Neutral Citation Number: [2021] EWHC 285 (QB)

Case No: QB-2017-002619

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 February 2021

Before :

RICHARD SPEARMAN Q.C.
(Sitting as a Judge of the Queens Bench Division)

- -

Between :

CATHERINE MARY PARRIS	**Claimant**
- and -	
(1) OLANREWAJU AJAYI	**Defendants**
(2) SHC CLEMSFOLD GROUP LIMITED	
(3) SHC RAPKYNS GROUP LIMITED	

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Justin Rushbrooke QC and Richard Munden (instructed by **Mills & Reeve LLP**) for the **Defendants**
Christina Michalos QC (instructed by **IRH Solicitors**) for the **Claimant**

Hearing date: 4 December 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to Bailii and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 12 February 2021.

Richard Spearman Q.C.:

1. In these proceedings, the Claimant ("Ms Parris") brings claims for libel and malicious falsehood based on the contents of a written statement ("the Statement") which was published by the First Defendant ("Mr Ajayi") to (at least) Mr David Gayler.

2. At the time when the Statement was published, Ms Parris, Mr Ajayi and Mr Gayler were all connected by work, although the precise relationship between them is not as clear as it might be. Ms Parris' Particulars of Claim ("POC") in these proceedings are dated 6 November 2017, and include the pleas that: (a) from 3 June 1998 to 2 November 2016, she was employed by the Second Defendant ("SHCC") and "its predecessors in title" as a physiotherapist (§2), (b) SHCC and the Third Defendant ("SHCR") "have sought to conceal which entity was [Mr Ajayi's] employer" (§11), (c) Mr Ajayi "was employed by [SHCC] and/or [SHCR] as a Quality Assurance and Therapy Manager" (§13), (d) "At 9.25am on Wednesday 14th September 2016, [Ms Parris] attended a meeting with [Mr Ajayi] (Quality Assurance and Therapy Manager) who was [Ms Parris'] line manager to discuss staffing issues" (§16), and (e) "On or about 15th September 2016, [Mr Ajayi] acting in the course of his employment wrote and published [the Statement] to David Gayler (Human Resources Manager) of [SHCC and/or SHRC] and various other employees and officers of [SHCC and/or SHRC] (and/or other entities trading as Sussex Health Care) whose names are at present unknown to [Ms Parris]" (§18). The POC make no mention of any employer other than SHCC and SHCR. Ms Parris' pleaded case is that she was employed by SHCC, and that each of Mr Ajayi and Mr Gayler were employed by either SHCC or SHCR, the precise identity of the employer of Mr Ajayi at least being unclear to Ms Parris due to the attempts at concealment made by SHCC and SHCR.

3. The POC also make reference (at §10.1) to proceedings for unfair dismissal which Ms Parris commenced in the Employment Tribunal on 31 March 2017 ("the Employment Tribunal Proceedings"). It is clear from the papers in the Employment Tribunal Proceedings that (a) those proceedings were brought against (1) SHCC, (2) SHCR, (3) Mr S.N. Boghani, and (4) Dr S.H. Sachedina, (b) by Order dated 20 November 2018, Employment Judge Baron ordered that SHCC and SHCR be discharged from those proceedings, (c) on 28 January 2019, the Respondents in those proceedings admitted unfair dismissal and wrongful dismissal, following which the basic and compensatory awards for unfair dismissal were agreed, and (d) the remaining issues in those proceedings were determined as between Ms Parris on the one hand and "Mr S.N. Boghani and Dr S.H. Sachedina t/a Alpha Care" (hereafter "the Partnership") on the other hand by a judgment of Employment Judge Ferguson dated 17 September 2019 following a hearing on 12-13 September 2019. That judgment records at §37:

> "The Employment Tribunal proceedings were originally brought against "Sussex Health Care" and there was considerable correspondence about the correct identity of the Claimant's employer, culminating in a Preliminary Hearing on 20 November 2018, following which the two current Respondents, trading as Alpha Care, were found to be the Claimant's employers."

4. On the face of it, therefore, decisions were made in the Employment Tribunal Proceedings, which are binding on Ms Parris, SHCC and SHCR, that Ms Parris was

employed by the Partnership. This accords with the plea in the POC (at §10.2) that in the response in the Employment Tribunal Proceedings it was contended that Ms Parris "was employed by Alpha Care (a partnership)". However, this is contrary to Ms Parris' case pleaded in the POC that she was employed by SHCC. It is also contrary to the Defendants' admission of that pleaded case (see Defence, §4). However, that admission accords with other aspects of the Defendants' pleaded case, viz. that Mr Ajayi (a) was employed by SHCC as Head of Quality and Compliance/Therapy Manager and (b) was Ms Parris' "direct manager" from November 2012 to November 2016 (see Defence, §5).

5. Regardless of the identity of the employer of Ms Parris and Mr Ajayi, it is common ground between the parties to the present proceedings that Mr Gayler was the Human Resources Manager of SHCC and/or SHCR (see POC, §18; Defence, §9.2 and §20; Reply, §17). At the same time, it is the Defendants' pleaded case that Mr Gayler was Mr Ajayi's "own manager" (see Defence, §17, read in conjunction with Defence, §§20-21). Because an employee and their manager are typically employed by the same employer, the implication of those pleas is that Mr Gayler (like Mr Ajayi) was employed by SHCC.

6. Be all that as it may, there can be no doubt, as discussed further below, that Mr Gayler played a significant part in the disciplinary proceedings which led to Ms Parris' dismissal. In particular, it is apparent from the contemporary documents that Mr Gayler asked Mr Ajayi to provide the Statement to him, and, further, that Mr Ajayi in fact provided the Statement to him, in connection with those disciplinary proceedings.

7. Whether there was any other publication of the Statement *to Mr Gayler* is an issue to which I return below. In addition, it is clear that Ms Parris' pleaded case puts in issue whether Mr Ajayi published the Statement to anyone *other than Mr Gayler*.

8. By application notice dated 21 September 2020, the Defendants seek permission to amend the Defence, and (on the premise that the amendments are allowed) an Order striking out the claim or granting summary judgment to them on the following grounds:

   (1) Ms Parris consented, and/or granted leave and licence, to the publication of the words complained of, and the claim therefore fails in accordance with the principle established by the Court of Appeal in *Friend v Civil Aviation Authority* [1998] IRLR 253 (*"Friend"*).

   (2) The claim is barred by the principle in *Johnson v Unisys Ltd* [2003] 1 AC 518 (*"Johnson"*) (hereafter "the *Johnson* exclusion principle"); alternatively, Ms Parris' claim for loss as a result of her dismissal is so barred; in the further alternative, Ms Parris has been compensated for her dismissal in the Employment Tribunal Proceedings and cannot seek compensation for the same loss in the present claim and/or such claim is an abuse of process in accordance with the principles set out in *Jameel v Dow Jones* [2005] QB 946 (*"Jameel"*).

   (3) The claim for special damages alleged to flow from the nature of the employment reference which was in fact provided by SHCC for Ms Parris, which is set out in §29.5 and §30 of the POC, has no real prospect of success.

9. Ms Parris contends that the application should be dismissed on the following grounds:

(1) The Defendants have already made one application for summary judgment and/or to strike out the claim. That application was dismissed by Master Davison in March 2019. That decision was not appealed. The current application should not be entertained given that the principle in *Henderson v Henderson* [1843] 3 Hare 100 (that a party should not be twice vexed) applies to interlocutory applications.

(2) The claim form was issued on 14 September 2017. This is a very late application to amend, and the Defendants need to satisfy the "heavy burden [that] lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it": see *Quah v Goldman Sachs International* [2015] EWHC 759 at §38(b).

(3) There is no real prospect of the defence of leave and licence succeeding as: (a) in *Friend*, consent turned on contractual agreement to a disciplinary process, whereas in the present case the process was expressly stated to be non-contractual; (b) *Friend* concerned republication to a disciplinary tribunal, whereas what is in issue in the present case is the primary publication which started the disciplinary process; (c) the factual evidence is far from clear; and (d) *Friend* pre-dates the Human Rights Act 1998, and it would be incompatible with Article 8 of the ECHR for (in effect) absolute privilege to be accorded to allegations made by co-employees where malice is alleged and for a claimant to have no remedy at all.

(4) The *Johnson* exclusion principle is of no application in the present case because (a) the defamation claim is brought against different parties: judgment in the employment proceedings was against the Partnership (which employed Ms Parris), and neither of the individuals who were members of the Partnership is a party to the present claim, which are brought against Mr Ajayi and, vicariously, his employer (admitted to be SHCC); and (b) the claim in the present case is not for losses flowing from the *manner* of the dismissal, but is instead for losses flowing from a defamatory publication which is said to have caused the dismissal.

(5) There has already been an attempt to strike out the special damages claim which was dismissed; there has been no change of circumstances; and there is no basis to re-open this argument. In any event, there are substantive factual disputes about the extent to which clinical (as opposed to factual) references were provided, and it would be wrong to grant summary judgment in the face of that factual dispute.

10. The Defendants were represented by Justin Rushbrooke QC and Richard Munden, and Ms Parris by Christina Michalos QC. I am grateful to all of them for their clear and helpful written and oral submissions.

THE FACTS

11. On 14 September 2016, Ms Parris attended a meeting with Mr Ajayi (POC, §16), which she left at some stage for about 10 minutes to attend to another matter (POC, §17).

12. While Ms Parris was out of the room, Mr Ajayi took a photograph ("the Photograph"). This shows a recording device, with a screen displaying "PAUSE 43.17". In it, the device is held in Mr Ajayi's left hand, and his left foot is visible underneath. The Photograph also shows, out of focus, what looks like a bag with documents protruding from the top.

13. Mr Ajayi's case as to how the Photograph came to be taken is set out in the Statement:

> "Re: Catherine Parris
>
> I sent CP an email on Tuesday 13th September requesting she attend a meeting with me on Wednesday 14th September to discuss the following:
>
> Ongoing treatments plans
>
> New service users at The Grange
>
> Ongoing clinics
>
> Feedback on Chailey visit
>
> Sling Audits
>
> Physiotherapy cover for Rapkyns Care Home
>
> Physiotherapy visit for VG as PL on annual leave
>
> JM exit interview
>
> On Wednesday the 14th September at 9.25am I met CP in the corridor at The Grange and we exchanged greetings. I went to the office and CP went to the bathroom before joining me in the office. I was sitting directly opposite CP. CP had a notebook and some paperwork in her hands and the paperwork was folded underneath her notebook which seemed to me to be unusual.
>
> I started the meeting but noticed that CP was fidgeting a lot and her demeanour was out of character. I asked CP if she was OK and she replied she was. I asked her some more friendly questions regarding her family to relax the atmosphere. I noticed that she continued to fidget throughout the meeting and I asked again if she was fine. She replied she was.
>
> About 45 minutes into our meeting, I asked CP to telephone JM to attend her exit interview with me. As CP got up she placed her paperwork and notebook down in an unusual manner and left the room.
>
> I heard a beep from her papers and was curious so got up and went over to open up the folded paperwork where I found a digital recording device paused at 43 minutes and 17 seconds. I looked at my watch and realised that it had been about 45 minutes since our meeting began. I took a photograph with my phone of the recorder, placed it back into the paperwork and resumed my seat.

> When CP came back into the room I composed myself and continued with the meeting to its conclusion. I then saw JM was waiting outside the office and ended the meeting.
>
> On Thursday 15th September, I sought advice from SHC's HR department regarding the recording of staff during meetings without their consent."

14. Ms Parris strongly disputes that version of events. She claims that the Statement bears the following defamatory meaning: "on the 14th September 2016 during the course of her employment the Claimant had covertly and without consent recorded a meeting with the First Defendant on a digital recorder which she had concealed in her paperwork and thereby had behaved in a devious and underhand manner contrary to the obligations of trust and confidence owed by an employee to her employer" (POC, §19). That plea would not be advanced unless Ms Parris contended that this allegation was false. Her case, as summarised in Ms Michalos' Skeleton Argument, is not only that the allegation was false but also that in making it Mr Ajayi lied and was thus malicious, in particular because:

    (1) The device was in a pocket in Ms Parris' bag. If Mr Ajayi found it by searching her bag when she was out of the room, he could have had no real basis to believe that a small handheld Dictaphone inside a bag would be actively recording a meeting. It would be very unlikely to be adequate to record voices at a considerable height above where it was placed and he must have known that.

    (2) Mr Ajayi's account that the machine was left in a loose sheaf of papers on Ms Parris' chair and that it beeped is, on the face of it, implausible. If she were recording a meeting unlawfully, it is obvious that leaving the Dictaphone behind in a loose sheet of papers would be very conspicuous.

    (3) Mr Ajayi did not challenge Ms Parris when she returned to the room about the Dictaphone, which is inconsistent with a genuine belief she was recording the meeting or to hear her account. It is far more consistent with a desire not to wish to hear the truth (that she was not recording the meeting) or any real explanation.

    (4) Mr Ajayi stated that he based his belief on the fact that Ms Parris had been recording the meeting due to the time shown on the Dictaphone screen because this mirrored the approximate length of the meeting at the point when she was out of the room. There is extrinsic evidence of Jane Medhurst that this was untrue and that Ms Parris had left the meeting to speak to her after a considerably longer period of 1 hour and 30mins. If this evidence is accepted, he could not have honestly believed she had been recording the whole meeting.

15. The Defendants' case is that on the morning of the following day, 15 September 2016: (a) Mr Ajayi went to see Mr Gayler, told Mr Gayler what had happened in the meeting, and showed Mr Gayler the Photograph; and (b) Mr Gayler said that this was a very serious matter and that he needed to speak to Ms Parris "as soon as possible", accompanied by Mr Ajayi (see Defence, §§20-21, not admitted by Reply, §§17-18). The Defendants' case is supported by the fact that a meeting with Ms Parris plainly took place that afternoon.

16. The Defendants' case concerning these matters is also supported by two documents:

(1) First, a "Meeting Outline" which they say was produced by Mr Gayler, which states:

> "Thursday 15 September 2016 14:00 at Beech Lodge
>
> Present:
>
> Olan Ajayi (OA)
>
> Chair David Gayler (DG) HR Manager
>
> Catherine Parris (CP) Physiotherapist
>
> DG to open the meeting and explain that, at this stage this is an informal conversation and is not part of any wider process.
>
> DG to hand over to OA to conduct the meeting.
>
> OA to tell CP that during the meeting with her on 14 September 2016 he noticed that a recording device was being used. - at this point OA to show CP the picture he took.
>
> OA to ask CP the following:
>
> • Why was the device being used?
>
> • Was she aware that she can not record a business discussion covertly?
>
> • Has she shared the content of the recordings with others?
>
> • Has she used this in any other meetings?
>
> • Has she taken photo's as well as recordings?
>
> • Does she think that her actions reflect well on her professionally?
>
> • Does she think this affects the mutual bond of trust and confidence between OA and her?
>
> Adjourn meeting and say we will get back to her within 24 hours (we will be considering if further action needs to be taken)"

(2) Second, some "Notes from meeting with Catherine Parris" which the Defendants say is a document which was prepared by Mr Gayler. Although this document is dated "Friday 16 September", the papers before me contain a version in which that date has been changed in manuscript to "Thursday 15 September" and which

additionally bears Mr Gayler's signature and the date "15.9.2016". In any event, it seems clear both from other contemporary documents and from Ms Parris' own evidence that the date of 16 September is a mistake for 15 September. These "Notes" state as follows:

> "Meeting held at Beech Lodge at 14:00
>
> Present:
>
> Olan Ajayi (OA) Head of Quality
>
> David Gayler (DG) HR Manager
>
> Catherine Parris (CP) Physiotherapist
>
> DG introduced the meeting and informed CP this was an informal management meeting and followed on from OA's previous meeting with her.
>
> OA asked CP if she had a recording device
>
> CP said she didn't but did have her phone which could record - is that what was meant?
>
> OA said do you have a Dictaphone
>
> CP said she didn't think so
>
> DG said so you haven't got a Dictaphone
>
> CP said actually yes I have got one I think it's in my bag or my car
>
> OA showed CP a copy of a picture of a Dictaphone that clearly shows paused at 43 minutes.
>
> CP said she wasn't recording anything at the time but uses the device to record patient notes prior to writing them up. CP then said she felt ambushed and did not wish to continue with the meeting, she stood up to leave.
>
> DG asked her to remain seated and said that there were only a few other questions. CP remained standing.
>
> OA asked CP why she was apparently recording their previous meeting
>
> CP said she wasn't
>
> DG asked if she had the Dictaphone with her and if she could show there was no recording form [sic] the meeting.

> CP said she thought she might have the Dictaphone in her car and said again she wanted to leave to go to the toilet.
>
> It was agreed she could leave and come back afterwards CP left the room at 14:02 and did not return until 14:26
>
> CP came back into the room and asked why pictures of the Dictaphone had been taken.
>
> OA said he saw it on the chair and wondered why it was in the room CP said it was not illegal to record conversations but hadn't don't [sic] so in this case.
>
> DG corrected CP and said that while it was not illegal to record conversations between private individuals it was illegal to then play them to a third part [sic] with out the express agreement of the individuals - however this was a work situation and there was an issue of trust and confidence being broken.
>
> CP then said that OA was bullying and harassing her.
>
> DG said the meeting she [sic] stop there and CP should leave.
>
> CP said I suppose I'm suspended now and should leave.
>
> DG said yes she would be suspended with immediate effect and should leave.
>
> DG said he would write to CP with the details.
>
> The meeting ended at 14:32"

17. It is clear that this meeting took place on 15 September (and not 16 September) 2016, because Ms Parris referred to it in an email which she sent at 11.19 on 16 September 2016. In that email, she said "I think I have been suspended by David, but that was not clearly indicated as I left the room incredibly upset so I am not sure where I stand. I felt I was ambushed in a meeting by the HR director and Ajayi". Further, in her first witness statement in the present proceedings dated 5 March 2019, she states at §§14-17:

> "14. The next day on 15/09/2016, I was asked, at approximately 13:40hrs, by the Deputy Home Manager Jisha Paulose, to attend a meeting with Mr Ajayi at 14:00hrs in a meeting room at Beechlodge care home. This was an unscheduled meeting. When I went into the meeting, I was surprised to see a participant who was not introduced to me. This person I subsequently found out was the Human Resources Manager, David Gayler. He was sat next to Mr Ajayi and he asked me to sit down telling me that this was an "informal management meeting". I had no idea what the meeting was about, but it was apparent that Mr Ajayi was running this meeting. In a Subject Access Request disclosure in 1/09/2017, I found out that he was the chair of the meeting and

> he was following an outline provided to him by Mr Gayler. I refer to an exhibit of this outline marked as "CMP1" page 22.
>
> 15. Mr Ajayi briefly showed me a photograph of a Dictaphone on an A4 paper sheet, but quickly withdrew it before I had a chance to study it. I was asked by Mr Ajayi if the Dictaphone that was shown in photograph belonged to me and if I had recorded the conversation of my meeting with him the previous day. A copy of the photograph was subsequently provided to me by SHC and I refer to a copy that is annexed to the exhibit bundle of Mr Ajayi's statement marked as "OA1" page 10. I confirm that this is a true copy provided to me by SHC as their evidence for my disciplinary hearing which is alongside Mr Ajayi's unsigned and undated statement (to go with the image) and I refer to what is exhibited by him and marked as "OA1" page 4.
>
> 16. I was a bit taken aback and surprised by the line of questioning and I was unsure if it was my Dictaphone as the photograph was shown to me very quickly, but I acknowledged that I did have a Dictaphone. I was not sure what the meeting was about, and I was guarded. I said something like I felt I had been ambushed and I did not want to continue with the meeting. I was not sure where the meeting was going and I asked if was being accused of something, because if so, I was not going to remain without a companion present. I had not recorded the meeting that I had with Mr Ajayi, and I told him and David Gayler that I had not recorded the meeting. I was feeling very uncomfortable and so I excused myself and said I had to have a comfort break. I then left the meeting, and on my return, I asked Mr Ajayi "when the photograph was taken". Mr Ajayi was a bit evasive about this and started to say that he found the dictaphone in my bag but was immediately corrected by David Gayler and he then said that "he saw it on the chair and wondered why it was in the room".
>
> 17. I was finding the meeting distressing and said to Mr Ajayi something like "You do not know what you have done to me but I will go now". Olan's manner was angry, he was leaning forward on the desk, his hands clenched and shoulders tense. His eyebrows were raised and his eyes were wide open and staring. I decided to leave …"

18. The Defendants' pleaded case is that "On the basis of [Ms Parris'] answers and conduct, Mr Gayler decided that [she] was suspended pending investigation" (Defence, §23). If this happened at the meeting on 15 September 2016 that would accord with the "Notes from meeting with Catherine Parris" (said by the Defendants to have been prepared by Mr Gayler). However, those "Notes" do not accord with Ms Parris' email dated 16 September 2016, in which she wrote that her suspension "was not clearly indicated".

19. Ms Parris' pleaded case is that she was notified by letter dated 15 September 2016 that she had been suspended because she may have covertly recorded the meeting (POC, §23).

20. At 8.53am on 22 September 2016, Mr Gayler sent an email to Mr Ajayi as follows:

> "Hi Olan I would like to get the letter out today inviting Catherine to a Disciplinary next Tuesday. Please could you send me your statement from the meeting so that I can include it with our evidence?
>
> Many thanks
>
> David"

21. At 15.00 on 22 September 2016, Mr Ajayi sent an email in reply, stating "Please find attached my statement and the photograph I took of the digital recording device. If you need any further information please do not hesitate to contact me". On the face of it, that email had two attachments (marked "20160914_103036.jpg"" and "OA – 14.09.2016.doc"). The Defendants say these were the Photograph and the Statement.

22. Because of the way in which matters unfolded at the hearing before me, it is necessary to set out parts of the statements of case relating to the issue of publication:

(1) Ms Parris' case on publication is pleaded as follows in §18 of the POC:

> "On or about 15th September 2016, the First Defendant acting in the course of his employment wrote and published to David Gayler (Human Resources Manager) of the Corporate Defendants and various other employees and officers of the Corporate Defendants (and/or other entities trading as Sussex Health Care) whose names are at present unknown to the Claimant the following words … [the Statement is then set out in its entirety]"

(2) The Defence, which is dated 16 January 2018, pleads at §9 and §12:

> "9. As to paragraph 18:
>
> 9.1 It is admitted that the First Defendant wrote the words complained of set out in paragraph 18. The First Defendant does not recall precisely when he did so, although to the best of his recollection it was on 15 September 2016.
>
> 9.2 It is admitted that on the 22 September 2016 the First Defendant sent the words complained of to Mr David Gayler, the Human Resources Manager of the Corporate Defendants, by way of attachment to an email of the same date. It is averred that attached to the same email was the Photograph …

> 9.3 It is denied that the First Defendant published the words complained of to anyone else whomsoever, whether as pleaded in paragraph 18 or at all.
>
> …
>
> 12. The words were published on an occasion of qualified privilege."

(3) The Reply, which is dated 21 February 2018, pleads at §§8-10:

> "8. As to Paragraph 9.3, the First Defendant is put to proof that "he did not publish the words complained of to anyone else whether as pleaded in paragraph 18 [of the POC] or at all" in particular that he did not publish the words complained of to, inter alia, Dawn Goodes (the First Defendant's personal assistant) and/or Josephine Njie (Care Centre Manager) and Geanina Patru (Physiotherapist) including disclosing to the latter two the photograph.
>
> 9. Paragraph 12 is denied. It is averred that if the First Defendant had no honest belief in the words, he therefore had no duty to publish the words and therefore the occasion did not attract qualified privilege. The First Defendant was under no duty whether moral and/or social and/or otherwise, to make a defamatory attack on the Claimant nor was he furthering or protecting any legitimate interest by so doing. Mr Gayler and any other employees of the Corporate Defendants to whom the words or similar words were published had no interest, whether corresponding or otherwise, in knowing the content of the First Defendant's false and damaging publications.
>
> 10. Further or alternatively, in publishing the words complained of the First Defendant was actuated by malice …"

(4) The Defence pleads at §§24-26:

> "24. On 22 September 2016, Mr Gayler sent an email to the First Defendant informing him that he wished to invite the Claimant to a formal disciplinary meeting the following week. The email contained a specific request that the First Defendant provide a statement summarising what had happened in the meeting with the Claimant of 14 September "so that I can include it with our evidence"; in other words, for the sole purpose of use in disciplinary proceedings involving the Claimant.
>
> 25. The same day, the First Defendant replied by email attaching his statement ("the Statement") and the Photograph. It is the Statement in respect of which the First Defendant is now sued.

> 26. In the circumstances set out above, the words complained of were published in the context of a pre-existing relationship and in response to a specific request. The First Defendant was under a legal, social or moral duty to publish the words complained of and had a legitimate interest in doing so, and Mr Gayler was under a reciprocal duty to receive them and indeed had a common and corresponding interest in doing so. The words complained of were published on an occasion of qualified privilege."

(5) The Reply does not plead to §24 of the Defence, but pleads at §§21-22 as follows:

> "21. Paragraph 25 is admitted. It is averred that Mr Gayler took no steps to independently investigate the First Defendant's statement and no formal statement was taken from the Claimant, from Ms Medhurst or any other person than the First Defendant. Mr Gayler accepted without question the First Defendant's statement as being true.
>
> 22. Paragraph 26 is denied and Paragraph 9 above is repeated."

23. Mr Rushbrooke submitted that §24 of the Defence is specifically admitted by Ms Parris in §21 of the Reply. In fact, however, §24 of the Defence is not specifically answered in the Reply. Nevertheless, §25 of the Defence (which pleads that "The same day, [Mr Ajayi] replied by email attaching [the Statement] and the Photograph" and that "it is the Statement in respect of which [Mr Ajayi] is now sued") is admitted by §21 of the Reply. I consider that §21 of the Reply contains an express acceptance that the Statement was published by Mr Ajayi to Mr Gayler in response to the request contained in his email.

24. That admission does not conclusively resolve the question of whether it is part of Ms Parris' case that the Statement was also published by Mr Ajayi *to Mr Gayler* on some other occasion or occasions. It seems to me, however, that it is clear that the only publication admitted by the Defendants is that mentioned in §9.2 of the Defence (i.e. as an attachment to an email from Mr Ajayi to Mr Gayler dated 22 September 2016). It is also clear that §8 of the Reply expressly takes issue with the Defendants' case that Mr Ajayi did not publish the words complained of to anyone *other than Mr Gayler* (whether as pleaded in §18 of the POC or at all) but does not expressly take issue with the Defendants' case that the only occasion of publication by Mr Ajayi to Mr Gayler was by means of an attachment to Mr Ajayi's email dated 22 September 2016. Bearing in mind that Ms Parris' case is confined to publication by Mr Ajayi (for which she alleges his employer is vicariously liable) I can see real force in the contention that if she was advancing a case which relies upon some publication other than that admitted by the Defendants in the Defence, she could and should have made clear that she contends that there was or may have been further publication by Mr Ajayi not only *to persons other than Mr Gayler* but also (if that is indeed her case) *to Mr Gayler on some other occasion*. I say that notwithstanding the wording of §18 of the POC, which alleges publication "[o]n or about 15th September 2016". That is explicable on the basis that at the time when the POC was pleaded Ms Parris had no knowledge of precisely what was occurring when she was not present on occasions in September 2016, whereas when

the Reply was pleaded Ms Parris was addressing a specific case as to those matters (pleaded in the Defence).

25. The Defendants further rely upon the following evidence of Ms Parris in her amended second witness statement dated 17 November 2020, at §1:

> "… This is my own statement about my claim for damages made under the Defamation Act 2013 against the Defendants for malicious falsehood arising from a statement made by the First Defendant, Mr Olanrewaju Ajayi (Mr Ajayi). The statement was published by Mr Ajayi to his employers on the afternoon on Thursday 22/09/2016. Prior to the statement being published, Mr Ajayi also published two emails that were sent to SHC staff on the 19/09/2016 …"

26. The first statement of Ms Parris' husband, Richard Edward Henman, dated 5 November 2020 is to the same effect. It states as follows at §1:

> "I am the husband of [Ms Parris] and I am also her employment tribunal lay representative. I am a consultant engineer and I work from home. I provide this statement in my own words in support of Ms Parris' claim for damages made under the Defamation Act 2013 against the First Defendant, Mr Olanrewaju Ajayi (Mr Ajayi). The claim arises from a statement Mr Ajayi published to his employers on the afternoon of Thursday 22/09/2016 …"

27. On the face of it, this evidence confines Ms Parris' claim to such publication of the Statement as was made by Mr Ajayi on the afternoon of 22 September 2016. For the reasons explained above, I also consider that this is the overall tenor of her pleaded case.

28. In addition, in response to the submissions made by Ms Michalos at the hearing, the Defendants produced further evidence in the form of a fourth witness statement of Mr Ajayi and a third statement of Laura Jane Fehilly, each dated 9 December 2020.

29. In his fourth statement, Mr Ajayi states:

> "3 I was very surprised at the hearing on 4 December 2020 to hear that, even though the Claimant's case as set out in her evidence for the application is that the only publication of my statement which she is suing on in this action is the email sent by me to David Gayler on 22 September 2016 (to which my written statement was attached as a Word document), she is now suggesting that I might have shown a written statement to Mr Gayler at some time between my meeting with him on the morning of 15 September 2016 and my meeting with him and the Claimant at 2pm later that day, i.e. before Mr Gayler suspended her.
>
> 4 I can state categorically that this is not the case. As at 15 September 2016 I did not have a written statement of my meeting

> with the Claimant, and I only had the photograph I had taken of the Dictaphone. When I went to see Mr Gayler, there was no written statement of any kind which I could show him and as I had to go to another meeting immediately after seeing Mr Gayler, I would not have had the time to create a written statement between finishing my meeting with him and setting off with him to meet the Claimant at 2pm that day. It was only after our meeting with the Claimant on 15 September that Mr Gayler told me that I would have to prepare a written statement, which as far as I can recall I started to do later that day.
>
> 5 I can also categorically confirm that I did not send my statement to anyone else other than Mr Gayler. I understand that Laura Fehilly is making a further statement to confirm from her searches of SHC's systems that this is correct.
>
> 6 As for Mr Gayler's email on 22 September, when he refers to "your statement from the meeting", while I can't speak for Mr Gayler, I of course presumed he was referring to the statement he had asked me to write on 15 September, and I emailed it to him later that day. I note that the original electronic version of the Word document that was attached to my email of 22 September has been located by Ms Fehilly and that its file 'properties' show that it was created by Dawn Goodes on 22 September 2016. Dawn Goodes was my PA, and I did what I would normally do which is to jot down handwritten notes myself of the main points, which I would then hand to Dawn to convert into a Word document. I am therefore absolutely sure that there was no written version of the statement in existence before my meeting with Mr Gayler and the Claimant on 15 September 2016."

30. In her third statement, Ms Fehilly states:

> "6 I have located the email of 22 September 2016 in its original electronic form as stored on SHC's servers.
>
> 7 I attach, in printed out form, an exact copy of: 7.1 the email itself in the form in which it is stored on SHC's servers … 7.2 the Word file attached to it which constitutes the statement (entitled "OA - 14.09.16.doc") … and 7.3 screenshots of the 'properties' that are stored along with this version of the email and the Word file …
>
> 8 The properties for the Word file show that it was created on 22 September 2016 at 14:03 (according to the time clock on the computer on which the document was created).
>
> 9 I discovered this electronic copy of the email by manually searching through the documents we had gathered in response to the subject access requests which the Claimant had made of the

SHC group. These are stored together in one folder on our system. This email was included in that set of documents.

10 However, having noted that this email was sent from the First Defendant's Gmail account, to which I do not have direct access, on 9 December 2020 I also asked Jason Bury, SHC's IT Technical Manager, to undertake searches on SHC's servers for any emails sent from the First Defendant's Gmail account to any SHC email address in the period 1 September to 30 September 2016 inclusive, and also asked him to search for emails sent from the First Defendant's SHC account in that period. This former search (emails from his Gmail account to SHC addresses) produced a list of 289 items (including the 22 September email), and the latter search (emails sent from his SHC account) generated 44. I have manually searched through all of these. I can confirm that other than the email of 22 September to Mr Gayler, I have not seen any email containing or attaching any kind of statement relating to the allegations made by the First Defendant which are complained of in these proceedings.

11 I should add, as an aside, that the fact that there are more emails sent from the First Defendant's personal email account than his work account is not unusual – many employees, including the Claimant, used personal email accounts extensively.

12 More generally, as a result of various Data Subject Access Requests made by the Claimant from about August 2016 onwards, exhaustive searches were made of SHC's electronic and manual records. My predecessor, Olive Jones, organised this for the SHC group together with Brethertons, our lawyers at the time who assisted us in undertaking this exercise. These searches were made not only of SHC's computer and email systems, but also of all paper records. Following one court hearing, an order was made (which I understand to be in the bundle for the recent hearing) requiring SHC to undertake even more searches, including for documents containing any of the words Catherine, Parris, and CP.

13 I attach … a copy of the response of Donna Bates to the Part 18 request made by the Claimant in the data protection proceedings. Donna was the IT manager who did the searches at the time. This document demonstrates the extent of the searches she carried out, including going into individual care homes to do searches on local machines.

14 As a result of all of this, I understand from Brethertons that the Claimant was provided with many thousands of documents, and also received 10 lever arch files of hard copy documents.

> 15 I am confident, bearing in mind the extent of those searches and the searches I have now done, that there does not exist anywhere on SHC's servers or local computers at individual care homes any other email or document dated prior to the start of the disciplinary proceedings involving the Claimant, in which the First Defendant's allegations concerning the Claimant are contained. If any such document existed, it would have been located by now. It is utterly fanciful to suggest that the First Defendant sent the statement to anyone at SHC other than Mr Gayler."

31. By letter dated 17 December 2020, Ms Parris' solicitors objected to the Defendants' attempt to adduce this further evidence, following the conclusion of the hearing. They contended that the date and manner of publication of the Statement had always been in issue, and that none of Ms Michalos' submissions represented a departure from Ms Parris' case (in particular, as pleaded in the POC at §18). They also pointed out that Mr Ajayi's fourth witness statement was produced 4 years after the events in question, and that the level of assurance and amount of detail which it contains are inconsistent with, and fall to be contrasted with, the Defendants' pleaded case and Mr Ajayi's earlier witness statements, the tenor of which is that Mr Ajayi has no precise recollection of when and how he prepared the Statement. They made the point that disclosure has not yet taken place in these proceedings, and said that all Mr Ajayi's new points were matters for cross-examination, especially in light of the following findings of District Judge Henry in a judgment dated 15 February 2019 on the trial of Ms Parris' application for an order under section 7(9) of the Data Protection Act 1988, that the Defendants comply with subject access requests made by her between August and November 2016, at §§24-27:

> "Mr Ajayi's evidence resulted in my forming a view of the Defendants' organisation that, from a data protection point of view, was chaotic. The written policies were not enforced. The IT system was basic and not controlled by anybody. Each home had a standalone computer. The disclosure that Mr Gayler did give, which was after the disciplinary hearing, did not include his briefing note … I find that it was, in effect, the investigation report, albeit a very poor one, and should have been disclosed and it is an example of the inadequate response of the Defendants.
>
> …
>
> The Defendants' response to the SARs request this is Mr Gayler's response was to send three packs of copy documents, which appear to have been randomly put together, with no index … No one it carried out a thorough search for the Claimant's personal data … The picture of disclosure that I got from Mr Ajayi, albeit that I accept that he was not responsible for the search, was chaotic and piecemeal and it is clear, as Ms McMahon said on behalf of the Claimant, that the Defendants had motivation not to comply …

> … The Defendants had a duty to preserve the Claimant's personal data. Mr Ajayi admitted that he deleted all the data on his laptop and his work phone was also given back in a vanilla state, i.e. no data was retrievable before he left the Defendant's employment in 2018. He said he thought his laptop was backed up. I find it was not and he should have known it was not. I found him to be somewhat evasive and on almost all points relating to the data that he might have known about and I would say that his evidence was given with a view to protecting himself, which is perhaps not surprising given the other proceedings."

32. With regard to the third witness statement of Ms Fehilly, Ms Parris' solicitors objected that they had not been able to check the original documents, for example to verify the file and attachment properties of the email from Mr Ajayi to Mr Gayler dated 22 September 2016; that there had been no disclosure of documents which would enable the original authorship of the Statement to be determined (including any hand written notes from Mr Ajayi to Dawn Goodes); and that the fact that a particular Word document was created by a particular individual on a particular date does not establish that the contents of that document were not created (and, if created, published) by another person on another date.

33. District Judge Henry's reference to it being clear that "the Defendants had motivation not to comply" is based on the rejection of Mr Ajayi's evidence that "on the whole" he and Ms Parris "got on" and the "impression that Mr Ajayi and [Ms Parris] did not get on".

34. That gains some support from other evidence in the hearing papers. The witness statement of Geanina Patru dated 16 August 2018 (which includes the evidence that Mr Ajayi had told Ms Patru that "he had found the device in Catherine's bag at the meeting") states at §5: "I was aware that from time to time Catherine and Olan did not see eye to eye".

35. As set out above, I consider that the evidence of Ms Parris and her husband accords with her case being confined to reliance on the publication of the Statement which was made by Mr Ajayi on 22 September 2016. That is in keeping with her pleaded case, which began in the POC by alleging publication "on or about 15 September", but which went on in the Reply to take no express issue with the Defendants' case that publication only took place on 22 September 2016. At the same time, Ms Parris has been consistent in not accepting the Defendants' denial "that [Mr Ajayi] published the words complained of to anyone else whomsoever, whether as pleaded in [§18 of the POC] or at all" (see Defence, §9.3) and, in particular, has put in issue whether Mr Ajayi published the words complained of to Dawn Goodes (see Reply, §8). To my mind, Mr Ajayi's fourth witness statement makes clear that, contrary to the Defendants' pleaded case, and by his own recent admission, the words complained of *were* published by Mr Ajayi to Dawn Goodes.

36. In these circumstances, on the one hand I can understand why Mr Rushbrooke expressed surprise at Ms Michalos' submissions to the effect that Ms Parris was or might be relying on publication by Mr Ajayi which took place *before* 22 September 2016. On the other hand, I consider that (a) there is clearly a contradiction between the Defendants' pleaded case and the evidence contained in Mr Ajayi's fourth witness

statement, and (b) there is substance in the points made by Ms Parris' solicitors in their letter of 17 December 2020.

37. Those points seem to me to have more substance with regard to Mr Ajayi's latest evidence than with regard to the latest evidence of Ms Fehilly. However, I consider that even with regard to Ms Fehilly's evidence there are issues which are not suitable for summary determination: Ms Fehilly's witness statement focuses on one aspect of the "properties" relating to the Word file, which show that it was created at 14.03; but those "properties" also show that it was last modified at 14.48; and there is no explanation as to why (as appears may be the case) it took 45 minutes to finalise a document containing 369 words; and nor is there any disclosure showing how the document reached Mr Ajayi.

38. Following disclosure and exploration at trial, these points may lead nowhere; or they may support or make good the Defendants' case. However, I cannot rule out the real prospect that they will contradict or undermine Mr Ajayi's account and the points extracted by Ms Fehilly, especially in light of the findings of District Judge Henry which, while made in separate proceedings, serve to underline the danger of relying on written materials alone.

39. For these reasons, which include an acceptance that it cannot be treated as conclusive, I do not consider that it is unfair to Ms Parris for me to have regard to this new evidence.

40. Later on 22 September 2016, Mr Gayler sent Ms Parris a letter stating:

> "I am writing to inform you that an allegation regarding your conduct has been brought to our attention, specifically relating to the covert recording of a meeting between you and your Manager, Olan Ajayi.
>
> Such actions indicate a severe break down in the mutual trust between employee and employer.
>
> As the organisation deems this behaviour as gross misconduct, Sussex Health Care is taking disciplinary action against you. You are therefore required to attend a disciplinary hearing on Tuesday 27 September at 15:00 at Tylden House. The meeting will be conducted by Pauline McCann, Area Manager and Pauline will be supported by Paul Macken, Area Manager. Emma Lees, HR Advisor will also be in attendance to take notes throughout the meeting. This gives you reasonable time to prepare your case.
>
> A full investigation of the facts will take place against the following allegation:
>
> That during a meeting with your Manager, Olan Ajayi, on Wednesday 13 September, you used a Dictaphone to covertly record the conversation.

> In the Organisation's view, this allegation constitutes gross misconduct and could lead to your dismissal.
>
> During the hearing we may refer to the following documents:
>
> • Minutes of the meeting held at Beech Lodge on Friday 16 September 2016 (1)
>
> • Photograph of Dictaphone showing paused state at 43 minutes 17 seconds
>
> • Disciplinary Procedure
>
> • General Regulations Covering All Staff (ref section 15.1)
>
> • Statement from Olan Ajayi
>
> • Letter from David Gayler dated 21 September
>
> • Email from David Gayler dated 22 September
>
> • Letter from Catherine Parris dated Sunday 19 July 2016"

41. Ms Parris admits receiving that letter by §24 of the POC, which further pleads:

> "25. On 28th October 2016, following a disciplinary hearing chaired by Paul Macken (Area Manager) and Co-Chaired by Ms Chris Trott (Area Manager) of [SHCC and SHCR], [SHCC] dismissed the Claimant on the grounds of gross misconduct with effect from 2nd November 2016 with 12 weeks' notice.
>
> 26. On 8th March 2017, the Claimant's appeal from the disciplinary hearing was heard by Andrea Potter (HR Advisor) and James Greene (Area Manager) of [SHCC and SHCR] and her appeal was refused."

42. On 31 March 2017, Ms Parris brought the Employment Tribunal Proceedings. The financial aspects of those proceedings are summarised in the first witness statement of Ms Warnock of the Defendants' solicitors (part of §18 of which is disputed in the first witness statement of Mr Henman, dated 5 November 2020, at §19) dated 18 September 2020, as follows:

> "17 This document records that the Claimant was claiming £12,214.50 in respect of the basic award …As for the compensatory award, the Claimant claimed £45,722.99 for loss of earnings for the period of 25 January 2017 to 11 September 2020 (albeit the document records an incorrect subtotal of £36,796.49) … She also sought £350 for "loss of statutory rights". Finally, she sought an uplift of 25% pursuant to section 207A Trade Union and Labour Relations (Consolidation) Act 1992 for failure to follow the ACAS code. Added together, these amounts total £57,591.24. The schedule acknowledges that the

> applicable cap is £50,045.16. The relevant section ends with the words: "Total loss of Earnings (Compensatory Award) £50,045.16" …
>
> 18 Ahead of the Final Hearing, by way of an email from their then solicitors Brethertons LLP to the Employment Tribunal dated 28 January 2019, the Respondents conceded liability on an open basis for both wrongful dismissal and unfair dismissal …
>
> 19 On 12 August 2019, Mills & Reeve LLP wrote on behalf of the Respondents to the Claimant's representative Mr Henman on an open basis making an offer of £70,000 in full and final settlement of the Claimant's Employment Tribunal claim … Of that sum, the Respondents offered £12,214.50 in respect of the basic award and £49,483.20 in respect of the compensatory award.
>
> 20 The Final Hearing took place on 12-13 September 2019 at London South Employment Tribunal before Employment Judge Ferguson.
>
> 21 The judgment was as follows: "1. The Claimant was unfairly dismissed and is awarded a basic award of £12,214.50 and a compensatory award of £50,045.16. 2. The Claimant was wrongfully dismissed and is awarded £90.24 in damages. 3. The Respondent made unauthorised deductions from the Claimant's wages and is ordered to pay the Claimant the gross sum of £237.90. 4. The application for a reinstatement or re-engagement order is refused. 5. The complaint of failure to provide a written statement of reasons for dismissal fails and is dismissed." …"

APPROACH TO THE ARGUMENTS

43. Mr Rushbrooke argued the points in the following order: (1) consent/the application of *Friend* to the present case, concluding with requests for (a) permission to amend the Defence to plead this defence and (b) an Order that the claim be struck out as disclosing no reasonable grounds for bringing the claim, or that summary judgment be granted; (2) the *Johnson* exclusion principle and its application to the present case, concluding with the like requests, and (3) the claim for special damages based on failure to provide a reference (in respect of which summary judgment was sought). Ms Michalos presented her arguments in the following order: (1) *Henderson* abuse of process; (2) the Defendants' application for permission to amend; and (3) the merits of the 3 points argued by Mr Rushbrooke, which she addressed in the order in which he presented them.

44. Whichever way one approaches matters, it seems to me that, having regard to the overriding objective, the merits of the points which are sought to be introduced by amendment need to be considered. I shall deal with the issues in the order which follows.

THE RELEVANT LEGAL PRINCIPLES

45. There was no dispute between the parties as to the legal principles applicable to the Defendants' application. With regard to the principles governing amendments, Ms Michalos relied on the frequently cited summary provided by Mrs Justice Carr DBE in *Quah v Goldman Sachs International* [2015] EWHC 759 at [38]:

> "a) Whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
>
> b) Where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
>
> c) A very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
>
> d) Lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
>
> e) Gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;
>
> f) It is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;
>
> e) A much stricter view is taken nowadays of non-compliance with the CPR and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in

> order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

46. Some important factors which fall to be taken into account in this context were identified by Hamblen J (as he then was) in *Brown v Innovatorone Plc* [2011] EWHC 3221 as follows:

> "(1) the history as regards the amendment and the explanation as to why it is being made late;
>
> (2) the prejudice which will be caused to the applicant if the amendment is refused;
>
> (3) the prejudice which will be caused to the resisting party if the amendment is allowed;
>
> (4) whether the text of the amendment is satisfactory in terms of clarity and particularity."

47. The position was summarised as follows in *Nesbit Law Group LLP v Acasta European Insurance Co Ltd* [2018] EWCA Civ 268 by Sir Geoffrey Vos, Chancellor of the High Court (as he then was), at [41]:

> "In essence, the court must, taking account of the overriding objective, balance the injustice to the party seeking to amend if it is refused permission, against the need for finality in litigation and the injustice to the other parties and other litigants, if the amendment is permitted. There is a heavy burden on the party seeking a late amendment to justify the lateness of the application and to show the strength of the new case and why justice requires him to be able to pursue it. These principles apply with even greater rigour to an amendment made after the trial and in the course of an appeal."

48. For the rest, I can take the principles from my judgment in *Gerrard v Eurasian Natural Resources Corporation Ltd & Anor* [2020] EWHC 3241 (QB) at [17]-[24] as follows.

49. A court may strike out a statement of case if it "discloses no reasonable grounds for bringing or defending the claim" (CPR 3.4(2)(a)). An example of such a statement of case is one "which contain[s] a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant" (CPR PD 3A, para 1.4(3)).

50. There is an overlap between the summary judgment and strike out jurisdictions to the extent that the court may treat an application under CPR 3.4(2)(a) as if it was an application for summary judgment: *Moroney v Anglo-European College of Chiropractice* [2009] EWCA Civ 1560 (at [24]). The applications here are put in the alternative anyway.

51. In *Easyair v Opal* [2009] EWHC 339 (Ch) at [15], Lewison J set out the principles applicable to the equivalent test in summary judgment, as follows:

> "i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success …
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable …
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial".
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents.
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial.
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to

> a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction".

52. The test to be applied on an opposed application to amend is the same as the test to be applied to an application for summary judgment (i.e. whether the proposed new claim has a real prospect of success): *SPR North Ltd v Swiss Post International (UK) Ltd* [2019] EWHC 2004 (Ch) at [5].

53. Further, given that the purpose of the statement of truth is to verify an amendment, a party will not be permitted to raise by amendment an allegation which is unsupported by any evidence and is therefore pure speculation or invention: *Clarke v Marlborough Fine Art (London) Ltd* [2002] EWHC 11.

54. Warby J provided another summary of the principles to be applied on an application to strike out in *Duchess of Sussex v Associated Newspapers Ltd* [2020] EMLR 21 at [33]:

> "(1) Particulars of Claim must include "a concise statement of the facts on which the claimant relies", and "such other matters as may be set out in a Practice Direction": CPR r.16.4(1)(a) and (e). The facts alleged must be sufficient, in the sense that, if proved, they would establish a recognised cause of action, and relevant.
>
> (2) An application under CPR r.3.4(2)(a) calls for analysis of the statement of case, without reference to evidence. The primary facts alleged are assumed to be true. The Court should not be deterred from deciding a point of law; if it has all the necessary materials it should "grasp the nettle": *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725, but it should not strike out under this sub-rule unless it is "certain" that the statement of case, or the part under attack discloses no reasonable grounds of claim: *Richards (t/a Colin Richards & Co) v Hughes* [2004] EWCA Civ 266; [2004] P.N.L.R. 35 [22]. Even then, the Court has a discretion; it should consider whether the defect might be cured by amendment; if so, it may refrain from striking out and give an opportunity to make such an amendment.
>
> (3) Rule 3.4(2)(b) is broad in scope, and evidence is in principle admissible. The wording of the rule makes clear that the governing principle is that a statement of case must not be "likely to obstruct the just disposal of the proceedings". Like all parts of the rules, that phrase must be interpreted and applied in the light of the overriding objective of dealing with a case "justly and at proportionate cost". The previous rules, the Rules of the Supreme Court, allowed the court to strike out all or part of a statement of case if it was "scandalous", a term which covered allegations of dishonesty or other wrongdoing that were irrelevant to the claim. The language is outmoded, but … the

> power to exclude such material remains. Allegations of that kind can easily be regarded as "likely to obstruct the just disposal" of proceedings."

55. At [34] in the same judgment, Warby J said:

> "In the context of r 3.4(2)(b), and more generally, it is necessary to bear in mind the Court's duty actively to manage cases to achieve the overriding objective of deciding them justly and at proportionate cost; as the Court of Appeal recognised over 30 years ago, "public policy and the interest of the parties require that the trial should be kept strictly to the issues necessary for the fair determination of the dispute between the parties": *Polly Peck v Trelford* [1986] Q.B. 1000, 1021 (O'Connor LJ). An aspect of the public policy referred to here is reflected in CPR r.1.1(2)(e): the overriding objective includes allotting a case "an appropriate share of the court's resources, while taking into account the need to allot resources to other cases"."

56. Further: "it is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact" (*Benyatov v Credit Suisse Securities (Europe)* [2020] EWHC 85 at [60(6)]).

THE PROPOSED AMENDMENTS

57. As set out above, the Defence is dated 16 January 2018. Some of the proposed amendments relate to the progress of the Employment Tribunal Proceedings since that date. Thus, permission is sought to amend §4.3 of the Defence to add the words "During the course of those proceedings the Employment Tribunal ruled (on the Respondent's admission) that the Claimant had been unfairly dismissed by her employer and awarded her compensation for that dismissal", and to add a new §11.7 in the following terms:

> "The Claimant has brought a claim in respect of, and been awarded compensation for, the circumstances of her dismissal in the Employment Tribunal, which has exclusive jurisdiction for claims for unfair dismissal and the resulting loss. The claim brought in these proceedings, as a claim relating to the dismissal and the loss suffered as a result, is barred by the principle in [*Johnson*] (hereafter "the *Johnson* exclusion principle")."

58. Further, permission is sought to amend §11.4 of the Defence (which pleads with regard to the words complained of in the Statement at §11.2 and §11.3 of the Defence respectively that "The words were published to a single person, Mr Gayler, who already knew the gravamen of the allegation and whose job it was to investigate that allegation and/or ensure that it was investigated" and "The sole publishee had formed his own independent view of the allegation by reference to the Photograph and his own meeting with the Claimant") by deleting three words and adding the words which are underlined below:

> "Disciplinary proceedings had been commenced were thereafter started specifically to investigate and consider the allegation to which the words complained of related, along with the Claimant's response to it. The Claimant participated fully in this process and the First Defendant played no further role in it whatsoever."

59. There are also some amendments which are sought to be made to §§41-43 of the Defence, a number of which replicate or are parasitic upon other more substantial amendments. Leaving aside some further, minor, amendments for which permission is also sought:

(1) In §41, the Defendants seek to add the following plea:

> "Alternatively, if the Claimant's claim is not barred in its entirety by the *Johnson* exclusion principle then her claim for loss as a result of her dismissal is barred by that principle. Alternatively, the Claimant has now been compensated for her dismissal in her Employment Tribunal claim and it is denied that she can seek compensation for the same loss in this claim and/or such claim is an abuse of process."

(2) In §42, the Defendants seek to add the following plea:

> "As the First Defendant (who is now pursuing a career in academia) and all of the managers involved in the Claimant's dismissal have left the Second and Third Defendants, and the Claimant has been successful in her unfair dismissal claim, it is denied that there is any reasonable prospect of any repetition of the words complained of, or any reasonable ground for the Claimant to fear the same."

(3) In §43.4, the Defendants seek to add the words which are underlined below:

> "Paragraph 29.4 is not a proper particular of loss or damage. Insofar as it purports to complain of a separate defamatory publication of different words, it is denied that this is a permissible matter to raise in support of a claim for damages in respect of the publication of the words complained of. Insofar as it purports to make any case in support of an allegation of malice different to that pleaded in the particulars of malice the Defendants decline to plead to it pending clarification or amendment. In any event, it is denied that the facts alleged provide any support for such a case."

(4) In §43.5, the Defendants seek to delete some words and add others as set out below:

> "Paragraph 29.5 is denied, save that it is admitted that the Claimant was provided with a reference confirming the fact and duration of her employment. This is the Second Defendant's policy as regards all references, as was expressly stated in the

> Claimant's reference itself and so would have been clear to any prospective employer. As such, publication of the words complained of had no effect on the Claimant's reference. The First Defendant had no involvement in the Claimant's reference and it is in any event denied not admitted that the Claimant was handicapped in the labour market as a result of the reference. The Claimant successfully obtained and accepted an offer of employment, and would never have obtained any other form of reference from the Defendants regardless of the words complained of. Further, the Claimant has now been compensated in respect of the damage caused to her on the labour market by the circumstances of her dismissal, and it is denied that she can claim for the same loss in this claim."

(5) In §43.6, the Defendants seek to add the words which are underlined below:

> "No admissions are made in relation to paragraphs 29.6 or 29.7. Paragraph 29.6 relates to an alleged consequence of the Claimant's dismissal, any claim in respect of which is barred by the Johnson exclusion principle; and in any event, the Claimant has now been compensated for that dismissal and it is denied that she can seek compensation for the same loss in this claim."

(6) Amendments to similar effect are sought to be made to §§44-45A under the heading "Special Damages".

60. The most substantive proposed amendments are contained under the headings "Consent" and "Abuse of process" at §§11A-11H and §§46A-46B respectively as follows:

> "11A. The Defendants have defences of consent and/or leave and licence to the Claimant's claim.
>
> 11B. The Claimant's employment contract for her position as Lead Physiotherapist ("the Contract"), which she agreed and signed on 11 March 2005, provided that the employer offered employment "on the terms and conditions set out in this statement", and that the Claimant as the employee "understands the terms and conditions and accepts the offer". Pursuant to ss.(1) and 3(1)(aa) of the Employment Rights Act 1996 (as amended), the contract was accompanied by a statement giving particulars of the Claimant's employment.
>
> 11C. Paragraph 23(d) of the statement provided that "You are required to read the staff manual containing policies, procedures and guidelines on commencement of your employment and at regular intervals thereafter as may be required to ensure you remain familiar with the Employer's policies, procedures and guidelines."

11D. The applicable "Disciplinary Procedure" set out in the staff manual at the time of the publication of the words complained of ("the Procedure") made clear that the investigation of disciplinary matters would include taking information, including written statements, from witnesses. It included that "The manager will notify the employee in writing of the allegations against him or her and will invite the employee to a disciplinary hearing to discuss the matter. The manager will provide sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case. This will include the provision of copies of written evidence, including witness statements where appropriate… At the hearing, the employee will be allowed to set out their case and answer any allegations and will also be given a reasonable opportunity to ask questions, present evidence, call relevant witnesses and raise points about any information provided by witnesses."

11E. Further, and irrespective of the content of the Contract and the Procedure, the Claimant knew and accepted that allegations of misconduct against her (or any other employee) would be investigated, and that such investigations would involve the publication of statements by witnesses about such alleged misconduct (such publications being a necessary part of any fair and proper investigation). In further support of this contention the Defendants will rely upon:

(a) The 'Acas Code of Practice on disciplinary and grievance procedures', issued under section 199 of the Trade Union and Labour Relations (Consolidation) Act 1992, which provides minimum standards for employers to follow, and provides that:

(i) "Employers should carry out any necessary investigations, to establish the facts of the case."

(ii) At paragraph 5: "It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases … the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing."

(iii) At paragraph 9: "If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification."

(b) Acas' Guidance on 'Conducting workplace investigations', which includes:

(i) At page 15 "When individuals might be able to provide information relevant to the investigation, an investigator may interview them and/or ask them to provide a witness statement."

(ii) At page 27: "An investigator should provide a reasonable deadline for completion and ask the witness to answer specific questions or to include in their statement: • their name and, where applicable, job title • the date, place and time of any relevant issues • what they saw, heard or know • the reason why they were able to see, hear or know about the issues • the date and time of statement • their signature"

11F. In the circumstances, the Claimant consented to the provision by witnesses of written statements relating to allegations of misconduct in respect of her employment, made for the purposes of a disciplinary investigation and/or procedure.

11G. The words complained of were published by the First Defendant to Mr Gayler as part of a disciplinary investigation in the circumstances set out in paragraphs 13 to 25 below. In particular, the words were published upon Mr Gayler's express written request to the First Defendant that he provide a statement summarising what had happened in the meeting with the Claimant of 14 September "so that I can include it with our evidence"; in other words, for the sole purpose of use in disciplinary proceedings involving the Claimant.

11H. In the circumstances the Claimant had consented, and/or granted leave and licence, to the publication of the words complained of, in accordance with the principle established by the Court of Appeal in [*Friend*].

…

46A. The Claimant's claim fails to disclose reasonable grounds for bringing the claim and/or is an abuse of process: paragraphs 11.7 and 41 above are repeated.

46B. If, contrary to the Defendant's primary case, it is not the claim in its entirety but only the Claimant's claim for special damages that is barred by the Johnson exclusion principle, the remainder of the claim is an abuse of process under the principles set out in [*Jameel*] and falls to be struck out on that basis. Such remainder relates only to the publication of the words complained of to Mr Gayler during the disciplinary investigation, when he was already aware of the allegation and was under a duty to investigate it: paragraphs 13 to 25 above are repeated. There are no reasonable grounds for fearing repetition

> of the libel: the second sentence of paragraph 42 above is repeated. Any relief the Claimant might hope to obtain from such a claim would be out of all proportion to the resources necessary to try it, not least having regard to the very lengthy and wide-ranging plea of malice set out under paragraph 22."

61. Ms Michalos submitted that the Defendants' application for permission to amend has been made "very late": although a trial date has not yet been fixed, the application is made (a) over 3 years since the defence of leave and licence was first intimated in correspondence in May 2017, (b) 3 years after the proceedings were issued, and (c) 1 year and 9 months after the Defendants' previous application for summary judgment/strike out. Accordingly, permission to amend should be refused for the following reasons:

(1) The individual amendments have no real prospect of success and/or do not clear the summary judgment hurdle.

(2) The Defendants have failed to discharge the "very heavy burden" which lies on them to show the strength of the new case and why justice to them, Ms Parris and other court users requires them to be able to pursue it.

(3) There is no good explanation for the delay. The first witness statement of Simon Grant Pedley of the Defendants' solicitors dated 20 November 2020 offers only reasons for delay since the judgment of Employment Judge Ferguson dated 5 December 2019 was sent to the parties to the Employment Tribunal Proceedings on or about 14 February 2020 (following, according to Mr Pedley, determination of a reserved issue on costs). These reasons are inadequate (the substance is that between February 2020 and the date of issue on 21 September 2020 "we have been putting together this application with our clients and their counsel" (see §9)). There is no explanation at all as to why matters first raised in correspondence in May 2017 are now sought to be added by amendment over 3 years later, nor why this was not raised in the Defendants' previous application for summary judgment/strike out. (In this regard, in substance all that Mr Pedley states is that his firm was instructed by SHCC and SHCR "around May 2019 in place of Brethertons LLP" (§5) and that a stay of the present proceedings until after the determination of the Employment Tribunal Proceedings was sought and obtained "because of the various overlapping issues between the two claims" (see §§5-8)).

THE *HENDERSON* ABUSE ISSUE

Submissions

62. Ms Michalos began by pointing out that the defence of consent was first raised by the previous solicitors for "Sussex Healthcare Limited", Brethertons LLP, in a letter dated 26 May 2017, which was sent in response to Ms Parris' letter before claim dated 9 May 2016, in the following terms: "insofar as your client complains that the document(s) complained of were published within formal disciplinary proceedings, our client would be entitled to rely on a defence of consent pursuant to [*Friend*]".

63. However, the Defendants chose not to rely upon this contention in the Defence. Instead, after pleadings had closed, the Defendants issued an application seeking an order for

summary judgment and to strike out part of the POC, including part of §30 of the POC. This is the next matter relied upon by Ms Michalos under this head.

64. That application came before Master Davison on 18 March 2019. The application was dismissed for the reasons contained in a judgment dated 20 March 2019. Master Davidson held (at §§12-16) that, contrary to the Defendants' submissions, Ms Parris' case that Mr Ajayi had lied and thus was actuated by malice had a real prospect of success. Master Davidson then turned (at §18) to the Defendants' "fall-back position" that Ms Parris' losses were caused by failings in the disciplinary process, which were either unforeseeable or which broke the chain of causation, and held as follows at §19:

> "There is nothing in this point. The disciplinary proceedings were the direct result of the allegations levelled at the claimant by the first defendant. The outcome was entirely foreseeable and no principle of the law of causation mandates that that outcome was not attributable to those allegations. Subject to the rule against double recovery, the claimant's losses, as pleaded, seem to me to be prima facie recoverable. At any rate, this is not a strike out point and I dismiss that part of the defendants' application as well."

65. Ms Michalos relied on well-known cases concerning the principle to be derived from *Henderson v Henderson* (1843) 3 Hare 100:

(1) In *Johnson v Gore-Wood & Co* [2002] 2 AC 1, Lord Bingham said at p31:

> "… *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole."

(2) In *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)* [2014] AC 160, Lord Sumption said at [24]:

> "The principle in *Henderson v Henderson* has always been thought to be directed against the abuse of process involved in seeking to raise in subsequent litigation points which could and should have been raised before."

(3) In *Koza Ltd v Koza Altin Isletmeleri AS* [2020] EWCA Civ 1018, Popplewell LJ (with whom Asplin LJ agreed) said at [42] (emphasis added):

> "… Many interlocutory hearings acutely engage the court's duty to ensure efficient case management and the public interest in the best use of court resources. Therefore the application of the principles will often mean that if a point is open to a party on an interlocutory application and is not pursued, then the applicant

> cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief, absent a significant and material change of circumstances or his becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing. This is not a departure from the principle in *Johnson v Gore Wood* that it is not sufficient to establish that a point could have been taken on an earlier occasion, but a recognition that where it should have been taken then, a significant change of circumstances or new facts will be required if raising it on a subsequent application is not to be abusive. The dictum in *Woodhouse v Consignia* [2002] EWCA Civ 275 that the principle should be applied less strictly in interlocutory cases is best understood as a recognition that because interlocutory decisions may involve less use of court time and expense to the parties, and a lower risk of prejudice from irreconcilable judgments, than final hearings, it may sometimes be harder for a respondent in an interlocutory hearing to persuade the court that the raising of the point in a subsequent application is abusive as offending the public interest in finality in litigation and efficient use of court resources, and fairness to the respondent in protecting it from vexation and harassment. The court will also have its own interest in interlocutory orders made to ensure efficient preparations for an orderly trial irrespective of the past conduct of one of the parties, which may justify revisiting a procedural issue one party ought to have raised on an earlier occasion. There is, however, no general principle that the applicant in interlocutory hearings is entitled to greater indulgence; nor is there a different test to be applied to interlocutory hearings."

66. The decision in *Woodhouse v Consignia* [2002] EWCA Civ 275 was summarised as follows by Nugee J (as he then was) in *Holyoake v Candy* [2016] EWHC 3065 Ch at [14] as part of what Popplewell LJ described as a "helpful summary" of those cases in which there is said to be a difference of approach concerning interlocutory decisions:

> "In *Woodhouse v Consignia plc* [2002] EWCA Civ 275, a claimant who had unsuccessfully sought to lift a stay applied to do so a second time, and both the district judge and judge held that he could not have a second bite at the cherry. The Court of Appeal allowed an appeal. Brooke LJ, giving the judgment of the Court, said that there was a public interest in discouraging a party from making a subsequent application for the same relief based on material which was not, but could have been, deployed in the first application; that one of the reasons was the need to protect respondents to successive applications from oppression [55]; but that although the policy that underpins the rule in *Henderson v Henderson* had relevance as regards successive pre-trial applications for the same relief:

> "it should be applied less strictly than in relation to a final decision of the court, at any rate where the earlier pre-trial application has been dismissed."[56]
>
> He then gave an example where an application for summary judgment under CPR Pt 24 had been dismissed, but a second application was made based on evidence that, although available at the time of the first application, was not then deployed through incompetence, but which was conclusive; the second application ought to be allowed to proceed [57]. The district judge and judge had therefore been wrong to regard the fact that the second application was a second bite at the cherry as decisive [58], and the Court of Appeal proceeded to consider the second application on its merits, regarding the fact that it was a second bite at the cherry as an important factor [61], but in the event decided that it would be a disproportionate penalty for the claimant to lose his right to damages due to a pardonable mistake by his solicitor, and lifted the stay [63]."

67. One point that I would add to the above distillation of the authorities is that in *Johnson v Gore-Wood & Co* [2002] 2 AC 1, Lord Millett explained at p59 that the *Henderson* principle has the same purpose as cause of action and issue estoppel, namely to bring finality to litigation and avoid subjecting a defendant unnecessarily to oppression, but that nevertheless there is an important difference:

> "It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is *prima facie* a denial of the citizen's right of access to the court conferred by the common law and guaranteed by article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953). While, therefore, the doctrine of *res judicata* in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression."

68. Ms Michalos submitted that the public interest in discouraging a party who makes an unsuccessful interlocutory application from making a subsequent application for the same relief based on material which was not but could have been deployed in the first application is engaged in the present case. There is no significant change of circumstances or new fact which warrants the Defendants being given latitude to have another try on different points of law - all of which were available to be submitted previously. Accordingly, the Defendants' present application falls squarely within the principle that it is abusive for a party who makes an unsuccessful interlocutory application to make a subsequent application for the same relief based on matters which could have been deployed in the first application.

69. Mr Rushbrooke submitted that the *Henderson* principle was not applicable because the arguments which are being run on this occasion are not those which were run before.

Discussion and conclusion

70. In my view, the principle that "a party should not be twice vexed in the same matter" is not restricted to circumstances where the same issue is sought to be litigated twice but extends to those where, although the issue which is now sought to be litigated is not one which has been litigated previously, nevertheless it is one which "could and should" have been litigated on an earlier occasion. Moreover, in the absence of either (a) a significant and material change of circumstances or (b) new facts coming to light which the applicant did not know and could not reasonably have discovered at the time of the first hearing, that principle will often have the effect that if a point was open to a party on an interlocutory application and was not pursued, that party will be prevented from relying on the point at a subsequent interlocutory hearing in relation to the same or similar relief.

71. In the present case, those factors support the submissions of Ms Michalos, and militate against allowing the Defendants to pursue their application seeking relief by way of summary judgment or striking out. The points which are now sought to be run are not based on any material change of circumstances or the emergence of new facts, but instead appear to derive from a change of legal representation on behalf of the Defendants subsequent to the initial pleading of the Defence and the judgment of Master Davidson.

72. At the same time, in order otherwise to be in a position to run their new arguments by obtaining permission to amend their Defence to plead their new case the Defendants will need to satisfy the Court that they ought to be granted that permission; in order to succeed on their summary judgment/strike out application they will need to satisfy the Court that Ms Parris has no answer to that new case which has any real prospect of success and that there is no other compelling reason why it should be disposed of at a trial; and in order to succeed on their damages arguments they will need to satisfy the Court that the relevant claims constitute a *Jameel* abuse of process or have no real prospect of success.

73. Those considerations mean that, if the amendment application were permitted to go ahead, it would be unlikely to succeed unless the balance of injustice comes down in favour of permitting the Defendants' new case to be pleaded; and that, if the application seeking summary judgment/strike out is one which would succeed if it were permitted to go ahead, the Court is here concerned with a claim which properly ought not to be tried.

74. To prevent the Defendants from advancing such a new case at all would, in those circumstances, be hard to justify in reliance on the *Henderson* principle. Further, if that case ought properly to be allowed in by way of amendment, to then require it to go to trial in reliance on that principle when it ought otherwise properly to be disposed of summarily (a) would not accord with that aspect of the public interest which involves taking into account "the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole" and (b) might well inadequately recognise that "because interlocutory decisions may involve less use of court time and expense to the parties, and a lower risk of prejudice from irreconcilable

judgments, than final hearings, it may sometimes be harder for a respondent in an interlocutory hearing to persuade the court that the raising of the point in a subsequent application is abusive as offending the public interest in finality in litigation and efficient use of court resources, and fairness to the respondent in protecting it from vexation and harassment".

75. Balancing these rival considerations, it seems to me that it would not be right to refuse the Defendants' applications in reliance on the *Henderson* principle. That would, in my opinion, represent a disproportionate penalty for the Defendants, and would not be in the public interest, especially if and in so far as it resulted in permitting a claim or issues which is or are bound to fail to proceed to trial. In reaching that conclusion, I bear in mind that this litigation began in 2017, that the Defendants' applications were not issued until September 2020, and that although part of this delay may be attributable to awaiting the progress and outcome of other proceedings, it has, on the face of it, occasioned prejudice to Ms Parris. I also bear in mind that some prejudice at least can be compensated in costs.

THE ISSUE OF CONSENT

The decision in Friend

76. The facts of *Friend* are set out as follows in the leading judgment of Hirst LJ (with whom Millett and Brooke LJJ agreed):

> "Captain Friend had since April 1987 until his dismissal in March 1993 been employed by the CAA as a Flight Operations Inspector… a formal complaint was laid before the CAA's internal disciplinary panel … the panel recommended that the complaint should be dismissed … The panel's recommendations were rejected by the head of the Operating Standards Division … the fourth defendant in the second action. As a result Captain Friend was dismissed by letter dated 1 December 1992.
>
> Captain Friend next pursued an appeal under the CAA disciplinary procedure, and this was heard on 2 and 10 March 1993 and dismissed on 17 March 1993. He then presented a final internal appeal which was dismissed on 16 June 1993.
>
> …
>
> Prior to the disciplinary proceedings, a number of senior employees of the CAA, including the five defendants in the second action, had written memoranda, numbering twelve in all, and dated between 1 August 1990 and 8 April 1991, which were highly critical of Captain Friend. These formed the basis of those proceedings, together with two subsequent memoranda compiled in June and September 1992 subsequent to the institution of those proceedings, and also numerous other documents.

> On 29 September 1995, one month after the conclusion of the EAT proceedings, Captain Friend issued his two libel writs, complaining in each case of the publication of all fourteen memoranda referred to above.
>
> The limitation period having started on 30 September 1992, Captain Friend limited his plea to the re-publication of the memoranda on and after 1 October 1992 to the respective members of the various tribunals (i.e. on the fourth day of the original disciplinary hearing before the panel, and thereafter throughout the internal appellate process): he did not claim in relation to the original publication by their respective authors of the fourteen memoranda, which of course fell outside the limitation period."

77. The terms and conditions of Captain Friend's employment provided that rules of conduct and discipline would be set out in a staff manual. The material rules were very detailed and laid down a number of general principles, including that natural justice would be applied, which included the requirements that disciplinary investigations should involve seeking evidence, taking statements and collating relevant records and documents.

78. Captain Friend's claims were brought against both the CAA and certain individuals, who were the authors of the memoranda complained of. The claims were struck out by the Master, but an appeal was allowed by Alliott J in respect of some of the publications complained of on the basis that (a) while the Captain had impliedly consented to the publications, any such defence would be defeated by malice, which the Captain alleged; but (b) the Captain had expressly consented to all publications in respect of the appeal.

79. On appeal to the Court of Appeal, the Defendants contended that malice was irrelevant, while the Captain challenged the Judge's finding in respect of the appeal publications. The Court of Appeal found for the Defendants. Hirst LJ summarised the Captain's submissions as follows: "a person cannot consent to a malicious untruth, and, as he put it, natural justice does not include malice; otherwise disciplinary proceedings are in effect clothed with absolute privilege." Hirst LJ ruled:

> "In my judgment the defendants here are entitled to rely on the defence of *volenti* and leave and licence in relation to both actions, substantially for the reasons given by [Counsel for the Defendants]. Captain Friend's submissions seem to me to based on a basic misconception as to the nature of disciplinary proceedings. Inevitably they are launched as a result of some kind of accusation or complaint against an employee, and their essential purpose is to decide whether that accusation is true or false, for which purpose the accusation or complaint must inevitably be re-published to the disciplinary tribunal and those responsible for hearing any subsequent disciplinary or appeal proceedings.
>
> Natural justice comes into the picture in order to ensure that their adjudication is fairly carried out.

> It necessarily follows that an employee who accepts a disciplinary code such as the CAA's as part of his contract of employment consents to the re-publication of the accusation or complaint as part of that process, otherwise there is no way in which, for his own protection as well for the protection of the interests of his employer, the truth or falsity of the accusation or complaint can be fairly established.
>
> …
>
> … Captain Friend's consent to the publication of the accusation or complaint to those involved in the disciplinary adjudications is on the basis that nobody can know for certain whether that accusation is true or false until it has been re-published to, considered by, and adjudicated upon by those persons at the various stages of the disciplinary process."

80. In his concurring judgment, Brooke LJ said:

> "I accept Captain Friend's proposition that in most ordinary circumstances there would need to be evidence of a special express consent before a person could be held to have consented to the publication or republication of malicious libels on him/herself. In my judgment, however, the disciplinary process to which he assented when he accepted employment with the CAA necessarily involved the publication to the relevant officers of the authority of the documents that related to a disciplinary charge that was being investigated. Without access to those documents the authority could not conduct a fair inquiry.
>
> It is only the publication of the documents for the purposes of the inquiry of which Captain Friend makes complaint, and this publication is covered by his consent. As Hirst LJ has said, there was nothing other than the passing of the limitation period to prevent him from bringing an action for damages against the authors in respect of their original publication."

Defendants' submissions

81. Mr Rushbrooke submitted that this decision is directly applicable to the present case:

(1) Ms Parris' employment contract is contained in the "Statement of Terms and Conditions of Employment" naming her employer as "Sussex Health Care" and signed by her on 11 March 2005. Clause 16 provides "The disciplinary rules and grievance procedure applicable to your employment are attached to this statement as Appendix 2 and are non-contractual". Clause 23(d) provides "You are required to read the staff manual containing policies, procedures and guidelines on commencement of your employment and at regular intervals thereafter as may be required to ensure that you remain familiar with all the Employer's policies, procedures and guidelines". Appendix 2 is contained at pages 11-16 in exhibit "LJF1" to the first witness statement of Ms Fehilly dated 18 September 2020.

(2) The Disciplinary Procedure in force at the material time is that dated October 2013, and it included the following (see Ms Fehilly's first witness statement, §13):

> "The manager will notify the employee in writing of the allegations against him or her and will invite the employee to a disciplinary hearing to discuss the matter. The manager will provide sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case. This will include the provision of copies of written evidence, including witness statements where appropriate."

(3) Ms Parris was not only required to keep herself aware of this policy, she was in fact aware of it: she sent a copy of it by email to Mr Gayler on 6 October 2016 in which she wrote "I have attached examples of what I would expect to see for the discipliniary [sic] and grievance procedures with the SHC/PP..... header and Sussex Healthcare footers. These are old copies, which is why I need the latest from the manual and they need to be controlled copies as explained previously". The attachments to that email include the relevant extract from the Staff Manual titled "Disciplinary Procedure" which Ms Fehilly referred to in her first witness statement (see her second witness statement dated 20 November 2020, §4). The explanation for Ms Parris' reference to "old copies" is that the copy which she attached had a "Review Date" of November 2014, whereas the version exhibited by Ms Fehilly had a "Review Date" of November 2017. The material wording of the policies is the same.

(4) Similarly, the ACAS Code of Practice and guidance, to which employers and employees were obliged to have regard, required employers to investigate allegations and collate written evidence including statements: see Ms Fehilly's first witness statement, §§15-16. Ms Parris relied on the terms of the ACAS Code of Practice and guidance in her disciplinary appeal, a grievance complaint, and in the pursuit of the Employment Tribunal Proceedings, as appears from her letter requesting an appeal dated 9 November 2016, the "Catherine Parris Appeal Bundle" which she prepared, and her Employment Tribunal Grounds of Complaint. Further, at §34 of her amended second witness statement dated 17 November 2020, Ms Parris states:

> "Mr Gayler and Mr Ajayi and their line manager Ms Wallace along with the panel members for the disciplinary and appeal hearings had failed to conform to any semblance of the ACAS code nor had they followed the ACAS 'Conducting Workplace Investigation' guidance … There were extensive breaches of the ACAS processes and these had been highlighted in the ACAS documents and provided to the appeal hearing panel in preparation for my appeal hearing held on 08/03/2017. It is particularly relevant for my treatment the part about the duration of the suspension (which was a punitive 6 weeks in my case) and the suspected malicious complaints made by another person and how it should be investigated by an organisation …"

(5) In any event, as the Court of Appeal emphasised in *Friend*, this is a feature of natural justice. For allegations to be fairly and properly investigated they will inevitably need to be republished during the investigation. It is an implied term of any contract of employment that disciplinary processes will be conducted fairly: *Lim v Royal Wolverhampton Hospitals NHS Trust* [2011] EWHC 2178 (QB) at [93].

(6) Ms Parris does not sue over Mr Ajayi's initial conversation with Mr Gayler, or over what Mr Ajayi said in the meeting with both her and Mr Gayler on 15 September 2016. Ms Parris sues only on the Statement, which was sent to Mr Gayler (a) upon his explicit request after that meeting, and (b) at a time when Mr Gayler was collating evidence for Ms Parris' disciplinary hearing. *Friend* is clear authority that there is a complete defence of consent, or as it was put in that case *volenti* and leave and licence, to any claim for libel or malicious falsehood in respect of such a publication.

(7) There is no basis for the allegation in the POC (at §18) that Mr Ajayi published the Statement beyond Mr Gayler to "various other employees and officers of the Corporate Defendants (and/or other entities trading as Sussex Health Care) whose names are at present unknown to the Claimant", and the Defendants deny any such further publication. No such individuals have ever been identified by Ms Parris despite the voluminous documentation with which she has been provided ever since the disciplinary process commenced, and there is no evidence to support such wider publication. In her evidence, Ms Parris refers only to the email to Mr Gayler: "Furthermore, Mr Ajayi on the afternoon of Thursday 22/09/2016 published a statement and photograph (a picture that he illicitly and illegally took) … of a dictation recorder that he had removed from my personal bag without my authority or consent" (see her second witness statement at §22). The words complained of in the POC were plainly part of a statement for a disciplinary investigation sent by Mr Ajayi in response to Mr Gayler's request, and self-evidently the email attaching the Statement was sent to Mr Gayler only. In these circumstances, it would be fanciful for Ms Parris to persist in the suggestion that Mr Ajayi published the Statement to others.

(8) On these grounds, the Defendants request (a) that they have permission to amend the Defence to plead this defence; and (b) that the claim is struck out as disclosing no reasonable grounds for bringing the same, or that summary judgment is granted.

Ms Parris' submissions

82. Ms Michalos submitted, first, that in order to succeed in a defamation action on the grounds of consent, the evidence of consent or acquiescence must be clear and amount to an authorisation by the claimant of publication by the defendant. She relied on the judgment of Eady J in *Otuo v Morley* [2017] EWHC 2186 (QB) at [1] and [9]:

> "In order to succeed, a defendant must show that the claimant has unequivocally consented to the publication of the defamatory allegations and with full knowledge. That will generally turn on issues of disputed fact. It must be very unusual, therefore, to find a case where such a defence is so clear that the case can be disposed of at the pre-trial stage."

> "It has to be shown that the Claimant's consent was given with a full understanding of the relevant circumstances and that it was unequivocal."

83. Second, Ms Michalos submitted that the decision in *Friend* is of no application in the present case for the following reasons:

(1) In contrast to the facts of *Friend*, the Disciplinary Code and Grievance Procedure in the present case are non-contractual. The entirety of the rationale in *Friend* hinged upon the fact that Captain Friend was contractually bound by the disciplinary code of the CAA. The disciplinary code in this case is expressed to be non-contractual: see Clause 16 cited above. This also appeared to Ms Parris to be the position in relation to the un-headed policy documents with which Ms Parris was provided prior to her disciplinary hearing and which "did not appear to be official documents" (see §27 of her second witness statement). Further, the Disciplinary Procedure states (emphasis in the original): "This disciplinary procedure is entirely non-contractual and does not form part of an employee's contract of employment".

(2) Again in contrast to the facts of *Friend*, the Statement in the present case is a primary publication which itself initiated the entire disciplinary process. In *Friend*, the claim was limited to re-publication to the respective members of the tribunal of various documents. In the present case, the publication complained of is not to the tribunal members during the course of an ongoing disciplinary process, but is instead the substantive publication which itself caused the disciplinary process.

(3) The present claim concerns an allegation of malice by knowingly lying. It is inconceivable that anyone would consent to a process where there was no redress against a malicious allegation, or that a person would willingly consent to malicious publications. To the extent that is compelled by a contractual disciplinary process, it would only be due to inequality of bargaining power. The Court should be cautious about striking out or granting summary judgment in reliance on *Friend* in a case where it is not clear that there is adequate protection against malicious motivation.

(4) Ms Michalos placed reliance on the decision of Eady J in *Spencer v Sillitoe* [2003] EWHC 1651at [33]-[35]. In that case, it formed part of the claimant's case that the first defendant had made up allegations that the claimant had threatened to sabotage the contracts of their employer (the second defendant), and he brought claims for libel based on various alleged publications of those allegations including publications to Miss Shirley Phillips (i) at the time when she was appointed in order to go through the requirements of the employer's published disciplinary procedures (and in accordance with the ACAS Code of Practice) and (ii) when she subsequently requested "some tangible evidence to serve as the basis for her investigation". Eady J stated:

> "31. [Miss Addy] invited my attention to the decision [in *Friend*]. This case provides authority for the proposition, at least, that where someone invokes his employer's disciplinary procedures, provided for in his contract of employment, in respect of an allegation against him, he must be taken to consent

to the repetition of that allegation during and for the purposes of the disciplinary proceedings. In some ways, this principle is analogous to the absolute privilege which covers steps taken in court proceedings. Nonetheless, the rationale is not that of privilege but of consent or *volenti non fit injuria*.

32. Miss Addy seeks to argue that this *Friend* principle would be sufficient to dispose of the defamation allegations from mid-August onwards, after the appointment of Miss Shirley Phillips to carry out her investigation. Miss Addy suggests that the oral communication to her on 15 August, and the provision to her of the typed-up notes of the meeting on or about the 24 August 2000, are properly to be regarded as part of the internal disciplinary proceedings. Mr Spencer should be treated as having given his consent - not in the sense that he invoked the disciplinary procedure himself, as had Captain Friend, but on the basis of having accepted the disciplinary procedures more generally by entering into his contract of employment.

33. Various matters have to be considered in testing the validity of this analogy, and perhaps the first issue to address is the point at which the disciplinary proceedings can be regarded as having commenced. I believe Miss Addy accepts that her argument would only prevail after that point in time. She suggests that the relevant procedure was implemented from the moment Mr Sillitoe appointed Miss Phillips to carry out the investigation.

34. As the Court of Appeal emphasised in *Friend*, "in this branch of the law the decision turns on the particular facts". It is thus clear that a judge needs to be wary of deciding matters prematurely if there are facts in dispute, requiring to be resolved at trial, which might affect the outcome. A factor which was clearly thought significant in *Friend* was the specific obligation upon the investigating officer "to check the motives of any informant". There was thus inbuilt protection against the risk of malicious motivation. Here the investigating officer was a newly appointed employee, answering directly to the initiator of the enquiry process (i.e. Mr Sillitoe). It is he who is accused by Mr Spencer of manufacturing the complaint and, in effect, "stitching him up".

35. Against that rather different background, I am not sure that I can rule at this stage that the "*Friend* doctrine" is dispositive of the claims in respect of the 15 and 24 August publications. I cannot be as confident as the Court of Appeal was that there was adequate protection against malicious instigation. Miss Phillips asked for "tangible evidence" to form the basis for her investigation, and what she received was Mr Sillitoe's note of the June conversation — its origin being controversial at this stage. For the moment, therefore, I do not feel able to strike out the parts of Mr Spencer's pleading which relate to the August

> publications. It does not seem to me to be clear, beyond argument, that the formal enquiry process had begun prior to the moment when that document reached Miss Phillips' hands."

(5) In this case, Mr Ajayi's allegations and publication initiated the entire disciplinary process. This was not the position in *Friend*. In this regard, see *Spencer v Sillitoe* [2003] EWHC 1651 at [35] "It does not seem to me to be clear beyond argument that the formal enquiry process had begun prior to the moment when the document reached Miss Phillips' hands". In *Friend*, the Court of Appeal accepted that a cause of action could lie for original publication as opposed to publication to the tribunal itself.

84. Third, Ms Michalos submitted that the Defendants are unable to establish the factual position to a summary judgment standard:

(1) As was emphasised in *Friend*, "In this branch of the law the decision turns on the particular facts". See, further, *Spencer v Sillitoe* [2003] EWHC 1651 at [34].

(2) The Defendants are not even sure which version of the Staff Manual or disciplinary procedures applied and have to give hearsay evidence: see the first witness statement of Ms Fehilly at §11 and §13 stating (emphasis added):

> "I exhibit [the Human Resources section] of the staff manual… This is the only staff manual I am aware of and Mr Boghani has confirmed to me that the Staff Manual was applicable to employees across the SHC Group i.e. those working for the Second Defendant, Third Defendant and Alpha Care."

> "Having reviewed the SHC Group's records, the only other disciplinary procedures that I have found were issued in 2018 and 2020. Therefore, this is the disciplinary procedure that appears to have been in place at the time the email was sent in September 2016."

(3) Ms Parris' evidence is that even after the disciplinary process started she was sent different versions of the policy (see §12 of her second witness statement). Her access to copies of policies and procedures was limited because they were kept in a locked manager's office. Employees were not encouraged to photocopy the policies and procedures and had to sit down and read them there and then (see §9 *ibid*). This does not accord with the requirement for clear and unequivocal consent with full understanding as articulated in *Otuo v Morley*.

(4) It appears that Ms Parris and Mr Ajayi were employed by different employers. In these circumstances, it is difficult to see how Ms Parris can have contractually consented to Mr Ajayi making allegations to a different entity. Ms Parris was held in the Employment Tribunal Proceedings to be employed by the Partnership; whereas it is admitted in this claim that Mr Ajayi is employed by SHCC (see Defence, §5).

(5) Further, it is far from clear that publication *only* took place on 22 September 2016 pursuant to the request of Mr Gayler and that earlier publication had not taken place.

Mr Gayler's email sent at 8:53 on 22 September 2016 asks (emphasis added) "Please could you send me your statement from the meeting so that I can include it with our evidence". Mr Ajayi's own evidence is that "To the best of his recollection, I wrote these words on 15 September 2016, which was the day after my meeting with [Ms Parris]" (see §6 of his second witness statement dated 17 September 2020). It is clear from the Notes of that meeting that Mr Ajayi had a hard copy of the Photograph at the meeting with Ms Parris at 2pm on 15 September 2016. Yet he sent the Photograph to Mr Gayler by email on 22 September 2016. The reference to the "statement from the meeting" suggests that the Statement already existed and had been shown to Mr Gayler and what he was requesting was a copy of the statement "from" the meeting.

85. Fourth, Ms Michalos submitted that the decision in *Friend* (dated 29 January 1998) pre-dates the Human Rights Act 1998 (which came into force on 2 October 2000) and needs to be considered in the light of Article 8 of the European Convention on Human Rights. Pursuant to section 6 of the Human Rights Act 1998, the Court must not to act in a way which is incompatible with a Convention right. It is now well established that a person's reputation falls within Article 8. The strict application of *Friend* in cases where malice is alleged is tantamount to according absolute privilege to allegations made maliciously in an employment context. Such a blanket rule would in principle be contrary to a claimant's rights under Article 8, as it would leave the claimant without a remedy. In any event, this point is not appropriate for determination on a summary judgment application.

Defendants' submissions in reply

86. Because the hearing over-ran the estimated length of 1 day, Mr Rushbrooke's principal submissions in reply were provided subsequently in writing. At the same time, as stated above, the Defendants served further evidence to deal with what they contended was an important change of case on the part of Ms Parris, which had taken them by surprise.

87. With regard to the facts, Mr Rushbrooke submitted:

(1) Ms Parris should not be allowed to advance a case which contradicts the evidence in the witness statements of her and Mr Henman served in opposition to the Defendants' application, which, as set out above, make clear that her claim is based solely on the publication of the Statement which took place on 22 September 2016, when Mr Ajayi sent it to Mr Gayler by email in response to an express request from Mr Gayler.

(2) If, contrary to the above, Ms Parris is permitted to advance a different case, it nevertheless has no real prospect of success, particularly in light of the Defendants' further evidence. Among other things, as the Statement was contained in a Word document which was created on 22 September 2016 at 14:03, that document cannot (as suggested by Ms Michalos in her submissions) have been printed out or shown by Mr Ajayi to Mr Gayler on 15 September 2016, in particular before the meeting between Mr Ajayi, Mr Gayler and Ms Parris which started at 2pm that day.

(3) It is "overwhelmingly likely" that the Statement was not published to Mr Gayler prior to 22 September 2016 in any event: (a) although named "OA - 14.09.2016", the Statement attached to Mr Ajayi's email of 22 September 2016 cannot have been

created before the end of Mr Ajayi's meeting with Mr Gayler on 15 September 2016, because the last paragraph refers to that meeting; (b) the words "On Thursday 15th September I sought advice …" strongly suggest that the document was created after that date; (c) there is no reference to any such statement (whether in printed or manuscript form) in either Mr Gayler's note of the meeting of 15 September 2016 with Ms Parris or Mr Gayler's Meeting Outline for that meeting; (d) (in contrast to the Photograph) Mr Ajayi had no need to show Mr Gayler a statement, nor did Mr Gayler have any need to see it, prior to their meeting with Ms Parris; (e) if either man had such a statement in their possession at their meeting with Ms Parris, it is highly likely that she would have noticed, and made some reference to it, or asked for a copy of it, then or subsequently; (f) there is no reference to any such statement in any of the large volume of documents which were generated after Ms Parris' suspension on 15 September 2016; (g) if Mr Ajayi had created and shown the Statement to Mr Gayler prior to 22 September 2016, it is likely that Mr Gayler would have retained a copy, and he would have no need to ask for "your statement from the meeting" on 22 September 2016; (h) the fact that Mr Ajayi sent Mr Gayler a digital version of the Photograph on 22 September 2016 does not make it more likely that the Word document he sent on that date is a document that he had already shown to Mr Gayler.

(4) The suggestion that Mr Ajayi may have sent the Statement to anyone other than Mr Gayler is comprehensively rebutted by the Defendants' further evidence.

(5) Accordingly, the Court can be satisfied to the Part 24 standard that the *first and only time* that Mr Ajayi published the Statement was by the email of 22 September 2016.

(6) Equally, the disciplinary process was under way (a) by no later than the time when Mr Gayler sent his letter of 15 September 2016, recording that Ms Parris had been suspended pending investigation of Mr Ajayi's allegation and (b) probably by the end of the meeting of that afternoon (because the Note of that meeting records that Ms Parris was told she was suspended "with immediate effect", and her own email of the following day records that she thought she had been suspended, and felt that the meeting was a "direct disciplinary meeting").

(7) Ms Parris clearly agreed to submit to the disciplinary procedure identified by the Defendants: the "correct controlled copy of the Disciplinary Procedure" as Ms Parris described it was a document that she insisted on going into the bundle for the disciplinary meeting; that document was in substantially identical terms to the third of the enclosures included by Mr Gayler to his letter of 22 September 2016; and Ms Parris even highlighted the words "This will include the provision of copies of witness evidence, including witness statements where appropriate".

(8) Ms Parris cannot realistically dispute that a Disciplinary Procedure in these terms governed her relationship with her employer: (a) she wrote to Mr Gayler on 19 September 2016 to say that she was employed by Alphacare and asking whether there were "different policies and procedures for Alphacare employees"; (b) in response, she was told by email of 4 October 2016 that "while you are nominally employed by Alphacare this is part of the Sussex Healthcare Group and therefore you are subject to the SHC's policies and procedures"; (c) Ms Parris did not dispute this contention, but instead complained by email of 4 October 2016 that she did not appear to have been given the latest copy of the SHC Disciplinary Procedure and

that the version supplied by Mr Gayler was an "uncontrolled document"; (d) in her email to Mr Gayler of 26 October 2016, Ms Parris complained "[you] are supposed to provide a thorough and detailed report (as per SHC disciplinary Procedure). According to ACAS this is based on witness statements and a full investigation of the facts from whatever relevant sources are available" (emphasis added); and (e) no alternative disciplinary procedure has even been suggested by Ms Parris.

88. With regard to the law, Mr Rushbrooke submitted:

(1) The reasoning in *Friend* does not depend upon the disciplinary procedure being one which is built into the contract. Brooke LJ refers to "the disciplinary process to which he assented when he accepted employment with the CAA". What matters is that the claimant has clearly assented to a process which involves the publication of the accusation or complaint to those involved in disciplinary adjudications, on the basis that (as Hirst LJ put it) "nobody can know for certain whether that accusation is true or false until it has been re-published to, considered by, and adjudicated upon by those persons at the various stages of the disciplinary process". The basis of this implied consent is that it is for the benefit of both employee and employer, and to insist on the process being a contractual one would substantially erode the employee's protection.

(2) The argument that consent cannot extend to a malicious publication was considered and rejected by the Court of Appeal in *Friend*. There is no requirement that the disciplinary process to which the claimant has agreed must contain a specific obligation on the investigator to "check the motives of any informant" before consent can be implied. It is to be expected of any fair disciplinary process (including that to which Ms Parris agreed) that the *bona fides* of any complainant or informant would be enquired into. Insofar as *Spencer v Sillitoe* (a case on different facts) suggests otherwise it is wrong in its interpretation of *Friend*, and in any event not binding.

(3) The argument that consent to the publication cannot extend to the "primary publication" which "initiated the disciplinary process" is unfounded. What matters is whether or not the publication sued upon took place within or outside the ambit of the disciplinary proceedings. The publication complained of in the present case indisputably took place within and for the purposes of the disciplinary procedure to which Ms Parris assented. Nor can any sensible distinction be made on the basis that in *Friend* the publications sued on were re-publications of pre-existing memoranda. In any event, the publication Ms Parris sues on only came into being after the disciplinary procedure had commenced and for the purposes of that procedure.

(4) The reasoning in *Friend* is unaffected by the passing of the Human Rights Act 1998. The doctrine of implied consent in this field is based on a legitimate and proportionate balancing of the rights of employer and employee. This submission collapses into a repetition of the complaint that Ms Parris could not consent to a malicious publication, and that if *Friend* applies she has no other remedy. Both points are bad.

Discussion and conclusion

89. Dealing first with the Defendants' application for permission to amend, in accordance with *Quah* a "very late" amendment is one made "when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost". In the present case, however, although the claim was issued more than 3 years ago, the proceedings have yet to progress beyond the exchange of statements of case. In my opinion, so far as concerns timing, this case is comparable to *Tesla Motors Ltd & Anor v British Broadcasting Corporation (BBC)* [2013] EWCA Civ 152, per Moore-Bick LJ at [50]:

> "For my own part I do not think that the application to amend in this case was made late in the ordinary sense. Although particulars of claim and a defence have been served, there has been no case management conference and directions have not been given for preparation for trial. There has been no disclosure and no exchange of witness statements. In truth the proceedings are still in their infancy and I can see no grounds for thinking that the proposed amendment would be likely to have a disruptive effect on the progress of the proceedings. Accordingly, if I were satisfied that the claim had a real prospect of success, I would not refuse permission to amend on that ground."

90. Nevertheless, in my judgment, the Defendants have been guilty of unacceptable delay:

(1) The Defendants' current solicitors wrote to Ms Parris' solicitors on 13 June 2019 saying that they had replaced Brethertons LLP as solicitors for SHCC and SHCR and had instructed new Counsel, and (among other things) stating "The entire claim is liable to fail because all the defendants have available to them an unanswerable defence of consent (or more accurately, leave and licence) to the publication complained of, of precisely the same kind as was established in [*Friend*]", notifying an intention to issue an application for permission to amend the Defence, and asking Ms Parris to agree to a stay pending determination of the Employment Tribunal Proceedings and to the vacation of the CCMC then listed for 21 June 2019.

(2) After Master Davison had vacated the CCMC by Order dated 20 June 2019, Ms Parris' solicitors wrote on 11 July 2019 saying "You have advised that it is your intention to amend your client's defence. The Claimant does not want this to cause any delay and requests therefore that you take steps to amend the Defence if that is your client's intention at the earliest opportunity and provide details to us".

(3) Even if it was reasonable to delay the application for permission to amend the Defence until after the resolution of the Employment Tribunal Proceedings, I do not see why it was either necessary or reasonable to wait to do that until after a judgment which disposed of a reserved decision on costs had been received from Employment Judge Ferguson on or about 14 February 2020. Thereafter, in spite of the disruption caused by the Covid-19 pandemic, I cannot accept that it should have taken the Defendants' solicitors from February 2020 to the date of issue of the application on 21 September 2020 to "[put] together this application with our clients and their counsel".

(4) When considering delay, it is relevant to have regard to its cumulative effects. In this case, 2 years had elapsed (from May 2017 to June 2019) between the time when the *Friend* argument was first raised and the time when it was revived. A further 6 or 8 months (from June 2019 to the date of the judgment of Employment Judge Ferguson, namely 5 December 2019, alternatively to the date when that judgment was sent to the parties to the Employment Tribunal Proceedings on or about 14 February 2020) elapsed between the time when the *Friend* argument was revived and the expiry of the stay ordered by Master Davison until after the determination of the Employment Tribunal Proceedings. In light of those earlier periods, it was incumbent on the Defendants to progress their amendment application expeditiously after the stay expired. Making all due allowance for the effects of the Covid-19 pandemic, which lawyers have had to cope with by working remotely, I consider they did not do so.

91. Further, in *Wani LLP v Royal Bank of Scotland plc* [2015] EWHC 1181 (Ch), Henderson J (as he then was) recorded at [45] that it had not been in dispute before him that "the instruction of new counsel is not in itself a good explanation for a late amendment".

92. For these reasons, I consider that "the history as regards the amendment and the explanation as to why it is being made late" are factors which tell against the Defendants.

93. Ms Michalos' remaining grounds for opposing the amendment relate to the merits of the argument based on *Friend*. On behalf of Ms Parris, she submits that it has no real prospect of success, and therefore should not be allowed in. Mr Rushbrooke, on the other hand, submits that the converse is the case: the argument is so strong that Ms Parris has no real prospect of success in seeking to meet it. Which of these rival contentions is right?

94. I have reached the conclusion that both are advanced too unequivocally, and that neither is correct. In my opinion, on the face of it, there is considerable force in the Defendants' case under this head, and it has at the very least a real prospect of success. At the same time, I am unable to hold that Ms Parris has no real prospect of defeating it. To my mind, that accords with the history summarised above: if the lawyers who first raised the issue decided that it should not even be pleaded (let alone made the subject of an application for summary judgment/strike out) and if their replacements took a different view but then took as long as they did to plead it, that suggests that it is not a straightforward matter.

95. Having set out the rival arguments in some detail, I can explain my reasons quite briefly.

96. So far as concerns the facts, I accept that because the Statement attached to Mr Ajayi's email of 22 September 2016 ends with the words "On Thursday 15th September, I sought advice from SHC's HR department regarding the recording of staff during meetings without their consent" that particular document was almost certainly created after the end of Mr Ajayi's meeting with Mr Gayler on 15 September 2016. However, that does not answer the question of when after that meeting that entire text was first created, let alone whether all of that text bar the final paragraph was created even earlier than that meeting.

97. The Defendants' pleaded case (§9 of the Defence) is that Mr Ajayi wrote the words complained of set out in §18 of the POC "to the best of his recollection on 15 September 2016". This does not purport to give any details of when on 15 September 2016 the words were written, and equally it does not suggest that they were not *all* written on that day.

98. Mr Ajayi's latest evidence (see §§3-4 of his fourth witness statement) is that he can "state categorically" that he could not have shown a written statement to Mr Gayler at some time between his meeting with Mr Gayler on the morning of 15 September 2016 and his meeting with Mr Gayler and Ms Parris at 2pm later that day because when he went to see Mr Gayler "there was no written statement of any kind which I could show him and as I had to go to another meeting immediately after seeing Mr Gayler, I would not have had the time to create a written statement between finishing my meeting with him and setting off with him to meet Ms Parris at 2pm that day"; and, further, that it was only after their meeting with Ms Parris on 15 September 2016 that "Mr Gayler told me that I would have to prepare a written statement, which as far as I can recall *I started to do* later that day".

99. In §6 of his fourth witness statement, Mr Ajayi states "Dawn Goodes was my PA, and I did what I would normally do which is to jot down handwritten notes myself of the main points, which I would then hand to Dawn to convert into a Word document". This evidence suggests that the "start" which Mr Ajayi made on preparing a written statement consisted of "jot[ting] down handwritten notes [him]self of the main points".

100. The suggestion that Mr Ajayi only *started* writing the Statement on 15 September 2016 is new. Further, in my judgment, the reliability of what appears to be a more detailed recollection in 2020, and a firmer ("categorical") statement of position, than is in any earlier iteration of the Defendants' case is at least open to legitimate testing with the benefit of disclosure and cross-examination. Purely by way of illustration, if Mr Ajayi prepared the Statement in response to a request made by Mr Gayler on 15 September 2016, it is unclear why Mr Ajayi did not complete it and provide it to Mr Gayler sooner than 22 September 2016. As against that, even if the Statement was created and shown or provided to Mr Gayler on 15 September 2016, if that was indeed done in response to a request from Mr Gayler, the Defendants' case in reliance on *Friend* may be unaffected if it transpires that the Statement was published to him earlier than 22 September 2016.

101. Other points relied on by the Defendants in support of the contention that it is "overwhelmingly likely" that the Statement was not published to Mr Gayler prior to 22 September 2016 (e.g. that (1) if either man had such a statement in their possession at their meeting with Ms Parris, it is "highly likely" that she would have noticed, and (2) if Mr Ajayi had created and shown the Statement to Mr Gayler prior to 22 September 2016, it is "likely" that Mr Gayler would have retained a copy, and he would have no need to ask for "your statement from the meeting" on 22 September 2016), are persuasive and appear, on the face of it, to be cogent. At the same time, it is, in my judgment, impossible to say that they are determinative, whether considered separately or cumulatively, and that it is "fanciful" to suppose that, nevertheless, it might transpire at a trial that the words complained of were not only written down but also published to Mr Gayler earlier.

102. There is also a difference between the Defendants' pleaded (and categorical) denial that Mr Ajayi "*published* the words complained of *to anyone else whomsoever*" and the

evidence contained in his fourth witness statement (at §5), which is that "I can also categorically confirm that I did not *send* my statement to anyone else other than Mr Gayler". The issue of publication to Dawn Goodes, which appears to me to be admitted by Mr Ajayi's fourth witness statement, may not make any difference to the merits of the case for either side at the end of the day. However, in light of that pleaded case, I was surprised to learn from the evidence which was served after the conclusion of the hearing about the involvement of Dawn Goodes in creating a Word version of the Statement. In my opinion, this emerging narrative underlines the risks which are inherent in deciding issues of fact on the written materials alone - especially in the absence of full disclosure (which has yet to take place) and of the accounts of witnesses who appear to be in a position to give evidence which would be material, such as Dawn Goodes and Mr Gayler.

103. So far as concerns *Friend*, Ms Michalos is right in saying that there are differences between the present case and the facts of *Friend*, including that (1) the Disciplinary Code and Grievance Procedure in the present case were stated to be non-contractual; (2) the publication of the Statement which is complained of in the present case is not one made to the tribunal members during the course of an ongoing disciplinary process, but is instead one which occurred at or near the start of (as Ms Michalos submits, "caused") the disciplinary process; and (3) in the present case, it is alleged that the Statement was published maliciously. As at present advised, I consider that Mr Rushbrooke's submissions in response may well prevail at the end of the day. Those were, in short, that (1) the reasoning in *Friend* does not depend on whether the disciplinary process is contractual but on whether it is one to which the employee consented; (2) what matters is whether or not the publication sued upon took place within or outside the ambit of the disciplinary proceedings; and (3) the decision in *Friend* does not exclude malicious publications, not least because "nobody can know for certain whether [an] accusation is true or false until it has been re-published to, considered by, and adjudicated upon by those persons at the various stages of the disciplinary process". In addition, I am doubtful that the reasoning in *Friend* is affected by the passing of the Human Rights Act 1998.

104. Nevertheless, it seems to me for the Defendants to succeed on the argument based on *Friend* would involve, or arguably involve, an extension of the reasoning in that case. In *Friend*, there is no doubt that the publications sued on came into existence after the disciplinary process was under way. In the present case, it is uncertain precisely when the disciplinary process began. Even assuming, without deciding, that it began when Ms Parris was informed that she was suspended, it is unclear whether that occurred at the meeting on 15 September 2016 or on her receipt of the letter of that date (see POC, §23). If it transpires that the words complained of (albeit excluding the final paragraph of the Statement) were first published to Mr Gayler on 15 September 2016, that may have occurred either before or after Ms Parris was informed that she was suspended, and thus, even on the Defendants' case as to what started that process, before or after it began.

105. Speaking for myself, I would not rule out the possibility that the publication might be covered by the principle in *Friend* even if it initiated a chain of events which resulted in a disciplinary process (assuming, of course, that Ms Parris unequivocally consented to that process). The reason for this is that it appears to be common ground that any complaint by an employee against a fellow worker is one for which the employee's

employer is in principle vicariously liable. If that is right, and if the publication of the complaint was only protected by qualified privilege (which would be defeated by malice), no employer could safely receive any such complaint without exposing the employer to liability in defamation for the same, because the employer could never know at the time whether the complaint was malicious. That would have a chilling effect on the airing and resolution of grievances at work, which would be inimical to good employment relations and practices.

106. It seems to me, however, that these are precisely the kind of points of law which are not sufficiently certain to justify the remedy of summary judgment or striking out, and which ought properly to be based on actual findings of fact. In addition, while naturally accepting that each case falls to be decided on its own particular facts, I cannot help noticing that Eady J, who had enormous experience and expertise in this area of the law, appears to have been cautious about the ambit and applicability of the *Friend* principle.

107. Mr Rushbrooke submitted that *Spencer v Sillitoe* is wrong in its interpretation of *Friend*, and in any event not binding on me. However, even if I considered it appropriate to disagree with the reasoning of Eady J in the context of an application for summary disposal of Ms Parris' claim, it might be hard to decide that she would have no real prospect of success of persuading the Court of Appeal that Eady J's analysis was right. If an appeal would have a real prospect of success, that means that the answers are not clear.

108. In any event, it is not suggested that Eady J was wrong to state that "In order to succeed, a defendant must show that the claimant has unequivocally consented to the publication of the defamatory allegations and with full knowledge". In this regard, it is a material complicating feature that the employment structure is as confused as it is here.

109. In confining my analysis to the points discussed above, I have not overlooked the many other points made by both sides, and I am not to be taken as holding that there is nothing in them either one way or the other. However, I consider that I have said enough to explain my decision, which is that both sides' cases have a real prospect of success.

110. Pulling all these matters together, I consider that, taking account of (a) the overriding objective, (b) the injustice to the Defendants if they were refused permission to amend, (c) the injustice to Ms Parris if permission is granted (in which regard, the proposed new case appears to me to rest essentially on propositions of law and to not give rise to any significant factual issues in addition to those which are already raised by the existing pleadings), (d) the need for finality in litigation, (e) the injustice to other litigants if the amendment is permitted, and (f) the burden on the Defendants to justify the timing of the application and to show the strength of the new case and why justice requires them to be able to pursue it, the Defendants ought to be granted permission to amend. I am not persuaded, however, that the new case based on *Friend* which the Defendants are thus entitled to advance is one which Ms Parris has no real prospect of successfully defeating.

THE *JOHNSON* EXCLUSION AREA

111. The Defendants' second ground for striking out relies on a body of case law starting with the decision of the House of Lords in *Johnson v Unisys Ltd* [2003] 1 AC 518. They

submit (a) the Statement was published during the disciplinary investigation that led to Ms Parris' dismissal, (b) however, her claim is not limited to such damage as may have been caused to her reputation in the eyes of the publishee(s), (c) instead, it extends to the damage caused by her dismissal (see PoC §§27, 29.2-3, 29.5-6, 30 of the POC; the witness statement of Mr Huckstepp of her solicitors, at §8: "As a result of this maliciously false statement the Claimant was dismissed from her employment and she has suffered losses"), and (d) this amounts to an attempt to sidestep the statutory restrictions on claims for unfair dismissal, and is an impermissible incursion into "the *Johnson* exclusion area".

The relevant case law

112. In *Johnson v Unisys Ltd* [2003] 1 AC 518 the claimant was summarily dismissed in 1994, following allegations concerning his conduct. His complaint of unfair dismissal was upheld by an industrial tribunal. He then commenced proceedings against the employer for damages for wrongful dismissal claiming that, because of the manner in which he had been dismissed, he had suffered a mental breakdown and was unable to work. He alleged that, in breach of an implied term of his contract of employment that the employer would not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence, the employer had in the manner of dismissing him harmed his professional development, health, financial welfare and future employment prospects.

113. On the employer's application, the judge struck out the claim as disclosing no reasonable cause of action. The Court of Appeal upheld that decision. The House of Lords dismissed the claimant's appeal, holding that, in the light of the evident intention of Parliament that claims relating to dismissals should be heard by specialist tribunals and the remedy restricted in application and extent, it would be improper for the courts to imply the relevant term, as they might otherwise have done.

114. The leading speech was delivered by Lord Hoffman (with whom Lord Bingham and Lord Millett agreed). Lord Hoffmann referred to the unfair dismissal jurisdiction and its effect on the common law as follows (emphasis added):

> "51. In 1968 the Royal Commission on Trade Unions and Employers' Associations under Lord Donovan recommended a statutory system of remedies for unfair dismissal. The recommendation was accepted by the government and given effect in the Industrial Relations Act 1971. Unfair dismissal was a wholly new statutory concept with new statutory remedies. Exclusive jurisdiction to hear complaints and give remedies was conferred upon the newly created National Industrial Relations Court. Although the 1971 Act was repealed by the Trade Union and Labour Relations Act 1974, the unfair dismissal provisions were re-enacted and, as subsequently amended, are consolidated in Part X of the Employment Rights Act 1996. The jurisdiction is now exercised by employment tribunals and forms part of the fabric of English employment law.

52. Section 94(1) of the 1996 Act provides that "An employee has the right not to be unfairly dismissed by his employer". The Act contains elaborate provisions dealing with what counts as dismissal and with the concept of unfairness, which may relate to the substantive reason for dismissal or (as in this case) the procedure adopted. Over the past 30 years, the appellate courts have developed a substantial body of case law on these matters. Certain classes of employees are altogether excluded from the protection of the Act. Section 108 excludes those who have not had one year's continuous service and section 109 excludes those over normal retiring age or 65. The tribunal may make an order for reinstatement, re-engagement or compensation. The latter consists of a basic award and a compensatory award. The basic award is related to the period of service but, by section 122(2), may be reduced by such amount as the tribunal considers just and equitable on account of the complainant's conduct before dismissal. A compensatory award under section 123(1) shall be, subject to qualifications:

"such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."

…

54. My Lords, this statutory system for dealing with unfair dismissals was set up by Parliament to deal with the recognised deficiencies of the law as it stood at the time of *Malloch v Aberdeen Corpn* [1971] 1 WLR 1581. The remedy adopted by Parliament was not to build upon the common law by creating a statutory implied term that the power of dismissal should be exercised fairly or in good faith, leaving the courts to give a remedy on general principles of contractual damages. Instead, it set up an entirely new system outside the ordinary courts, with tribunals staffed by a majority of lay members, applying new statutory concepts and offering statutory remedies. Many of the new rules, such as the exclusion of certain classes of employees and the limit on the amount of the compensatory award, were not based upon any principle which it would have been open to the courts to apply. They were based upon policy and represented an attempt to balance fairness to employees against the general economic interests of the community.

And I should imagine that Parliament also had in mind the practical difficulties I have mentioned about causation and proportionality which would arise if the remedy was unlimited. So Parliament adopted the practical solution of giving the tribunals a very broad jurisdiction to award what they considered just and equitable but subject to a limit on the amount.

> 55. In my opinion, all the matters of which Mr Johnson complains in these proceedings were within the jurisdiction of the industrial tribunal. His most substantial complaint is of financial loss flowing from his psychiatric injury which he says was a consequence of the unfair manner of his dismissal. Such loss is a consequence of the dismissal which may form the subject matter of a compensatory award…
>
> 56. Part X of the Employment Rights Act 1996 therefore gives a remedy for exactly the conduct of which Mr Johnson complains. But Parliament had restricted that remedy to a maximum of £11,000, whereas Mr Johnson wants to claim a good deal more. The question is whether the courts should develop the common law to give a parallel remedy which is not subject to any such limit.
>
> 57. My Lords, I do not think that it is a proper exercise of the judicial function of the House to take such a step. Judge Ansell, to whose unreserved judgment I would pay respectful tribute, went in my opinion to the heart of the matter when he said:
>
> "there is not one hint in the authorities that the ... tens of thousands of people that appear before the tribunals can have, as it were, a possible second bite in common law and I ask myself, if this is the situation, why on earth do we have this special statutory framework? What is the point of it if it can be circumvented in this way? ... it would mean that effectively the statutory limit on compensation for unfair dismissal would disappear.""

115. Lord Nicholls said at [2]:

> "… a common law right embracing the manner in which an employee is dismissed cannot satisfactorily coexist with the statutory right not to be unfairly dismissed. A newly developed common law right of this nature, covering the same ground as the statutory right, would fly in the face of the limits Parliament has already prescribed on matters such as the classes of employees who have the benefit of the statutory right, the amount of compensation payable and the short time limits for making claims. It would also defeat the intention of Parliament that claims of this nature should be decided by specialist tribunals, not the ordinary courts of law."

116. Lord Steyn came to the same conclusion, but on the different basis that although the plaintiff had a cause of action, he had no realistic prospect of overcoming the obstacle of remoteness of damage.

117. The appeals to the House of Lords in *Eastwood v Magnox Electric Plc* and *McCabe v Cornwall County Council* were heard together and are reported at [2005] 1 AC 503.

118. In *Eastwood* two employees, Messrs Eastwood and Williams, sought damages for stress-related illness and inability to work which they claimed to be the result of a campaign on the part of their employer to demoralise them before dismissing them, in breach of an implied term in their contracts of employment and/or a duty of care.

119. In summary (see Lord Nicholls at [17]-[19]) the assumed facts were as follows. Mr Eastwood's immediate superior had a long-standing grudge against him and made a report against him to his manager, Mr Allen. This was followed by a series of events whose purpose was to secure evidence as a foundation for disciplinary proceedings against Mr Eastwood. Individuals were counselled to provide false statements. Mr Williams was asked to provide a false statement against Mr Eastwood, to be used to counteract an appeal brought by Mr Eastwood against a finding of misconduct made by Mr Allen. When Mr Williams refused, he was threatened with possible investigation into his own conduct. There were no grounds for making any such investigation. In July 1996, Mr Eastwood's appeal succeeded in part. A Mrs Roberts was encouraged by Mr Allen and other members of management to formulate a series of complaints against Mr Eastwood and Mr Williams. Both men were told that serious allegations of sexual harassment had been made against them, but they were not given any details or the name of the complainant. A week later, on 7 August, both men were very publicly suspended from work. Those responsible for investigating the complaint on behalf of management then encouraged individuals to provide statements with the promise they would not be asked to attend any hearing. Members of management asked Mrs Roberts to "beef up" her allegations and assisted her to do this. By the time of the (grossly unfair) disciplinary hearing, after four months of a campaign to demoralise and undermine him, Mr Williams had symptoms of anxiety and fear, later diagnosed as a depressive illness. On 4 October, he was dismissed. Mr Eastwood's disciplinary hearing was postponed until April 1997 because he was suffering from a depressive illness. He too was dismissed.

120. Lord Nicholls continued at [20]-[23]:

> "20. Both men pursued claims for unfair dismissal. Mr Williams' complaint resulted in a finding of unfair dismissal. Before a remedies hearing took place on Mr Williams' claim, and before any hearing on Mr Eastwood's claim, a compromise agreement was reached. Both men received financial payments. The agreement reserved the men's right to pursue a claim at common law for any claims they might have in respect of personal injuries arising out of their employment.
>
> 21. Mr Eastwood and Mr Williams then commenced proceedings in the County Court in July 1999 for negligence and breach of contract. They alleged they suffered personal injuries in the form of psychiatric illnesses caused by a deliberate course of conduct by certain individuals using the machinery of the disciplinary process. Judge Elystan Morgan dismissed both claims on the basis that, as a matter of law, they had no reasonable prospect of success. *Johnson's* case showed that the development of the common law implied terms, of trust and confidence and the like, cannot proceed further 'in so far as they come up against the buffers, as it were, of the unfair dismissal

> legislation'. Those terms are excluded from the area within the purview of an employment tribunal, and that area includes acts done from the time the disciplinary machinery starts running.

> 22. The Court of Appeal [2003] ICR 520, comprising Peter Gibson and Mantell LJJ and Sir Swinton Thomas, upheld the judge's decision. Peter Gibson LJ delivered the only reasoned judgment. Having referred to *Johnson's* case, he said at paragraph 23:
>
> "The implied term of trust and confidence cannot be used in connection with the way the employer/employee relationship is terminated. There may be cases where the particular manner in which an employee is dismissed or the circumstances attending dismissal is or are confined to events occurring at the same time or immediately before the dismissal. In other cases that manner and those circumstances may include a pattern of events stretching back over a period. It is a question of fact for the trial judge to determine in each case."
>
> 23. Peter Gibson LJ then concluded, in short, that the circumstances attending Mr Williams' dismissal began in May 1996. All these circumstances were considered by the employment tribunal. The compensation recoverable in the employment tribunal covers the substance of what Mr Williams is claiming in his court proceedings. There can be no justification for allowing Mr Williams a second bite of the cherry. In Mr Eastwood's case there has been no hearing in the employment tribunal. But on analysis his position is no different from that of Mr Williams."

121. In *McCabe,* a teacher employed by Cornwall County Council sought damages for psychiatric injury cause by the Council's suspension of him and failure during the next five months to inform him of allegations made against him or to carry out a proper investigation of those allegations, in breach of the relationship of trust and confidence and of the duty to provide a safe system of work.

122. In summary (see Lord Nicholls at [24]-[25]), in May 1993 allegations were made that he had behaved inappropriately towards certain female pupils, and he was suspended from his employment. At a disciplinary hearing he was given a final written warning. He appealed. Following a hearing by an appeal panel he was dismissed. Mr McCabe appealed again, unsuccessfully. He lodged a complaint with an industrial tribunal. In November 1996 the tribunal found that he had been unfairly dismissed. The dismissal was in breach of the relevant disciplinary procedures, as the allegations had not been investigated at the time by a senior member of staff and the complainant girls had not signed their statements. The Employment Appeal Tribunal upheld the industrial tribunal's finding on liability and overturned its finding of 20% contributory fault. Meanwhile in March 1997 Mr McCabe instituted proceedings in the High Court against the council and the school governors claiming damages for breach of contract,

negligence and breach of statutory duty. His primary complaint in his statement of claim as originally served was that by reason of the council's failure to investigate the allegations properly and to conduct the disciplinary hearings properly and his dismissal he had sustained psychiatric illness. He claimed special damages approaching £200,000. Later, in response to the decision in *Johnson*, he sought to amend his statement of claim to seek damages, in contract and tort, for psychiatric injury caused during the period before his dismissal, that is, for the suspension and the failure to properly inform him of the allegations or investigate. On 27 May 2002 Judge Overend, sitting as a judge of the High Court [2002] EWHC 3055 (QB), refused permission to amend the statement of claim and struck out the original statement of claim as disclosing no cause of action. The conduct of which Mr McCabe complained was all part and parcel of the events which led up to his dismissal and as such was caught by "the *Eastwood* extension to the *Johnson* principle*"*.

123. Lord Nicholls continued at [26]:

> "The Court of Appeal, comprising Auld, Brooke and Sedley LJJ, allowed an appeal by Mr McCabe on 19 December 2002 [2003] ICR 501. Auld LJ, at [27], with whom the others agreed, identified the essential question as one of determining where on the facts of any particular case the line should be drawn between dismissal, caught by the unfair dismissal legislation, and conduct prior to that causing injury compensatable in damages at common law. The case should be permitted to go to trial to enable the underlying facts to be ascertained."

124. At [27]-[31], Lord Nicholls said this:

> "27. Identifying the boundary of the "*Johnson* exclusion area", as it has been called, is comparatively straightforward. The statutory code provides remedies for infringement of the statutory right not to be dismissed unfairly. An employee's remedy for unfair dismissal, whether actual or constructive, is the remedy provided by statute. If before his dismissal, whether actual or constructive, an employee has acquired a cause of action at law, for breach of contract or otherwise, that cause of action remains unimpaired by his subsequent unfair dismissal and the statutory rights flowing therefrom. By definition, in law such a cause of action exists independently of the dismissal.
>
> 28. In the ordinary course, suspension apart, an employer's failure to act fairly in the steps leading to dismissal does not of itself cause the employee financial loss. The loss arises when the employee is dismissed and it arises by reason of his dismissal. Then the resultant claim for loss falls squarely within the *Johnson* exclusion area.
>
> 29. Exceptionally this is not so. Exceptionally, financial loss may flow directly from the employer's failure to act fairly when taking steps leading to dismissal. Financial loss flowing from suspension is an instance. Another instance is cases such as those

> now before the House, when an employee suffers financial loss from psychiatric or other illness caused by his pre-dismissal unfair treatment. In such cases the employee has a common law cause of action which precedes, and is independent of, his subsequent dismissal. In respect of his subsequent dismissal he may of course present a claim to an employment tribunal. If he brings proceedings both in court and before a tribunal he cannot recover any overlapping heads of loss twice over.
>
> 31. … In cases of constructive dismissal a distinction will have to be drawn between loss flowing from antecedent breaches of the trust and confidence term and loss flowing from the employee's acceptance of these breaches as a repudiation of the contract. The loss flowing from the impugned conduct taking place before actual or constructive dismissal lies outside the *Johnson* exclusion area, the loss flowing from the dismissal itself is within that area. In some cases this legalistic definition may give rise to difficult questions of causation in cases such as those now before the House, where financial loss is claimed as the consequence of psychiatric illness said to have been brought on by the employer's conduct before the employee was dismissed. Judges and tribunals, faced perhaps with conflicting medical evidence, may have to decide whether the fact of dismissal was really the last straw which proved too much for the employee, or whether the onset of the illness occurred even before he was dismissed."

125. Lord Steyn delivered a speech concurring in the result, and Lord Hoffmann, Lord Rodger and Lord Brown agreed with Lord Nicholls. Accordingly, the appeals in *Eastwood* were allowed, and the appeal in *McCabe* was dismissed. In short (see Lord Nicholls at [34]): "the assumed facts constitute causes of action which accrued before the dismissals. They disclose reasonable causes of action which should proceed to trial".

126. In *Edwards v Chesterfield NHS Trust* [2012] 2 AC 22, the Supreme Court decided two conjoined appeals, both of which involved claims for damage to reputation.

127. In the first case, Mr Edwards was a consultant surgeon employed by the defendant NHS trust. A complaint was made against him of an inappropriate examination of a female patient. A disciplinary panel decided that he should be summarily dismissed on the grounds of gross professional and personal misconduct. Because of the finding of gross professional misconduct against him, he was unable to secure another full-time medical post. He issued proceedings seeking damages for breach of his employment contract, contending that the constitution of the disciplinary panel failed to comply with the terms of his contract, and that a properly constituted panel would have reached a different conclusion. The NHS trust obtained a declaration that any damages would be limited to loss of earnings for the contractual period of three months' notice. The Judge and Court of Appeal allowed appeals, with the result it was held that the claimant was entitled to recover damages for the loss of the opportunity to hold another full-time appointment within the NHS as a consultant surgeon.

128. In the second case, Mr Botham was a youth worker employed by the Ministry of Defence. An allegation was made against him of inappropriate conduct towards two teenage girls. Following a disciplinary hearing he was dismissed for gross misconduct. As a result of that dismissal he was placed on the list of persons deemed unsuitable to work with children. His claims for unfair dismissal and wrongful dismissal were upheld by an employment tribunal, which found that there had been breaches of contract by the defendant regarding the disciplinary procedures. Following the tribunal's decision, his name was removed from the list of persons unsuitable to work with children. He issued proceedings in the High Court seeking damages for breach of the express terms of his contract of employment contending that as a result of those breaches he had been dismissed from his employment, suffered a loss of reputation, been placed on the unsuitable persons register and been precluded from further employment in his chosen field. The judge dismissed his claim but, following the decision of the Court of Appeal in *Edwards*, and by consent, the Court of Appeal allowed an appeal by him.

129. A Supreme Court comprising 7 justices overturned the Court of Appeal in both cases, by a majority. The holdings and certain observations of the justices are summarised in the head note as follows:

> "*Held*, (1) (Baroness Hale of Richmond JSC dissenting) that damages were not recoverable for breach of contract in relation to the manner of a dismissal even where the breach was of an express term of the contract of employment regulating the disciplinary procedures leading to dismissal …
>
> (2) Allowing the appeal in the first case (Baroness Hale of Richmond JSC, Lord Kerr of Tonaghmore and Lord Wilson JJSC dissenting), that it was impossible to divorce the findings on which the claimant founded his claim for damages for loss of reputation from the dismissal itself …
>
> (3) Allowing the appeal in the second case (Baroness Hale of Richmond JSC dissenting), that the damages claimed by the claimant for loss of reputation were caused by the dismissal itself …
>
> *Per* Lord Walker of Gestingthorpe, Lord Mance and Lord Dyson JJSC. Provisions about disciplinary procedure incorporated as express terms into a contract of employment are not ordinary contractual terms agreed by the parties to a contract in the usual way, since Parliament, in the unfair dismissal legislation, linked a failure to comply with such procedures with the outcome of unfair dismissal proceedings and could not have intended that the inclusion of such provisions in a contract would also give rise to a common law claim for damages …
>
> *Per* Lord Kerr of Tonaghmore and Lord Wilson JJSC. If a cause of action is in existence before dismissal, it is not extinguished by subsequent dismissal, even if the dismissal is consequent on the state of affairs which gave rise to the cause of action …

> *Per* Lord Phillips of Worth Matravers PSC. If the courts in developing the common law principles of measure of damage can exclude a claim for stigma damages for breach of contract which consists of wrongful dismissal, it is equally open to them to exclude such a head of claim for breach of contract which consists of a failure to comply with a disciplinary code, and the chain of causation linking a failure to follow a disciplinary procedure is more tenuous than the chain of causation linking wrongful dismissal with stigma ..."

130. Lord Dyson (with whom Lord Walker and Lord Mance agreed) said at [40]:

> "… "Parliament has made certain policy choices as to the circumstances in which and the conditions subject to which an employee may be compensated for unfair dismissal. A dismissal may be unfair because it is substantively unfair to dismiss the employee in the circumstances of the case and/or because the manner in which the dismissal was effected was unfair. The manner may be unfair because it was done in a humiliating manner or because the procedure adopted was unfair, inter alia, because the agreed disciplinary procedure which led to the dismissal was not followed. It may be unfair because defamatory findings were made which damage the employee's reputation and which, following a dismissal, make it difficult for the employee to find further employment. Any such complaint was intended by Parliament to be adjudicated on by the specialist employment tribunal subject to the various constraints to which I have referred. Parliament did not intend that an employee could choose to pursue his complaint of unfair dismissal in the ordinary courts, free from the limitations carefully crafted by Parliament for the exercise of this statutory jurisdiction."

131. In respect of the individual cases Lord Dyson said:

> "*Mr Edwards*
>
> 55. It is accepted by [his counsel] that Mr Edwards's claim for unfair dismissal falls within the Johnson exclusion area. But she submits that his claim for damages for loss of reputation consequent on the findings of misconduct made by the disciplinary panel does not. She contends that these findings resulted from the fact that (in breach of the contractual disciplinary procedures) the disciplinary panel was not properly constituted and acted in a manner which was procedurally unfair. This breach, she submits, occurred independently of the dismissal.
>
> 56. The undisputed facts are that Mr Edwards's disciplinary hearing was held on 9 February 2006. He was notified of his summary dismissal on the following day. The decision was confirmed in a long letter from the chairman of the disciplinary

panel dated 16 February which set out in detail the allegations and the panel's findings. The complaint is that the panel's "erroneous" conclusions flowed from these findings. The findings and conclusions were first published in the letter which was sent six days after the decision to dismiss had been communicated to Mr Edwards and were contained in the letter which confirmed his dismissal. In my view, it is impossible to divorce the findings on which Mr Edwards seeks to found his claim for damages for loss of reputation from the dismissal when they were the very reasons for the dismissal itself.

57. In these circumstances, Mr Edwards's claim for damages for loss of reputation is not one of those exceptional cases to which Lord Nicholls referred in Eastwood's case [2005] 1 AC 503 where an employer's failure to act fairly in the steps leading to a dismissal causes the employee financial loss. This claim does not arise from anything that was said or done before the dismissal. It is not independent of the dismissal. It arises from what was said by the trust as part of the dismissal process. It follows that I cannot accept the distinction made by Lord Kerr and Lord Wilson JJSC between the findings or reasons for the dismissal and the dismissal itself. I agree with what Lord Mance JSC says about that.

Mr Botham

58. The case pleaded, at para 20 of the particulars of claim, is that as a result of the MOD's breaches of contract, Mr Botham "foreseeably, was dismissed from employment, and was caused (wrongly) to suffer loss and damage to his reputation and to be precluded from further employment in his chosen field and to be placed on the register of persons deemed unsuitable to work with children …" The damages claimed include loss of earnings and other benefits from the date of dismissal. The statement of facts and issues agreed for the purposes of the appeal state that Mr Botham was placed on the register "as a consequence of the dismissal for gross misconduct" (para 5) and the relief sought by him includes damages on the grounds that his "dismissal and his inclusion on the POCA precluded him from further employment as a youth community worker" (para 15(3)).

59. In my view, this case is a fortiori that of Mr Edwards. In Mr Edwards's case it is alleged that the damages for loss of reputation were caused by the erroneous findings made by the panel, rather than the dismissal. Mr Botham goes further and says that the damages he claims for loss of reputation were caused by the dismissal itself. For the reasons already given, it falls within the Johnson exclusion area. That was the view of Slade J [2010] EWHC 646 (QB) and I agree with it. The consent order made by the Court of Appeal on 31 August 2010 [in Mr Botham's favour] should therefore be set aside."

132. Lord Mance said:

> "94. … in the absence of express contrary agreement, the *Johnson* exclusion area must be taken to cover both loss arising from dismissal and financial loss arising from failures in the steps leading to such dismissal, unless the loss claimed can be regarded as occurring quite independently of the dismissal, as the psychiatric loss claimed by the claimants in the Eastwood cases could be.
>
> 95. There are further potential objections to Mr Botham's proposed case. It depends upon the propositions (a) that one alleged breach of contract or duty can be said to have caused the commission of another breach of contract or duty by the same person or entity, and (b) that where recovery for the latter breach is limited, a claim may, by relying on the former breach as causing the latter breach, avoid the limit. Both propositions are in my view open to question. First, so far as the failure to take proper disciplinary steps can be separated from the dismissal, then it constituted not a reason for dismissing, but a reason for *not* dismissing. The dismissal was a fresh decision, which the employer ought not to have taken and without which there would have been no loss. But, second**,** assuming the first point in Mr Botham's favour, any loss that he suffered flowed from the wrongful or unfair dismissal, and was recoverable either as compensation for breach of contract or for unfair dismissal, subject in either case to the relevant limits. If the wrongful or unfair dismissal is to be attributed causatively to the prior failure to take proper disciplinary steps, I find it difficult to see why or how the damages recoverable for the prior failure should or could exceed the compensation recoverable for the later dismissal. However, these points were not fully developed in argument, and I express no further view on them."

133. With regard to Mr Edwards, Lord Mance said at [99]:

> "The fact is that Mr Edwards was dismissed on the basis of and contemporaneously with the disciplinary findings about which he seeks to complain. In so far as his claim consists of loss allegedly suffered by dismissal, it falls directly within the "exclusion area" which was recognised in *Johnson v Unisys Ltd* [2003] 1 AC 518 and which I have referred to … above. But, in my opinion, it is quite unrealistic in this context to seek to differentiate any of the loss he has allegedly suffered from his dismissal. Any breach of disciplinary procedure did not cause of itself identifiably separate loss or illness... Where the findings reached in the disciplinary proceedings and the dismissal are, as in the present case, a part of a single process, the remedy for any unjustified stigma lies, short of circumstances establishing a claim for defamation, in the restoration of reputation which may

> in the ordinary course be expected to result from a successful claim for wrongful or unfair dismissal."

134. Lord Kerr (with whom Lord Wilson agreed) said in respect of Mr Botham at [156]:

> "It is accepted that the reputational damage which he is alleged to have suffered was inextricably linked to the fact of his dismissal. His cause of action in respect of that reputational damage did not exist before he was dismissed, therefore. Such financial loss as he may have suffered as a consequence is the result of his dismissal. I consider, therefore, that compensation for damage to his reputation could only have been sought as part of his unfair dismissal claim."

Defendants' Submissions

135. Mr Rushbrooke submitted that the present case falls within the *Johnson* exclusion area and should be struck out:

(1) It contains both of the elements which caused the surgeon and the teacher to fail in *Edwards*: it seeks to complain of an element of the dismissal process and the reasons for it, for which Mr Edwards' claim was refused; and it seeks to recover for the consequences of the dismissal, for which Mr Botham's claim was refused.

(2) Mr Edwards sought to complain of the defamatory findings of a disciplinary panel dismissing him; Ms Parris seeks to complain about one step earlier in the process, a defamatory statement made as part of a disciplinary investigation which resulted in a panel dismissing her. Both are part of the dismissal, on which Parliament has legislated, and within the *Johnson* exclusion area. As Lord Dyson said: "it is impossible to divorce the findings on which Mr Edwards seeks to found his claim for damages for loss of reputation from the dismissal when they were the very reasons for the dismissal itself."

(3) Ms Parris' case as to damage is on all fours with that of Mr Botham. As in his case, the damages she seeks are explicitly said to be the result of (and plainly were the result of) her dismissal. They are "inextricably linked" to the dismissal, and as such may only be sought in an unfair dismissal claim.

(4) Alternatively, even if the Court were willing to find that the publication of Mr Ajayi's statement during the disciplinary procedure resulting in Ms Parris' dismissal could be separated from the dismissal and considered an independent and pre-existing cause of action, her claim would still fail:

a. In so far as the claim is one in malicious falsehood, it requires pecuniary loss, or the likelihood thereof: that is only the loss flowing from dismissal (PoC §27). As such there is no independent cause of action.

b. In so far as the claim is in libel, the allegations of serious harm (PoC §20) and damage (PoC §29.2, 29.3, 29.5, 29.6, 30-30.9) depend upon the dismissal and its consequences. Unlike in *McCabe* (but like Mr Botham in *Edwards*), Ms Parris has not sought to amend to limit her claim to

remove reliance on the consequences of dismissal. Her claim should be taken as it is pleaded.

(5) Nor is this a problem that could be cured by amendment. The dismissal is the core of the claim. Without it, Ms Parris would only be able to complain about the damage allegedly caused to her reputation in the mind of Mr Gayler, by the publication of the Statement. This publication was at a time when Mr Gayler had (i) already heard Mr Ajayi convey his concerns to him, which had led him (ii) to hold a meeting with Mr Ajayi and Ms Parris to discuss the incident; and thereafter (iii) to request Mr Ajayi to set out his account in a statement. Any damage caused by the repetition of the allegation in those circumstances would be so trivial that it would fail to satisfy the serious harm to reputation requirement of section 1 of the Defamation Act 2013 (or if it did, that allowing a libel claim on it to proceed to a full High Court trial would be grossly disproportionate and an abuse of process: *Jameel v Dow Jones* [2005] QB 946).

(6) That Ms Parris is seeking the very same damages for dismissal that she sought in the Employment Tribunal Proceedings has been explicitly recognised by Mr Henman (acting on her behalf), when he stated in those proceedings that "there is an issue of double recovery in the High Court claim", and, in a passage which he cites in §19 of his witness statement dated 5 November 2020, that she sought "just enough of [her] losses to bring the value up to full compensation – in other words we don't [reduce] liability claims in other proceedings". It is therefore plain that Ms Parris is seeking the same losses, flowing from the dismissal, in the present claim as she was in the Employment Tribunal Proceedings. Indeed, her solicitor, Mr Huckstepp, explicitly acknowledges that she is seeking "the same loss of earnings" in his evidence, but contends that she "has additional damages for defamation and damages for loss of earnings" because "her claim for loss of earnings is larger than the cap allowed in the employment tribunal proceedings" (see §23 of his witness statement dated 5 November 2020). That is precisely what is prohibited by *Johnson*: the bringing of a common law claim to subvert the intention of Parliament as to the remedies available in respect of unfair dismissal.

(7) Ms Parris' evidence further demonstrates this. She refers not to any (inconsequential) harm to her reputation in the eyes of Mr Gayler, but rather to the effects of her unfair dismissal for gross misconduct: "The added stigma of being (falsely) dismissed for Gross Misconduct means that I was severely restricted in finding a comparative income in the NHS" and "Nor has the tribunal award eliminate[d] the stain and stigma of Gross Misconduct on my employment record" (see §54 and §57 respectively of her amended witness statement dated 17 November 2020). Moreover, it is clear from Ms Parris' own evidence that she is treating the publication complained of as inextricably bound up with the disciplinary process: see §47 *ibid*, where it is alleged that "By constructing such a statement in this manner, [Mr Ajayi] knew that this would ensure my dismissal under the Corporate Defendants' disciplinary regime of the day".

(8) Accordingly, the Defendants ask for permission to amend their Defence to plead that Ms Parris' claim falls within the *Johnson* exclusion area, and for the claim to be struck out and/or for summary judgment to be granted on that basis.

Ms Parris' submissions

136. Ms Michalos submitted:

(1) The principle in *Johnson* is that where Parliament has provided statutory redress for unfair dismissal, it would be inappropriate for the judiciary to seek to extend the common law to a wider claim for damages for the *manner* of the dismissal.

(2) However, in *Johnson*, primary liability was sought against the same party as in the unfair dismissal proceedings (namely the employer) through a separate cause of action to unfair dismissal. In the present case, the claim is against wholly different parties. Primary liability is sought against Mr Ajayi and his employers are asserted to be vicariously liable. The Defence admits that Mr Ajayi is employed by SHCC. However, judgment in the Employment Tribunal Proceedings was against the Partnership, which is not a party to the present proceedings.

(3) Further, the claim is not reliant on the *manner* of dismissal, which is the foundation of the rule in *Johnson*. It is for losses flowing from a defamatory publication which, it is said, caused the dismissal. The Employment Tribunal Proceedings concerned Ms Parris' dismissal by her employer, and whether that process was in accordance with employment law. The defamation claim concerns the statement made by Mr Ajayi, and the consequences that flowed from it that are to be attributed to his actions. This includes a refusal to provide a clinical reference after 18 years of employment, which is wholly separate from the manner of dismissal.

(4) More generally, that Mr Rushbrooke's reliance on *Johnson, Eastwood* and *Edwards* was misplaced on a number of grounds. These included, in addition to the "different employer" point summarised above, that the *Johnson* exclusion area does not apply to a malicious untruth, and that Lord Mance's reference in *Edwards* at [99] to "circumstances establishing a claim for defamation" clearly covered the present case.

Defendants' submissions in reply

137. Mr Rushbrooke submitted:

(1) With regard to Ms Michalos' argument based on "different parties", on Ms Parris' own pleaded case she and Mr Ajayi were employed by the same employer. Ms Parris has made no application to amend the POC, and the Court can only deal with the case in front of it. Further, even if the Court felt constrained to deal with the case on the basis that Ms Parris' employer has been found to be a different entity to SHCC or SHCR, the *Johnson* exclusion area should extend to claims against all companies within a group. Were that not the case, the availability of the protection which, as the Courts have found, Parliament intended to be available to employers in relation to complaints about their employees' dismissal might depend, arbitrarily, on whether the employer was part of a group of companies and how that group had structured itself.

(2) Insofar as Ms Parris contends that *Johnson* can have no application in relation to the claim against Mr Ajayi, if that were correct any employee could get around the rule by confining her common law proceedings to a claim against the individual

fellow employees or officers whom she alleges were tortfeasors, safe in the knowledge that the employer would be likely (or perhaps even contractually obliged) to indemnify those tortfeasors.

(3) The argument that *Johnson* can have no application where the employee has a pre-existing cause of action for damages for defamation is wrong, and flows from a misunderstanding of Lord Nicholls' speech in *Eastwood*. It is clear from the passage at [27]-[29] in that speech that the *Johnson* exclusion area is a rule about loss, not about causes of action. If before his dismissal an employee has acquired a cause of action for breach of contract or otherwise, he can bring a claim to recover any loss which "flows directly from the employer's failure to act fairly when taking steps leading to dismissal" [29], but he cannot bring a claim for "loss arising when the employee is dismissed" [28]. If the loss arises when the employee is dismissed and it arises by reason of his dismissal it can only be recovered in the Employment Tribunal *irrespective of the existence of any common law cause of action* which is alleged to have given rise to it. It is to be noted that both employees in *Eastwood* had sued for negligence as well as breach of duty (see [21], [25]). The reason why Mr McCabe was permitted to pursue his claim for special damages was because following the decision in *Johnson* he had amended his claim to confine it to the period before his dismissal (see [25]). It was not because he had a common law cause of action in negligence.

(4) Accordingly, Ms Parris' claim is caught fairly and squarely by the *Johnson* rule because (a) the causes of action are not 'independent' of her dismissal albeit that in temporal terms they precede it, (b) even if they could be regarded as independent in the sense meant by Lord Nicholls, the serious harm and/or pecuniary loss without which the causes of action are not complete depend upon losses which plainly fall do within the *Johnson* exclusion area, namely the special damages arising from her dismissal, and/or (c) in any event that special damages claim is plainly caught by the *Johnson* rule for the reasons given by Lord Nicholls at [27]-[29].

Discussion and conclusion

138. The POC includes the following pleas:

> "20. The meaning of the words is such that (a) it is to be inferred that they caused serious harm to the reputation of the Claimant by reason of the inherent gravity of the imputation and (b) their publication did in fact cause serious harm to the reputation of the Claimant because as a result she was dismissed by the Second Defendant from her employment as set out further below.
>
> 27. The publication of the said words was calculated to cause and did cause pecuniary damage to the Claimant in respect of her employment as she was dismissed as aforesaid.
>
> 28. In addition to the serious harm caused to her reputation, the Claimant has suffered considerable hurt, distress and embarrassment. The Claimant's future employment opportunities have been substantially hindered, and she has suffered anxiety due to the fear that the Defendants will continue

publishing the allegations about her to employees of the Corporate Defendants, those who work within her field and relatives of service users as to the reasons she left.

29. In support of their claim for general damages and/or aggravated damages the Claimant will rely on the following:

…

29.2. The First Defendant well knew and intended that the words complained of would or were likely to lead to the dismissal of the Claimant and/or severe disciplinary sanction of the Claimant.

29.3. The Claimant lost her employment with an employer she had been employed by for 18 years.

…

29.5. As was reasonably foreseeable to the First Defendant, despite the Claimant's 18 years of service without any prior disciplinary issue, the Second Defendant refused to provide the Claimant with a positive or full employment reference and only provided a bare minimum reference confirming the fact of her employment. As a result, the Claimant is and was handicapped on the labour market and in respect of her ability to obtain immediate alternative employment.

29.6. The Claimant was obliged to refer the circumstances of her dismissal to her regulator the HCPC under Section 9.5 of the HCPC Standards of Conduct, Performance and Ethics. The Claimant is suffering understandable distress, anxiety and stress as the HCPC will now have to investigate the matter in order to determine whether there are any fitness to practice concerns in relation to the Claimant's HCPC registration and have opened an investigation.

…

30. The Claimant has suffered special damage in the form of loss of income caused by the publication complained of

PARTICULARS OF SPECIAL DAMAGE

Past Loss

30.1. The Claimant's annual net salary at the point her employment was terminated was £36,325 per annum.

30.2. From 24th April 2017, the Claimant became employed by the NHS at a lower grade than her employment with the Second Defendant at a lower rate of pay.

> 30.3. Between 25th January 2017 and 24th April 2017 the Claimant was unemployed.
>
> 30.4. Her net loss of income during that period was £5,193.00.
>
> Future Loss
>
> …
>
> 30.6. By reason of the publication complained of, the Claimant's dismissal and the inevitable result that the Claimant was unable to obtain a positive employment reference or a recommendation from the Corporate Defendants, the Claimant is handicapped on the labour market and unable to obtain employment in the private sector at a commensurate salary to her employment with the Corporate Defendants.
>
> …
>
> 30.9. The Claimant's total loss of income from 24th April 2017 until her retirement on 25th April 2027 is £20,771.28 x 10.12 = £210,205.35.
>
> …
>
> 30.10. The Claimant claims: Past loss: £5,193.00 Future loss: £210,205.35 Total loss: £215,398.35"

139. As Lord Nicholls explained in *McCabe*, generally speaking an employer's failure to act fairly leading to dismissal does not by itself cause the employee financial loss. On the contrary: "The loss arises when the employee is dismissed and it arises by reason of his dismissal. Then the resultant claim for loss falls squarely within the *Johnson* exclusion area" and "An employee's remedy for unfair dismissal, whether actual or constructive, is the remedy provided by statute". On the other hand: "If before his dismissal, whether actual or constructive, an employee has acquired a cause of action at law, for breach of contract or otherwise, that cause of action remains unimpaired by his subsequent unfair dismissal and the statutory rights flowing therefrom". However, exceptionally, "financial loss may flow directly from the employer's failure to act fairly when taking steps leading to dismissal" (for example "when an employee suffers financial loss from psychiatric or other illness caused by his pre-dismissal unfair treatment"); and in such cases the employee has a common law cause of action which precedes, and is independent of, his subsequent dismissal; and he is then entitled to bring proceedings both in a court and before a tribunal, although he cannot recover any overlapping heads of loss twice over.

140. Although Lord Nicholls made reference to "the employer's duty to act fairly", in my judgment the same considerations apply to any claim to recover loss which arises by reason of the employee's dismissal, regardless of whether the claim is based on a breach of contract (such as an implied duty to act fairly) or tort (such as negligence). As Lord Dyson said in *Edwards* at [40]: "Any such complaint was intended by Parliament to be adjudicated on by the specialist employment tribunal subject to the various constraints

to which [he had] referred". That accords with *Edwards*, in which both (i) Mr Edwards' claim for damages for loss of reputation said to have been caused by the erroneous findings made by the panel (rather than by his dismissal itself) and (ii) Mr Botham's claim for damages for loss of reputation which were said to have been caused by his dismissal itself were held by the Supreme Court to fall within the *Johnson* exclusion area. In the words of Lord Kerr, if the reputational damage which the claimant is alleged to have suffered is inextricably linked to the fact of his dismissal such that the cause of action in respect of that reputational damage did not exist before the dismissal, such financial loss as he may have suffered as a consequence is the result of the dismissal, and compensation for that damage can only be sought as part of his unfair dismissal claim.

141. In contrast, if the claim is based on a cause of action which was complete before the employee was dismissed and which occasioned loss which arises independently of his dismissal, then it is outside the *Johnson* exclusion area. That accords with *Eastwood*, in which the assumed facts constituted causes of action which accrued before the dismissals, and the losses claimed were occasioned by those causes of action and not the dismissals.

142. In my judgment, applying these principles to the facts of the present case, the following aspects of the POC fall within the *Johnson* exclusion area: (i) the claim that publication of the words complained of was "calculated to cause and did cause pecuniary damage to [her] in respect of her employment as she was dismissed" contained in §27, (ii) the allegation that "their publication did in fact cause serious harm to [her] reputation … because as a result she was dismissed by [SHCC] from her employment" contained in §20(b), (iii) the claims for damages contained in §§29.2, 29.3, 29.5 and 29.6, and (iv) the claims for past and future losses contained in §§30-30.10.

143. I do not consider that this conclusion is affected either by fact that the present claim is brought against SHCC and SHCR, whereas it was determined in the Employment Tribunal Proceedings that Ms Parris was employed by the Partnership, or by the fact that the present claim is brought against an individual (Mr Ajayi) as well as Ms Parris' employer (whoever that employer may truly be). It would run counter to, and would substantially undermine, the effect of the decisions of the House of Lords and the Supreme Court in *Johnson, Eastwood* and *Edwards,* and the policy considerations so clearly spelled out in those cases, if a claim for loss which arises when an employee is dismissed and which arises by reason of that dismissal could be brought in the High Court (instead of the specialist tribunal designated by Parliament, and subject to the constraints identified by Lord Dyson) by bringing a claim against someone other than the employer.

144. Nor, for the avoidance of doubt, do I consider that this conclusion is affected by when the words complained of were first published by Mr Ajayi to Mr Gayler (an issue which I have concluded is unsuitable for summary determination when discussing the implications of the decision in *Friend*). The publication which constitutes the foundation for those parts of the POC which I have held to fall within the *Johnson* exclusion area is whichever one led to the consequence that Ms Parris was dismissed. It matters not for purposes of those pleas whether that publication occurred on 15 September 2016 (as I have held that Ms Parris has a real prospect of establishing at trial) or on 22 September 2016 (as the Defendants contend); or, indeed, whether some other publication (such as an antecedent oral statement by Mr Ajayi to Mr Gayler,

which is not pleaded) had that effect (although Ms Michalos argued at the hearing that a written statement from Mr Ajayi was central to her client's case, as without it the disciplinary process would have faltered).

145. In these circumstances, it seems to me that the factors which led me to conclude that I should accede to the Defendants' application for permission to amend to plead a new case based on *Friend* apply *a fortiori* to their application for the like permission with regard to the *Johnson* exclusion area. I therefore propose to grant permission to amend to plead the latter case, and, having done so, to grant the Defendants' application to strike out the following paragraphs of the POC: §20(b); §27; §29.2; §29.3; §29.5; §29.6; §§30-30.10.

THE EMPLOYMENT REFERENCE CLAIM

146. If, contrary to their primary case that Ms Parris' claim should be struck out on one or more of the above grounds, it survives in whole or in part, the Defendants seek summary judgment in respect of the claim to special damages alleged to flow from the nature of the employment reference which SHCC provided for Ms Parris. This is set out in §29.5 and §30 of the POC. Mr Rushbrooke submits that this claim has no real prospect of success.

147. I have taken the view that, on proper analysis, Ms Parris' employment reference claim forms part of the claim for loss arising from her dismissal and by reason of her dismissal, and accordingly falls squarely within the *Johnson* exclusion area. The need to consider the Defendants' alternative case only arises in the event that this conclusion is wrong.

Defendants' submissions

148. The Defendants contend:

(1) The claim in §29.5 of the POC is the only part of Ms Parris' damages claim at §29 which relates to future loss. It was pleaded on 6 November 2017, after she had found employment with Sussex Community NHS Trust as a Band 6 Senior Physiotherapist. Details of her claim for loss of income are then set out at §30. Above §30.5 is the heading "Future Loss", and §30.6 (among other sub-paragraphs) appears beneath that.

(2) As such, Ms Parris' alleged inability to obtain a positive employment reference from SHCC and/or SHRC is crucial to her claim (a) to be handicapped on the labour market, (b) to be unable to obtain employment in the private sector, and (c) thus, to have suffered loss in respect of her employment.

149. Turning to the evidence, the Defendants contend:

(1) As Ms Parris pleads, SHCC did provide a reference for her, which confirmed the fact of her employment (and its duration).

(2) However, contrary to Ms Parris' case, this accorded with the policy of SHCC (and the group of companies more widely) in respect of all references.

(3) First, this was explicitly stated on the reference itself (which reads "It is our standard response to confirm only the following"), and therefore would have been clear to Ms Parris, as well as to any prospective employer.

(4) Second, this is the evidence of Ms Fehilly, the Director of Human Resources for "the Sussex Health Care Group", which (she says) includes SHCC, SHCR and the Partnership. In her first witness statement dated 18 September 2020, she states:

> "20 I have made enquiries with staff in my (HR) team, many of whom have worked for within the SHC Group for longer than I have. My colleagues stated that, up and until around February 2019, it was the policy of the SHC Group to only give references that confirm the dates that the employee worked for the employer and the employee's job title. From around February 2019, references also confirmed the employee's place of work and contractual hours.
>
> 21 References which confirm the dates that the employee worked for the employer and the employee's job title are commonly referred to in the HR industry as "factual references". They can be distinguished from references that comment on an employee's performance or the circumstances in which they left the business.
>
> 22 I have considered the SHC Group's HR records with a view to finding examples of the references that were given before I worked in the business.
>
> 23 I selected 30 references at random, copies of which I exhibit to this statement … Each reference was entirely factual and in the style referred to above. I did not find a single reference that was non-factual. After carrying out this task, I did however notice that the vast majority of the references that I had selected happened to fall well after the Claimant was dismissed/the reference in question was provided. I therefore selected a further 10 references at random, but this time limited my search to references given in 2016 – 2017. I exhibit copies of those references … Again, the references were entirely factual."

150. The Defendants submit that Ms Parris has provided no reason to doubt this:

(1) In correspondence, after the Defendants' solicitors had invited Ms Parris to withdraw her case in this respect, her solicitors stated that she herself had given fuller references including for Laura Stonham, and requested the reference which SHCC had provided for Ms Stonham. That reference was duly provided. It is in the hearing papers. It was in the same factual format as the reference which had been provided for Ms Parris.

(2) At §54 of her amended second witness statement dated 17 November 2020, she states:

> "Mr Ajayi did not provide (as would have been expected of an HCPC registered professional) the clinical reference in the case of Laura Stonham … or provide my clinical reference which would have been done by custom and practice otherwise. Furthermore, the lack of full disclosure of my employment capabilities by way of an accurate and truthful clinical reference showing my extensive clinical experience and skills acquired over 18 years at SHC compromised my employment opportunities. The added stigma of being (falsely) dismissed for Gross Misconduct meant that I was severely restricted in finding a comparative income in the NHS."

(3) The Defendants submit that this (i.e. a complaint that Mr Ajayi had not provided her with a "clinical reference") is not the complaint made in Ms Parris' pleaded case, and is accordingly irrelevant.

(4) However, if this issue is relevant, Mr Ajayi's evidence in response (see §9 of his third witness statement dated 20 November 2020) is "I was simply never asked to provide the Claimant with a reference. If she had asked me for a reference, I would have first checked with HR. Subject to HR's authorisation that I could provide a reference in the first place, I would have given her an honest appraisal".

(5) Further, Ms Parris' evidence in the Employment Tribunal proceedings (see §18 of her third witness statement therein dated 24 August 2019) is that she secured references from managers who knew "the workings of SHC and were well versed with the antagonism that my line manager had shown towards me" and "were also aware of the conduct of SHC towards their staff and that the company had unlawfully dismissed me, and I was now embroiled in Employment Tribunal, County Court proceedings and a future Defamation claim" and provided her with "exemplary support".

(6) Ms Parris' employment contract provided at §23(e): "The Employer has no duty to provide any person or organisation with a reference regarding your employment with the Employer. However, if such a reference is given, all reasonable care will be taken to ensure its accuracy".

151. The Defendants therefore contend that Ms Parris would not have obtained any other reference from SHCC (or SHCR), even if she had left for a different reason.

152. Moreover, the Defendants submit that there is no basis for any case to go forward that Ms Parris has in fact suffered any handicap on the labour market, whether in the private sector or otherwise, and let alone by reason of the content of the employment reference with which she was in fact provided. Her own evidence in §§19-22 of her third witness statement in the Employment Tribunal Proceedings dated 24 August 2019 is:

> "I had seen two jobs advertised in late January … One advertised job was in Responsive services with the Sussex Community Foundation Trust at Horsham hospital … This service was very similar to some of my experiences at SHC, but rather than treating service users over several years, my interactions would be for weeks before discharging the patients into follow up

> 'continuing care services'. I applied for this job on 01/02/2017 a full month before my appeal against dismissal was to be held (although at that time this outcome was unknown but presumed).
>
> I requested application information on three part time jobs during February, one in Responsive services, the others in the neurological community team and musculoskeletal services. I completed application forms for the first two … I spoke to the Manager of Responsive services, Karen Perry, and she confirmed with Claire Watts (one of my referees that worked in the adjacent building) that I was a suitable candidate despite my gross misconduct dismissal from SHC …
>
> Ms Perry told me if I passed through the NHS formal application process, she would employ me. References were requested from SHC by the NHS but there was no answer. I was advised if there was no response to the reference from SHC, I would not be employed … I contacted my union representative at the Chartered Society of Physiotherapy (CSP) and she then eventually contacted SHC … As a result an inaccurate one-line reference was sent to the NHS from SHC … on 21/03/2017 … After I had been accepted for the advertised post, I then arranged a meeting with my new manager to discuss my starting salary.
>
> The advantages of working for the NHS over other commercial or private health care organisations are significant, and I was impressed with the support for new staff as well as future role development offered by the NHS …"

153. Accordingly, the Defendants submit that: (a) SHCC's reference for Ms Parris was unaffected by the publication of the Statement or indeed her dismissal, (b) the sole job application for which the reference was given was successful, (c) there is no real prospect of Ms Parris establishing otherwise, and (d) summary judgment should therefore be granted in respect of the claims advanced on this basis at POC, §29.5 and §§30.5-30.10.

154. Finally, the Defendants argue that once those claims fall away: (a) the remainder of the special damages claim must fall away to avoid double recovery with the award for the same loss in the Employment Tribunal; and (b) the remainder of the claim falls to be struck out as a *Jameel* abuse of process. As to this latter point, the Defendants submitted:

(1) It is wrong to say that Ms Parris had no other means of obtaining vindication in relation to the allegation complained of. She chose to complain of the publication of the Statement that she did. By the time she made her legal complaint on 12 May 2017 she and her lawyers knew everything that they needed to be able to include within the scope of her complaint any publications between Mr Ajayi and Mr Gayler that took place prior to the start of the disciplinary process, but they did not. It would have been obvious to Ms Parris by no later than the afternoon of 15 September 2016 that Mr Ajayi had reported to Mr Gayler on the substance of his meeting with her of the previous day, and what the tenor of that report was.

(2) Although it is plainly too late to seek permission to make such a complaint now, Ms Parris is wrong to submit (as she did at the hearing) that it would not have been possible to make a complaint of slander. In a case where a claimant knows that defamatory words have been published about her but does not know the precise words used, the procedure to be followed is set out in *Gatley* (12th Ed) at para 26.17. As long as a slander complaint is not obviously speculative it will be allowed to go forward.

(3) There is no evidence before the Court as to why Ms Parris chose to confine her complaint to the publication that she did. If that choice was to any extent due to a misapprehension of defamation law and practice, as opposed to a strategic decision, that would be a matter between her and her solicitors.

(4) In any event, judged objectively, Ms Parris has no need of vindication in respect of a publication of the words complained of to one person, within the confines of the workplace, and in circumstances where she cannot point to any reputational damage suffered outside of the workplace and has obtained a judgment in her favour for unfair dismissal.

Ms Parris' submissions

155. Ms Michalos submitted, first, that the Defendants' previous application for summary judgment contained an application to strike out the special damages claim for future losses set out at §§30.5-30.9 of the POC on the basis that: (a) Ms Parris had no reasonable prospect of proving that the future losses were caused by the publication complained of; (b) there was an inconsistent case put in related proceedings; and (c) Ms Parris could not effect double recovery. That application was refused by Master Davison. The Defendants' current application is to strike out the special damages claim in §29.5 of the POC and again to strike out §30. This has previously been considered by the Court and should be disallowed in principle on the basis that reviving it constitutes a *Henderson* abuse.

156. Second, in the event that this submission was rejected, Ms Michalos submitted that:

(1) There is no good reason why the new points have not been pleaded before and no explanation for the delay in raising the same.

(2) The suggestion that no clinical references (as distinguished from pure factual references confirming the fact of employment) were ever provided is a factual matter which is disputed and is not suitable for summary judgment.

(3) The evidence of Ms Fehilly as regards the reference practices is also inadequate. What is in issue is the position of Ms Parris in 2017 *vis-à-vis* the entity by which she was actually employed (i.e. the Partnership, and not either (i) "the SHC Group" generally, or (ii) companies in that Group). Ms Fehilly only joined the corporate defendants in February 2020, and §§20-22 of her first witness statement dated 18 September 2020 comprises "third hand hearsay" and is not a sufficient or reliable basis for a Court to conclude that summary judgment in the Defendants' favour is warranted.

(4) Ms Parris disputes these matters, and her evidence at §53 in her amended second witness statement dated 17 November 2020 is:

> "As a registered professional following a code of conduct … I did provide clinical references (as did other professionals such as nursing care home managers) for staff taking up new employment and by supporting a former employee who were already registered professionals with the HCPC (or were seeking registration). Several example references and email threads have been provided in the annexed exhibits (with redacted names) that show this custom and practice of clinical references provide for former professionals that were made in full knowledge of HR personnel and the care home administrators … A professional reference … given by Mr Ajayi shows an example of a document he provided as a clinical reference for Maria Rogan …"

(5) Indeed, Mr Ajayi himself admits that he gave clinical references, although he asserts that this was only in the early part of his career with SHC and that these were provided in his personal capacity (see his third witness statement dated 20 November 2020 at §8).

(6) Ms Parris accepts that she is not entitled to double recovery. This is not disputed and there is no basis in law to strike out the claim on the footing that she contends otherwise. The issue of double recovery is a factual matter to be addressed at trial. Ms Parris' claim for special damages is pleaded in total as £215,398.35. The compensatory award in the Employment Tribunal was in the sum of £50,045.16. It is far from clear that Ms Parris will not recover anything for her losses over and above the Employment Tribunal award, if she succeeds on her present case. It would be unfair to her to be shut out from even arguing that element of her claim at this stage.

Discussion and conclusion

157. I do not consider that I should refuse to entertain this aspect of the Defendants' application on the grounds of *Henderson* abuse, for the reasons that I have given above.

158. Nor do I consider that delay is a bar in this instance. In this regard, I agree with the reasoning of Jacob J in *Brinks Ltd v Abu Saleh (No 1)* [1995] 1 WLR 1478 at 1451 (a case concerning, I accept, not CPR Part 24, but Order 14 of the Rules of the Supreme Court):

> "… there is nothing in the rules precluding an application at a later stage in the proceedings. I do not see why delay, of itself, should be a relevant matter. If there is no "defence to the claim" or the defendant cannot show that there is an "issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim" then delay can make no difference. Of course in some circumstances delay in proceeding summarily, coupled with an adoption of the procedures for full trial, may well suggest a weakness in the plaintiff's case or may even sometimes suggest some other reason for trial. But it would

> be that weakness or reason, not the delay itself, which led to refusal of the application. Moreover the plaintiff may well, having indicated an intention to go to full trial and then having both incurred his own costs and caused the defendant to incur his in going down that route, have to suffer a penalty in costs if he brings his Order 14 application late. But otherwise I can see no objection to a late application for judgment under Order 14. Indeed, in some cases, and I think this is one, its use may be commendable as saving both the extra costs and time involved in a full trial. If these defendants truly have no defence it is worse than pointless for them to be present at the trial, which will be complex enough without them. The plaintiffs are right to clear the decks as far as possible before trial."

159. I therefore turn to consider the merits of the Defendants' application.

160. As to that, it is clear that SHCC did, in fact, provide an employment reference for Ms Parris. Further, I accept the Defendants' contention that any claim that the terms of this reference were affected by the publication of the Statement or indeed by Ms Parris' dismissal has no real prospect of success. In addition, according to Ms Parris' own evidence, she was successful in the only job application which she made around the time of her dismissal for which that reference was needed. It also seems to me that the Defendants are likely to succeed in establishing at trial that, as a matter of contract, Ms Parris had no right to require a reference to be provided by whoever was her employer.

161. As against these considerations, Ms Parris' pleaded case is that "[SHCC] refused to provide [her] with a positive or full employment reference and only provided a bare minimum reference confirming the fact of her employment" and that "[a]s a result, she is and was handicapped on the labour market and in respect of her ability to obtain immediate alternative employment" and is "unable to obtain employment in the private sector at a commensurate salary to her employment with [SHCC and/or SHCR]". I consider, although not by a wide margin, that this pleaded case allows Ms Parris to rely on an alleged failure to provide what is termed in the evidence a "clinical reference". Further, it appears that Ms Parris did not obtain a "clinical reference", and I agree with Ms Michalos that the question of whether, absent the publication of the words complained of and the harmful consequences of that publication about which Ms Parris complains, Ms Parris would have obtained such a reference raises factual issues which are not suitable for summary determination. In addition, the fact that Ms Parris secured employment following her dismissal is not determinative of her claim to have suffered financial loss, because her claim is based on being handicapped in (and not excluded from) the labour market and on being unable to obtain employment in the private sector (not being unable to obtain employment at all): in accordance with her evidence "the lack of full disclosure of my employment capabilities by way of an accurate and truthful clinical reference showing my extensive clinical experience and skills acquired over 18 years at SHC compromised my employment opportunities". If Ms Parris has a viable case on this footing, it is clear that her claim for financial loss substantially exceeds the compensation she was awarded in the Employment Tribunal Proceedings, and therefore it is impossible to say that this claim will be defeated by the prohibition on double recovery.

162. For these reasons, if these aspects of Ms Parris' pleaded case had survived the Defendants' arguments based on the *Johnson* exclusion area, I would not have considered it appropriate to grant their application for summary judgment in respect of the same.

THE *JAMEEL* ABUSE ISSUE

163. This point was raised as an alternative or ancillary argument at various stages of the Defendants' submissions, as indicated above. In substance, once regard is had to the *Johnson* exclusion area, Ms Parris' claims are reduced to a complaint about such publication of the words complained of as took place in advance of and (as Lord Nicholls said) "independently of" the dismissal, in which regard she contends that the meaning of the words complained of is such that it is to be inferred that they caused serious harm to her reputation by reason of the inherent gravity of the imputation (see POC, §20(a)).

164. I have considered the topics of *Jameel* abuse and serious harm in earlier judgments, including *Otuo v Watch Tower Bible and Tract Society of Britain* [2019] EWHC 1349 (QB), *Yavuz v Tesco Stores Ltd & Anor* [2019] EWHC 1971 (QB) and *Fentiman v Marsh* [2019] EWHC 2099 (QB), and the following summary is taken from those judgments.

165. In *Jameel*, Lord Phillips MR said at [55]:

> "Keeping a proper balance between the Article 10 right of freedom of expression and the protection of individual reputation must, so it seems to us, require the court to bring to a stop as an abuse of process defamation proceedings that are not serving the legitimate purpose of protecting the claimant's reputation, which includes compensating the claimant only if that reputation has been unlawfully damaged."

166. Dealing with the facts of that case, Lord Phillips MR said [68]-[70]:

> "… At the end of the day the trial will determine whether the publications made to the five subscribers were protected by qualified privilege. If they were not, it does not seem to us that the jury can properly be directed to award other than very modest damages indeed. These should reflect the fact that the publications can have done minimal damage to the claimant's reputation. Certainly this will be the case if the three subscribers who were in the claimant's camp prove to have accessed the Golden Chain list in the knowledge of what they would find on it and the other two had never heard of the claimant.
>
> If the claimant succeeds in this action and is awarded a small amount of damages, it can perhaps be said that he will have achieved vindication for the damage done to his reputation in this country, but both the damage and the vindication will be minimal. The cost of the exercise will have been out of all proportion to what has been achieved. The game will not merely

> not have been worth the candle, it will not have been worth the wick.
>
> If we were considering an application to set aside permission to serve these proceedings out of the jurisdiction we would allow that application on the basis that the five publications that had taken place in this jurisdiction did not, individually or collectively, amount to a real and substantial tort."

167. As Lord Sumption explained in *Lachaux v Independent Print Ltd* [2020] AC 612 at [14], whether a statement has caused "serious harm" falls to be established "by reference to the impact which the statement is shown actually to have had", and that, in turn, "depends on a combination of the inherent tendency of the words and their actual impact on those to whom they were communicated". Further, as appears from [16], in light of wording of section 1(1) of the Defamation Act 2013 ("A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant"), a statement may not be defamatory even if it amounts to "a grave allegation against the claimant" if (for example) it is "published to a small number of people, or to people none of whom believe it, or possibly to people among whom the claimant had no reputation to be harmed". At the same time, the assessment of harm of a defamatory statement in not simply "a numbers game" (see *Mardas v New York Times Co* [2009] EMLR 8 , Eady J at [15]). Indeed: "Reported cases have shown that very serious harm to a reputation can be caused by the publication of a defamatory statement to one person" (*Sobrinho v Impresa Publishing SA* [2016] EMLR 12, Dingemans J at [47]).

168. Other points which arise from the *Sobrinho* case include the following:

> "46 …. [F]irst … "Serious" is an ordinary word in common usage. Section 1 requires the claimant to prove as a fact, on the balance of probabilities, that the statement complained of has caused or will probably cause serious harm to the claimant's reputation …
>
> 47. Secondly, it is open to the claimant to call evidence in support of his case on serious harm and it is open to the defendant to call evidence to demonstrate that no serious harm has occurred or is likely to do so. However, a Court determining the issue of serious harm is, as in all cases, entitled to draw inferences based on the admitted evidence …
>
> 48. Thirdly, there are obvious difficulties in getting witnesses to say that they read the words and thought badly of the claimant, compare *Ames v The Spamhouse Project* [2015] EWHC 127 (QB) at [55]. This is because the claimant will have an understandable desire not to spread the contents of the article complained of by asking persons if they have read it and what

> they think of the claimant, and because persons who think badly of the claimant are not likely to co-operate in providing evidence."

169. In *Doyle v Smith* [2019] EMLR 15, Warby J cited these passages with approval at [116]. Warby J went on to emphasise the importance of the point about inference, and (among other things) approved at [117] the following words of HHJ Moloney QC in *Theedom v Nourish Training (trading as CSP Recruitment)* [2016] EMLR 10:

> "Depending on the circumstances of the case, the claimant may be able to satisfy section 1 without calling any evidence, by relying on the inferences of serious harm to reputation properly to be drawn from the level of the defamatory meaning of the words and the nature and extent of their publication."

170. Although the Supreme Court stated the law differently from the Court of Appeal in *Lachaux v Independent Print Ltd* [2018] QB 594, the following passages from the judgment of Davis LJ appear to me to be consonant with the correct legal analysis of section 1 as set out in the judgment of Lord Sumption:

> "72. … serious reputational harm is capable of being proved by a process of inference from the seriousness of the defamatory meaning … there is no reason in libel cases for precluding or restricting the drawing of an inference of serious reputational harm derived from an (objective) appraisal of the seriousness of the imputation to be gathered from the words used.
>
> 73. … The seriousness of the reputational harm is … evaluated having regard to the seriousness of the imputation conveyed by the words used: coupled, where necessary or appropriate, with the context in which the words are used (for example, in a newspaper article or widely accessed blog).
>
> 79. There may, for instance, be cases where the evidence shows that no serious reputational harm has been caused or is likely for reasons unrelated to the meaning conveyed by the defamatory statement complained of. One example could, for instance, perhaps be where the defendant considers that he has irrefutable evidence that the number of publishees was very limited, that there has been no grapevine percolation and that there is firm evidence that no one thought any the less of the claimant by reason of the publication …" (emphasis added).

171. In *Dhir v Saddler* [2017] EWHC 3155 (QB), [2018] 4 WLR 1, Nicklin J said at [55]:

> "In my judgment, the authorities demonstrate that it is the *quality* of the publishees not their *quantity* that is likely to determine the issue of serious harm in cases involving relatively small-scale publication. What matters is not the extent of publication, but to whom the words are published. A significant

> factor is likely to be whether the claimant is identified in the minds of the publishee(s) so that the allegation "sticks" …
>
> (ii) A feature of the "sticking power" of a defamatory allegation that has potential relevance to the assessment of serious harm is the likelihood of percolation/repetition of the allegation beyond the original publishees ("the grapevine effect") (*Slipper v BBC* [1991] 1 QB 283, 300 *per* Bingham LJ). In *Sloutsker v Romanova* [2015] [2015] EWHC 545 (QB); [2015] 2 Costs LR 321, Warby J said at [69]:
>
> "… It has to be borne in mind that the assessment of whether there is a real and substantial tort is not a mere numbers game, and also that the reach of a defamatory imputation is not limited to the immediate readership. The gravity of the imputations complained of… is a relevant consideration when assessing whether the tort, if that is what it is, is real and substantial enough to justify the invocation of the English court's jurisdiction. The graver the imputation the more likely it is to spread, and to cause serious harm. It is beyond dispute that the imputations complained of are all extremely serious." …" (emphasis added)

172. For the reasons submitted by Mr Rushbrooke, I have grave misgivings about the extent to which, in taking these claims to trial, "the game is worth the candle". However, in keeping with my ruling on the Defendants' arguments based on *Friend,* and having regard to all the factors identified in the cases discussed above, I do not consider that it would be right to strike out or stay Ms Parris' claim completely on the grounds that the further pursuit of the same would be an abuse of process. As set out above, publication of the Statement may have occurred at a time and in circumstances that, on the complete analysis which will be possible when disclosure has taken place and all the witness evidence is available for consideration (and, where contentious, testing by cross-examination), are independent of the dismissal. Moreover, it may transpire that publication was made not only to Mr Gayler (as the Defendants accept) and Dawn Goodes (as I consider Mr Ajayi's most recent evidence reveals) but also other individuals. The allegations were sufficiently serious to found disciplinary proceedings, and, in due course, result in Ms Parris' dismissal. It may or may not transpire that the individual(s) to whom they were published believed them without question; or suspended judgment on whether they were right or wrong until more was known; or discounted them altogether. Similarly, while the basis for an injunction now seems doubtful, it may be clear at trial.

CONCLUSION

173. In the result, I propose to allow the Defendants' application for permission to amend the Defence; to order that paragraphs §20(b), §27, §29.2, §29.3, §29.5, §29.6 and §§30-30.10 of the POC should be struck out; and otherwise to dismiss the Defendants' application to strike out Ms Parris' claim or alternatively for summary judgment. In my view, if the claim is now to be progressed, Ms Parris should consider amending the POC not only to reflect those rulings but also to bring her pleaded case in line with the findings made in the Employment Tribunal Proceedings and to clarify (to the extent that she is presently able to do) her true or full case in relation to a number of the issues

which were debated at the hearing and are discussed above. It might make sense for the Amended Defence to be served after that has been done, rather than in response to the current POC.

174. I ask Counsel to agree an order which reflects the above. I will deal with submissions on any points which remain in dispute as to the form of the order, any other issues such as costs and permission to appeal, either (if Counsel agree) on the basis of written submissions, or else on an adjourned hearing on some convenient date. It is my intention that the time for seeking permission to appeal should not start running in the meantime.