Chief Justice. Racism still 'alive'?"
- Recorder Herbert's actions demonstrate disrespect, refusal to accept formal advice and a lack of contrition; conduct wholly inappropriate from a serving judge.

17. By letter dated 1 May 2017, Recorder Herbert responded in summary as follows:

- (i) Whilst Mr Greenhill was entitled to express his view, his complaint was a frivolous and vexatious one designed simply to cause harassment. The Recorder was surprised that the JCIO had entertained it to this extent.
- (ii) Mr Greenhill had tweeted about the outcome of the first complaint intending that his comment would be seen by the Recorder, which it was; this was as a deliberate act of racial harassment and victimisation.
- (iii) The Recorder's own Twitter account was only used in his capacity as Chair of the Society of Black Lawyers and contained no reference to him being a part time judge.
- (iv) He referred to various paragraphs in the findings of the disciplinary panel in relation to the first complaint where it had concluded that the JCIO should not have suggested to the Lead Presiding Judge, and the latter should not have invited the



Recorder, voluntarily not to sit pending the determination of the first complaint. Although this was not a word that appeared in those paragraphs of the disciplinary tribunal's findings with which I have been provided, the Recorder complained that he had been treated unlawfully in this respect and had not received the apology recommended by the disciplinary tribunal. He complained that the "failure to initiate any investigation of this misconduct by the JCIO, the Lord Chief Justice and Lord Chancellor forms a part of my allegation of victimisation & differential treatment based on race. The failure by anyone within the MOD a to offer an apology, however belatedly, was also further evidence of discrimination.

- (v) His letter to the Lord Chief Justice and Lord Chancellor was an announcement of his intention to challenge the recommendation of the disciplinary panel; it was a "protected act" under the Equality Act 2010.

### **Proceedings brought by the Recorder**

18. I am informed by the JCIO that, in the meantime, in March 2016, while the original conduct investigation was ongoing, the Recorder had issued proceedings against the Ministry of Justice for racial discrimination in the employment tribunal. The claim alleges racial discrimination in respect of the handling of the request made to the recorder by Sweeney J in November 2015 to refrain from sitting pending the outcome of the investigation and the decision by Underhill LJ in his capacity as nominated judge to refer the matter to the JCIO for investigation under rule 97. The claim is currently stayed pending the judgment of the Supreme Court in *P v Commissioner of Police for the Metropolis* (on a judicial immunity point). That claim, I am told, does not make any specific allegations against the Lord Chancellor or the Lord Chief Justice. I have not been provided by the JCIO with copies of the pleadings and other materials in that claim.

19. I am also informed that a second claim was issued recently which also alleges race discrimination, again in relation to the original investigation. This claim focusses mainly on the findings of the disciplinary panel, and the joint decision of the

former Lord Chancellor and the Lord Chief Justice to accept that recommendation. The claim cites as respondents Mrs Justice Laing, as chair of the disciplinary panel, the MoJ, the former Lord Chancellor and the Lord Chief Justice. The Government Legal Department, which represents all the respondents, has been instructed to seek a stay on the same basis as the first claim. I likewise have not been provided by the JCIO with copies of the proceedings and other materials in that claim.

### **Preliminary point - is the complaint vexatious?**

20. The JCIO is obliged by rule 21(d) of the Judicial Conduct (judicial and other office holders) Rules 2014 to dismiss a complaint, or part of a complaint, if it is vexatious. Supplementary guidance to rule 21(d) states that in many cases vexation is inferred from a pattern of past complaints and the absence of reasonable cause. I do not consider that the present complaint is vexatious. As noted above, Mr Greenhill's previous complaint against Recorder Herbert was upheld. The JCIO has no record of any other complaints by Mr Greenhill. Whether or not his second complaint is well-founded, Mr Greenhill in my view has reasonable cause for making the current, i.e. the second, complaint. Accordingly, I decline to find that it is vexatious.

### **Determination of the complaint**

21. Pursuant to Rule 38 of the 2014 Rules, and in the circumstances of this case, what I have to decide in the first instance is whether any one or more of:

- a. the provision by Recorder Herbert to The Guardian of his letter to the Lord Chief Justice dated 5 April 2017;
- b. the tweet by Recorder Herbert; and/or
- c. the content of the Recorder's letter to the Lord Chief Justice dated 5 April; (together "the relevant conduct")

amounts to judicial misconduct. For present purposes, I define judicial misconduct as conduct by the relevant officeholder in a judicial capacity which is either likely to bring the judiciary into disrepute or demonstrates that the officeholder is unfit for judicial office.

### **Did the relevant conduct amount to judicial misconduct?**

22. The Guardian published three direct quotations from the letter (namely those I have bolded in paragraphs 9 and 11 above). In my view, the statements quoted

(whether viewed in the context of the newspaper article or in the context of the Recorder's letter) amounted to direct allegations by the Recorder:

- a. that the disciplinary panel (Underhill LJ and/or Laing J and others), in concluding that, the Recorder was guilty of misconduct and had put the reputation of the judiciary at risk, and in recommending that he be given formal advice by the Lord Chief Justice, had been motivated by direct racial discrimination and an intention to victimise the Recorder on racial grounds in breach of the Equality Act 2010;
- b. that the Lord Chief Justice and the Lord Chancellor/Minister of Justice, in accepting the disciplinary panel's decision and acting on its recommendation to issue formal advice, had likewise been motivated by direct racial discrimination and an intention to victimise the Recorder on racial grounds; and
- c. that the Lord Chief Justice and the Lord Chancellor/Minister of Justice, deliberately allowed a racially discriminatory judicial conduct investigation system to remain in place, whereby BME judges were to be referred for disciplinary misconduct pre-proceedings on spurious grounds whilst white High Court Judges were above the law and could act with impunity.

23. The Recorder has provided no evidence whatsoever, in his response to the second complaint, to justify such very serious allegations against the Lord Chief Justice, the Lord Chancellor/Minister of Justice, or Underhill LJ or Laing J. They are no more than bare assertions.

24. It can be inferred, and indeed the Recorder has not denied, that he provided his letter to The Guardian and that he drew attention to the article by means of his Tweet.

25. I conclude that the relevant conduct does indeed amount to judicial misconduct for the following reasons:

- a. it shows that the Recorder is not prepared to accept criticism of his past judicial conduct, notwithstanding that such criticism was properly made after due investigatory process;

- b. it shows that he is prepared publicly to repudiate such criticism and process;
- c. it shows the Recorder making serious, unwarranted and scandalous public attacks on the characters of the Lord Chief Justice, the Lord Chancellor, and Underhill LJ and/or Laing J, at a time when they were acting in discharge of their public duties as part of the judicial disciplinary process;
- d. it shows the Recorder improperly using the media to promote his allegations in circumstances where he has no evidence to support them;
- e. it demonstrates public disrespect for the judiciary and the judicial disciplinary process and a public lack of contrition;
- f. it shows a total disregard of the formal advice which he had previously received from the Lord Chief Justice and the Lord Chancellor as set out in the Lord Chief Justice's letter;
- g. it is conduct that is likely to damage the reputation of the judiciary and undermine public perception of his impartiality as a judge.

26. There are two matters referred to in the Recorder's response which I should mention. First, I do not consider that it is relevant that the Recorder claims that his "own Twitter account was only used in his capacity as Chair of the Society of Black Lawyers and contained no reference to him being a part-time judge". The article in The Guardian referred to him as such. Second, the fact that, for whatever reason, no apology was offered for the fact that he was invited not to sit voluntarily pending the determination of the first complaint, is irrelevant to my consideration of the substance of the complaint.

27. Nor, for the reasons given in paragraphs 91-93 of the Disciplinary Tribunal's determination, do I regard the relevant conduct as a "protected act" under the Equality Act 2010.

### **Advice**

28. I consider that the relevant conduct shows that Recorder Herbert is unfit for judicial office. He has demonstrated that he is not prepared to accept criticism or abide by the judicial disciplinary process. He has sought, once again, to make scandalous and unsubstantiated allegations against senior members of the judiciary, and the Lord Chancellor, in flagrant disregard of the formal advice

which he previously received. And he has deliberately chosen to do so in the public media. His conduct brings the judiciary into disrepute.

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29. I would advise the Lord Chief Justice and the Lord Chancellor to remove Recorder Herbert from office as a recorder with immediate effect, notwithstanding the current proceedings brought by the Recorder.



Elizabeth Gloster

**The Rt. Hon. Lady Justice Gloster DBE**

**Vice-President of the Court of Appeal, Civil Division**

2 October 2017