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APPEAL REF: QA-2021-000067

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

ON APPEAL FROM
THE COUNTY COURT AT CENTRAL LONDON
CLAIM NO. E27YM059

Date: 1 December 2021

Before :

MR JUSTICE RITCHIE

- -

BETWEEN

UNIVERSITY OF EAST LONDON

Appellant/Defendant

- and -

PEARL CHUKS

Respondent/Claimant

(Howard Smith instructed by St Valchikwe Solicitors) for the Claimant
(Paul Greatorex instructed by BLM) for the Defendant

Hearing date: 29 November 2021

- -

Mr Justice Ritchie:

The appeal

[1] This is an appeal from a case management decision.

[2] By a notice of appeal dated 22nd March 2021 the Defendant seeks to overturn a decision of Her Honour Judge Backhouse made on the 8th of March 2021. The Judge dismissed the Defendant's application dated 4th October 2018 to strike out the claim on the assertion that it constituted an abuse of the process of the court or alternatively for summary judgment on the assertion that the claim had no reasonable prospect of success.

[3] Permission to appeal was granted on the papers by Stewart J. on 11th June 2020 and the original order was stayed. That order was not in the appeal bundles but was handed up at my request during the hearing.

Bundles and evidence

[4] For this appeal I have before me an appeal bundle and bundles numbered one and two. I have a skeleton argument from the Respondent. I do now have a copy of the defence in the action having asked for it before the hearing. In addition a bundle of emails was handed up during the hearing relating to the events of 8th and 14th May 2015 and further authorities were provided by counsel after the hearing.

Chronology

[5] In September 2013 the Claimant and the Defendant entered into a contract when the Claimant enrolled as a student on a degree course in social work at the Defendant's University. The Claimant was given a handbook governing the course and the Defendant's procedures for discipline, matters of concern and lots of other matters.

[6] The Claimant completed her first year and was in her second year when, as part of the course, she was sent out on a practical placement with Chingford Children Centre (CCC). That placement started in February 2015. Disputed events took place on the 8th of May 2015 when the Claimant visited a young mother who did not understand English. On the Claimant's case an interpreter had been recommended for the visit by the health visitor but the Claimant was sent by her CCC manager to do the visit without the interpreter. The Claimant was accompanied by a member of the CCC staff team. The health visitor had been concerned that the baby was being fed with unsterilised feeding equipment. It is the Claimant's case that the visit went well and she advised the young mother, who was Slovakian, how to sterilise the baby's bottles, having purchased sterilisation products herself.

[7] On the 11th of May 2015 the Claimant received an email from Carol Lee, the CCC manager, saying that the manager had "serious concerns" about her behaviour on the day of the visit.

[8] On 14th May the Claimant met with Carol Lee of CCC for a concerns meeting and the events of that meeting are disputed. The Claimant asserts that she was not told what the complaints/concerns were.

[9] CCC then terminated the Claimant's placement.

[10] On 15th May Carol Frederick of CCC emailed Karen Adshead of the Defendant setting out the reasons for the termination of the Claimant's placement. CCC were worried about the Claimant's emotional state and suggested that the Defendant *urgently* follow up on that. CCC stated that the Claimant's reaction to the "concerns meeting" on 14 May was "very concerning" and led them to question her "current emotional state". The Claimant was allegedly *wailing* for 1.5 hours loudly and rocking backwards and forwards and "not coherent". Carol Frederick noted the Claimant asserted that she was herself "vulnerable". The Claimant was escorted outside the building. CCC ended the letter stating that they had serious concerns about her "emotional wellbeing".

[11] During the hearing I was handed up a tutor report (undated and unsigned) which contained a note of a meeting between the tutor and the Claimant on 20th May at which the tutor stated that she did not have the details of the concerns prior to 14th May but then put to the Claimant the concerns from CCC about the meeting on the 14th May. It was asserted by the tutor that the Claimant denied the concerns, then became angry and aggressive in tone and demanded to know what the concerns were, then became upset and cried and shouted and then asserted she was vulnerable and was being bullied. As to the facts of the meeting on 14th May it was asserted that the Claimant denied crying in that meeting then admitted crying, then admitted doing so for 20 minutes but when she was alone in a room.

[12] It is clear that the disputed facts of these meetings are the essence of the Defendant's concerns. The Claimant's concerns are wider and encompass the procedures followed or not followed by CCC and the Defendant in relation to and arising from the 8 May 2015 placement visit.

[13] There was no evidence put before HHJ Backhouse or me showing that the Defendant did anything in relation to CCC's main concern that the Claimant had emotional wellbeing challenges or issues. This perhaps is a pastoral matter, and may also be a major procedural matter at the heart of the issues. It is not pleaded out in the Defence. The Particulars of Claim focusses on lack of support, amongst other assertions of procedural irregularity.

[14] The Claimant was failed by the Defendant and was dismissed from the degree course after various procedures. Having instructed solicitors, a letter before action was sent on the 25th of November 2015 by the Claimant's lawyers alleging that University failed to follow the proper procedures set down in the handbook and made decisions which were irrational and perverse. In particular pages 34, 36, 38 of the handbook were relied on, which set out the processes for addressing practice concerns and suitability issues and other procedures.

[15] The Claimant requested reinstatement within 14 days and threatened judicial review if that did not take place.

[16] The Defendant did not reinstate the Claimant and so on the 18th of December 2015 a judicial review claim form was issued in the High Court. There were three grounds in the claim form. The first was that the Defendant failed to follow the procedures set out in the handbook; the second was that the bases of the allegations made against the

Claimant were not communicated to the Claimant and were not investigated thoroughly or at all; the third related to page 38 of the handbook. The relief sought was not properly particularised. In support of the judicial review the Claimant filed a witness statement dated 16th December 2015.

[17] I was handed up the Defendant's Grounds for Resisting the claim during the hearing. It was not in the bundles. It was dated January 2016. In it the Defendant asserted that there was an alternative remedy, a complaint to the Office of the Independent Adjudicator (OIA) and other grounds: the claim was unarguable because the Defendant had followed its own procedure correctly and that it was highly likely that in any event the decisions would have been the same if the correct procedure had been followed. There was no assertion of the offering of any support or emotional wellbeing care for the Claimant.

[18] On the 5th of February 2016 the Claimant amended her Claim Form seeking review of six decisions: the decision to fail the Claimant; the decision not to offer a resit; the decision to dismiss the Claimant from the University; the decision to deny the Claimant a right of appeal; the decision not to follow the University's policies set out in the handbook and the decision of the Vice Chancellor not to investigate the Claimant's complaints. By way of remedy the Claimant sought an Order quashing the Defendant's decision of the 20th of August 2015 which was served on the Claimant on the 20th of September 2015 to expel the Claimant; and Orders quashing the decisions: to fail the Claimant and to refuse any appeal. A mandatory Order was sought that the Defendant reinstate the Claimant on the course. The Claimant contended that the Office of Independent Adjudicator had no jurisdiction over her complaints. The Claimant relied on a second witness statement from herself dated 5th February 2016. There was no claim for damages or compensation made.

[19] By an Order dated 4th March 2016 Mr Justice Green refused permission for the judicial review. The reason given was that an independent reviewer had been appointed by the Defendant to determine the issues, who spoke to the Claimant and assessed the facts of the case and recommended that the Claimant should be failed and not offered a resit.

[20] On the 26th of April 2016 the application for permission came back before the court and oral argument was heard from counsel for both parties. His Honour Judge Allan Gore QC sitting as a Judge of the High Court adjourned the judicial review pending the Claimant lodging a complaint to the OIA for higher education. The Claimant did as directed.

[21] In September 2016 the OIA reported its decision. It rejected the Claimant's complaints that the University unfairly rejected her appeal. The Claimant had appealed out of time and hence had breached the relevant time limits in the appeal regulations. The OIA also rejected the Claimant's complaint that the Vice Chancellor failed to investigate her complaint. This was because the regulations stated that if a complainant instructed lawyers such investigation would be halted. However, in the conclusion the OIA noted that the Defendant's decision was a career ending decision and commented that the University did not give her case the serious attention it deserved, through the Vice Chancellor failing to explain why her complaint was not investigated.

[22] By an Order dated 19th December 2016 Robin Purchas QC sitting as a deputy High Court Judge granted the Claimant permission to apply for judicial review and made directions for the future conduct of the claim.

[23] Negotiations to settle the judicial review claim took place in February 2017. The Defendant offered to agree to the quashing of the decisions but produced a draft order which did not reflect that offer and instead stated that the Claimant withdrew her claim.

[24] During those negotiations on 17th February 2017 the Claimant asserted in a without prejudice communication that because of the decisions which were to be quashed she had suffered delayed qualification (by two years) and sought compensation of £93,800 for loss of earnings she would have received after earlier qualification. She informed the Defendant that the relationship had broken down. That damages claim was not accepted by the Defendant, nor did the Defendant attempt to include settlement of that claim in the consent order they proposed.

[25] On the 24th of February 2017 the Defendant offered in an open letter to agree to an Order quashing the decisions: (1) of the practice assessment panel dated 22nd July 2015 not to recommend a reset placement to the Claimant; (2) of the University's Assessment Board of the 10th of September 2015 refusing to offer the Claimant a resit; and (3) of the University's Assessment Board of 16th September 2015 confirming the earlier decision of the Board. Further the Defendant stated that it:

> *"is willing to reconsider whether your client, having failed her placement, should be offered an opportunity to resit that placement."*

No damages or compensation were offered. Again the draft Order did not reflect the letter but instead stated that the Claimant would withdraw the claim. Past failure was expressly assumed.

[26] The Claimant did not accept that offer but sent back a draft consent Order quashing the decisions and for the Defendant to pay the Claimant's costs. On the 1st of March 2017 the parties signed a consent Order quashing the three relevant decisions on the basis that the Defendant undertook to reconsider the decisions. The Defendant was ordered to pay the Claimant's legal costs. There was no mention of settling the damages or compensation.

[27] Two months later, on 2nd May 2017, the Defendant posted a letter (so I was told in the hearing) to the Claimant inviting her to a meeting in 8 days' time of the Practice Assessment Panel. In that letter the Defendant stated that the on-site supervisor from the CCC refused to attend any further meetings with the Claimant and therefore no representative from the placement organisation was to be present.

[28] The letter set out only in the most general terms the concerns that had been raised by the CCC which included the Claimant speaking inappropriately in relation to tone and language to the Slovakian mother; the absence of empowering support for the mother who needed guidance and reassurance; and overall concerns regarding the Claimant's ability and motivation to prepare and research information to support the Slovakian

mother. It went on to state that there were concerns relating to behaviour which could be deemed to constitute serious professional misconduct including: an unwillingness to accept the forum for feedback and supervision and the Claimant's refusal to permit investigations to proceed; displaying unprofessional behaviour including shouting, crying and general disruption in a workplace where service users were present; confronting staff and acting in a manner deemed to place the safety and wellbeing of other service users and staff at risk.

[29] No offer was made of support to the Claimant for the process personally or emotionally. At page 25 the handbook states in relation to the role and responsibilities of the Claimant's tutor that they include:

- "ensuring that, where possible, students have sources of support which are suitable and relevant to their personal learning needs;
- acknowledging the power imbalance (authority, dependence, conflict) implicit in the placement process;
- responsible for managing any difficulties on the placement …"

[30] The letter alleged that the concerns in relation to the Claimant's behaviour on the 14th of May 2015 (so after the disputed visit) could be deemed a serious breach of the relevant professional standards. No particulars of the detail of the assertions made against the Claimant arising from 14th May were included in that letter, only vague general assertions. So, on the evidence put before HHJ Backhouse, the Claimant did not know the details of the case she had to meet at the forthcoming meeting. In addition, because none of the CCC witnesses were to attend, the Claimant was to be deprived of the ability to hear and test the evidence supporting the unparticularised assertions. Only hearsay evidence was to be laid against her and that was not particularised. Various procedures were set out in the letter. At page 24 the handbook includes in the list of the placement Onsite Supervisor's responsibilities:

- " to attend all meetings required within the procedure toe managing placement difficulties as required;"

[31] The Claimant wrote back quickly, refused to attend the proposed meeting and procedures and informed the Defendant that as a result of that letter and the earlier decisions the Claimant terminated her studentship and her lawyers would be writing to them, which they did on 3rd August 2017, making a claim for damages for breach of contract.

[32] In August 2018 the Claimant issued a part seven claim form claiming damages for breach of contract and/or negligence against the Defendant. The damages claimed were above £150,000 but not more than £200,000.

[33] In the Particulars of Claim the Claimant relied on the contract made in September 2013, pleaded express and implied terms and asserted that a duty of care existed alongside the contract. She pleaded out the handbook and asserted that her practical course feedback was positive before the 8th of May 2015. The Claimant pleaded out the events of the 8th of May 2015 and named the member of staff who attended with her as Shanice Britton. The Claimant pleaded that Miss Britton alleged straight after the contact with the young mother two concerns: the 1st was that the Claimant said *"do you understand me"* to the mother which was allegedly inappropriate and the

second was that the Claimant threatened the mother that her baby would be taken away if she did not sterilise the bottles properly. The events thereafter were pleaded out and it was asserted that the concerns raised should not have been categorised as "serious". The Claimant asserted that the first "concern" was factually correct but was not a matter properly categorised as a concern. The Claimant factually denied the second "concern". The Claimant pleaded that the independent reviewer, Mr Jeffrey Baker, who reported on the 22nd of July 2015, did not consider that the first concern was a serious concern and did not consider that the alleged threat was really a threat, however he did consider that the Claimant's reaction to being told about the concerns (on 14th May) was inappropriate and he decided the Claimant had failed to acknowledge the inappropriateness of her reaction and therefore no further placement should be offered. The Claimant criticised that decision. The Claimant then pleaded criticisms of the subsequent procedure and decisions. The foundation of the claim was that the Claimant was entitled to terminate the contract due to the Defendant's repudiatory breaches in failing properly to follow their own procedures. She sought compensation: payment for loss of earnings from June 2016 at £60,000 per annum dropping in June 2018 to £14,000 per annum and future ongoing partial loss of earnings.

[34] In the Defence the University denied that the handbook contents were terms of the contract and denied breach of them in any event. It asserted that the key factual issues related to the Claimant's behaviour from 14 May 2015 onwards, which it asserted was "inappropriate" and a proper foundation for the decisions to rusticate her. The Defendant asserted that that settlement agreement was an affirmation of the contract and that the Claimant terminated the contract without any repudiatory breach by the University.

[35] On the 4th of October 2018 the Defendant applied to strike the claim out on the basis that it disclosed no reasonable cause of action or constituted an abuse and also applied for summary judgment on the defence. The application was supported by a witness statement from the Defendant's lawyers' in house barrister – Mr Wilkins. It contained assertions of facts which were not within Mr Wilkins' own knowledge (hearsay) and did not state the sources of those facts or a statement that he believed the sources to be telling him the truth. So for instance Mr Wilkins asserted at para. 8:

> "The University's letter of 24 February 2017 was written in accordance with its understanding that the Claimant wished to continue on the course and to be restored therefore to the position prevailing prior to the decision of the PAP, and constituted an open offer to compromise the Judicial Review Claim in this way."

No witness is named as the source of that alleged understanding.

[36] The witness statement also contained legal argument which is the not the purpose of a witness statement.

[37] At para. 5 Mr. Wilkins asserted that:

> "It is striking that the Claimant did not at any point between 2015 and 25 August 2018 bring a claim for damages".

That assertion was factually inaccurate because it ignored the claim for damages made in the Claimant's letter of 17.2.2017 for £93,800.

[38] There was then a gap of three months and on the 15th of January 2019 the Claimant amended the Particulars of Claim, mainly by adding paragraphs 31A and 31B expanding the assertion that the Claimant had no reasonable expectation that the Defendant would have dealt with the renewed disciplinary process fairly after the letter of the 2nd of May 2017 and reasserting that the Defendant was in repudiatory breach entitling the Claimant to terminate the agreement.

[39] On the 11th of June 2019 His Honour Judge Johns QC, on paper, allocated the case to the multitrack.

[40] On the 25th of August 2020 His Honour Judge Saggerson heard counsel for both parties and sorted out the procedural confusion that had arisen in the case. New directions were made for the future conduct of the case but unfortunately, there was no date for disclosure, service of witness statements or for a trial. Permission was given retrospectively for the amendment to the Particulars of Claim. This case was drifting.

[41] On the 7th of January 2021 the Claimant applied for permission to rely on various without prejudice correspondence that had passed between the parties. I have seen no Order dealing with that, but the evidence was allowed in at the hearing to come.

[42] On the 8th of March 2021 Her Honour Judge Backhouse heard the Defendant's applications to strike out and for summary Judgment and dismissed both. Mr Wilkins appeared for the Defendant (arguing on the basis of the evidence in his own witness statement) and Mr Smith of counsel appeared for the Claimant. Permission to appeal was refused. No stay was imposed on the claim.

[43] The Defendant appealed by notice dated 22 March 2021.

[44] On 21 April 2021 Andrew Baker J. ordered that the grounds of appeal would stand as the skeleton having refused permission for late filing of the skeleton by the Claimant. He permitted perfection of the grounds after the transcript was received.

[45] On 25 June 2021 the Claimant provided further and better particulars of the claim answering the Defendant's request. These concerned the quantum. She had enrolled at the Angela Ruskin University in in September 2017 and qualified as a social worker in 2020, then earning £36,000 gross. She explained that her claim was for the 2 years delay in qualification and for the additional tuition fees at Angela Ruskin together with damages for humiliation and stress.

[46] There is no served schedule of loss. However, two years loss of income as set out in the FBPs, at £36,000 gross (approx. £27,000 net) would amount to £54,000.

Appeal - CPR 52

[47] I take into account that under CPR rule 52.21 this appeal is a review of the decision of the lower court, unless the court rules otherwise or a practice direction makes different provision, it will not hear oral evidence or new evidence which was not

before the lower court. I have allowed some pieces of evidence to be handed up during the hearing.

Findings of fact

[48] I take into account the decision in *Grizzly Business v Stena Drilling* [2017] EWCA civ 94 at 39-40. Any challenges to findings of fact in the court below have to pass a high threshold test.

Case management decisions

[49] I take into account that appeals from case management decisions also have a high threshold test, see *Royal & Sun v T & N [2002] EWCA Civ 1964.*

> "37. … We were reminded, properly, by counsel for T & N that these are appeals from case management decisions made in the exercise of his discretion by a Judge who, because of his involvement in the case over time, had an accumulated knowledge of the background and the issues which this Court would be unable to match. The Judge was in the best position to reach conclusions as to the future course of the proceedings. An appellate court should respect the Judge's decisions. It should not yield to the temptation to "second guess" the Judge in a matter peculiarly within his province.
> 38. I accept, without reservation, that this Court should not interfere with case management decisions made by a Judge who has applied the correct principles, and who has taken into account the matters which should be taken into account and left out of account matters which are irrelevant, unless satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the Judge."

[50] In *Abdulle v Comm of the Police [2015] EWCA Civ 1260,* Lewison LJ ruled that:

> "26. In *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2014] 1 WLR 795 at [52] this court said:
>
> > "We start by reiterating a point that has been made before, namely that this court will not lightly interfere with a case management decision. In *Mannion v Ginty* [2012] EWCA Civ 1667 at [18] Lewison LJ said: "it has been said more than once in this court, it is vital for the Court of Appeal to uphold robust fair case management decisions made by first instance Judges.""
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> 27. The first instance Judge's decision in that case was to refuse relief against sanctions and her refusal was upheld by this court. But the same approach applies equally to decisions by first instance Judges to grant relief against sanctions. In *Chartwell Estate Agents Ltd v Fergies Properties SA* [2014] EWCA Civ 506, [2014] 3 Costs LR 588 Davis LJ said at [63]:
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> > "… the enjoinder that the Court of Appeal will not lightly interfere with a case management decision and will support robust and fair case management decisions should not be taken as applying, when CPR 3.9 is in point, only to decisions where relief from sanction has been refused. It does not. It likewise applies to robust and fair case management decisions where relief from sanction has been granted."
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> 28. In my judgment the same approach applies to decisions by first instance Judges to

> strike out, or to decline to strike out, claims under CPR 3.4 (2) (c). In a case in which, as the Judge himself said, the balance was a "fine" one, an appeal court should respect the balance struck by the first instance Judge. As I have said I would have found that the balance tipped the other way; but that is precisely because in cases where the balance is a fine one reasonable people can disagree. It is impossible to characterise the Judge's decision as perverse."

[51] In the judgment of Mrs. Justice Yip in *Razaq v Zafar* [2020] EWHC 1236 (QB) this principle was reaffirmed:

> "2. … the appeal proceeds in the usual way as a review of the decision below. It follows that this court can only intervene if it is demonstrated that the decision of the lower court was wrong or unjust because of a serious procedural or other irregularity in the court below.
> 3. As the Court of Appeal has reinforced on many occasions, an appellate court will not lightly interfere with case management decisions or the exercise of judicial discretion. Further, it has been said that it is vital that appellate courts uphold robust case management decisions by first instance Judges. See *Clearway Drainage Systems Ltd v Miles Smith Ltd* [2016] EWCA Civ 1258, the test in considering an appeal against a decision of this nature was neatly encapsulated at paragraph 68:
>
> > "The fact that different Judges might have given different weight to the various factors does not make the decision one which can be overturned. There must be something in the nature of an error of principle or something wholly omitted or wrongly taken into account or a balancing of factors which is obviously untenable.""

The grounds of appeal

[52] The Defendant filed grounds of appeal dated 18 March 2021. No skeleton argument was filed within the time limit imposed. The Defendant applied for an extension of time for the skeleton and that was refused by Andrew Baker J on 21.04.2021 who ordered:

> "Appellant's application for an extension of time for skeleton argument is refused, and the Grounds of Appeal shall stand as the Appellant's skeleton argument, but the Appellant has leave to file a perfected version of the Grounds of Appeal, if so advised, making any corrections or modifications required upon consideration of an approved transcript of the judgment of HHJ Backhouse once received."

[53] The Defendant did not comply with that Order. Instead a document called "perfected grounds of appeal" was filed dated 3rd June 2021 which did not redraft the original grounds and did not perfect them. In paragraph 1 Mr Greatorex of counsel explained why:

> "Andrew Baker J granted the Appellant permission to file perfect version of the Grounds of Appeal following consideration of the transcript. This is that document. It does not amend the Grounds of Appeal dated 18th March 2021 which is

to be read with it, but to the extent the court consider it does the Appellant hereby applies for permission for this, which would not cause the Respondent any prejudice, would assist the court in the speedy resolution of this appeal and in general terms be consistent with the overriding objective."

[54] No application for permission was made at the appeal hearing. The appeal hearing proceeded on the basis of the "perfected grounds of appeal".

[55] A concise summary of the grounds of appeal in the perfected grounds with para. numbers is as follows:

5.(1) Affirmation by the Claimant;
5.(2) Abuse of process by the Claimant;
5.(3) No real prospects of success on the claim.

[56] In more detail (with paragraph numbers) the grounds were:

a. 6(1): the Judge confused justiciability with abuse and misunderstood the abuse of process law;
b. 6(2) and (4): the Claimant was affirming the contract when settling the judicial review and the Judge fell into error looking at and taking into account the without prejudice correspondence.
c. 6(3)(10): the Claimant should have claimed damages in the judicial review, failing to do so and settling the judicial review and later terminating was an abuse of process and the Judge was wrong to find she had very good reasons to do so.
d. 6(5)(6)(7): the Judge was wrong to hold that the letter of 2nd May 2015 changed the situation, it did not change but instead matched the proposal made by the Defendant before the settlement agreement. The Judge was wrong to find it was arguable that the Defendant breached the contract further after the settlement by the letter of 2nd May 2015. It gave the Claimant no right to terminate for fundamental breach.
e. 6(8)(9): the Claimant's delay should have justified the Judge in striking out the claim.
f. 6(10): the Judge erred in characterising the claim as one for loss of a chance. In any event such a claim had no real prospect of success.

Justiciability

[57] Some issues are not justiciable by the courts for good reason. In the field of education there is case law filtering those cases out. The detailed subject matter of academic and pastoral issues are not generally for the courts to review. I shall return to this below in the case law.

[58] The key factual issues in this claim arise from two dates. The visit on 8th May 2015 and the meeting thereafter on 14th May 2015. The key procedural matters relate to all the events from 9th May 2015 to the rustication of the Claimant, in which the Defendant sought to review and evaluate the Claimant's behaviours and which on the Defendant's case involved the Claimant behaving in an utterly unacceptable manner.

[59] There is no ground of appeal based on lack of justiciability of the pleaded claim. By that term I mean justiciability using the *Clark v University of Lincolnshire* [2000] 1

W.L.R. 1988 filter, whereby the courts may refuse to consider issues of academic and pastoral nature, see the judgment of Sedley L.J. at para 12.

[60] The issue of whether the events on 8th May and 14th May 2015 are pure "pastoral judgment" and hence not justiciable in this case will rightly be for the trial Judge.

Case Law

Issue estoppel/abuse of process

[61] One of the main 3 grounds of the appeal is issue estoppel by abuse of process. The gist of which is that where there have been two claims between the same parties, one after the other, the court should not allow a party to litigate in the second claim what *should* have been brought before the court in the first claim.

[62] This is not a grade one issue estoppel case, where the issue was pleaded and determined or settled in the first claim. There was no claim for damages for breach of contract made in the judicial review claim.

[63] This is a grade two issue estoppel case, where on the Defendant's case the issue of breach of contract and damages could and *should* have been pleaded in the judicial review claim but was not, such that the Claimant should be estopped or debarred from bringing it in the second claim (this claim).

[64] This interesting point of law was considered, amongst other cases, in *Henderson v Henderson* (1843) 67 ER 313; *Johnson v Gore Wood* [2002] 2 A.C. 1, at p 31F; and more recently by the Supreme Court in *Virgin Atlantic v Zodiac* [2014] A.C. 160.

[65] In *Virgin* Lord Sumption dealt with the topic in his judgment as follows (para. 17):

> "*Res judicata: general principles*
> 17. Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see *Conquer v Boot* [1928] 2 KB 336. Third, ….. Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: *Duchess of Kingston's Case* (1776) 20 State Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197—198. Fifth, there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against

abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

At p 181 C:

"In *Henderson v Henderson* (1843) 3 Hare 100, Wigram V-C said, at pp 114—116:

"In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case."

[66] At para, 22 he continued:

"22 *Arnold v National Westminster Bank plc* [1991] 2 AC 93 is accordingly authority for the following propositions. (1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action. (2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised. (3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised."

[67] At para. 24 he continued:

"Lord Bingham of Cornhill took up the earlier suggestion of Lord Hailsham of St Marylebone LC in *Vervaeke (formerly Messina) v Smith* [1983] 1 AC 145, 157 that that the principle in *Henderson v Henderson* was "both a rule of public policy and an application of the law of res judicata". He expressed his own view of the relationship between the two at p 31 as follows:

"*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. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous

> decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before." (My underlining).

[68] The test for issue estoppel/abuse was also considered in *Johnson v Gore-Wood* [2002] 2 A.C. 1 by Lord Bingham at p. 31F. The test requires the Judge to look at all the circumstances of the case in deciding what *should* be included in the first action and hence *should* be rejected if raised in a second action.

Abuse more generally

[69] Apart from issue estoppel abuse, various other principles can be extracted from *Clark* concerning education claims and the topics of abuse of process and justiciability:

a. **Choice of procedure:** Judicial review under CPR r 54, can be used to resolve public/administrative law issues between students and universities but only when the domestic remedies and external review mechanisms available for the student have been exhausted.
b. **Evading time limits:** Seeking to avoid the 3 month time limit for judicial review by bringing a claim in contract covering ground which a judicial review should have covered is not generally permitted. See the judgment of Lord Diplock in *O'Reilly v Mackman* [1983] 2 A.C. 237 at p.285 and see the judgment of Lord Woolf M.R. in *Clark* at p1998 para. 39.
c. **Alternative remedy:** Grievances against Universities are preferably solved within the University's grievance procedures and then if necessary by the Visitor. See the judgment of Lord Woolf M.R. in *Clark* at 1995 para. 31 and the judgment of Underwood J. in *Moroney v Anglo-European* [2008] EWHC 2633.
d. Where there is no Visitor for the University and the student has exhausted the domestic procedures within the University and outside it, but considers the dispute still unresolved, the courts will adjudicate contractual issues in a part 7 claim, see the judgment of Lord Woolf M.R. in *Clark* at 1997 para.32
e. **Collateral issues:** Such can be litigated in part 7 claims instead of judicial review, see the judgment of Lord Woolf M.R. in *Clark* at 1995 para. 25. This appeal was not advanced on collateral issues grounds so I move on.
f. **Delay:** is a factor which the court will take into account when considering abuse of process, see the judgment of Lord Woolf M.R. in *Clark* at 1997 para.35.

Affirmation – the law

[70] Appellant's counsel made his submissions on affirmation free of authority. I requested any authorities which the Appellant wished to rely upon. In submissions in

reply the Appellant produced and relied on *Bournemouth v Buckland* [2010] EWCA Civ 121, in particular paras 32-44 and 52-53. That case deals with the wrongdoer seeking to cure its repudiatory breach and whether in law that can occur.

[71] Affirmation is summarised in *Chitty on Contracts* 34th Ed. at 27-056 et seq. To affirm a contract after an alleged repudiatory breach the innocent party must firstly have knowledge of the relevant facts giving rise to the breach and secondly of his own legal rights and alternatives. Affirmation only occurs if the innocent party makes a clear and unequivocal choice that he intends to continue the contract despite the breaches and communicates that to the defaulting party in clear terms. Conditional responses are not affirmation. Mere inactivity is not affirmation. Starting an action for damages for breach does not affirm, see *General Billposting v Atkinson* [1909] A.C. 118.

[72] The law was neatly summarised in *Yukong v Rendsberg Investments* [1996] 2 Lloyds Rep 604 at p 608 by Moore-Bick J, who having reviewed the authorities on affirmation at page 607, set out the principles thus:

> "(1) A renunciation of the contract by one party prior to the time for performance is not itself a breach but it gives the other party, the injured party, the right to treat it as a breach in anticipation and thus to treat the contract as discharged immediately. In other words if a person says he will not perform, the law allows the other to take him at his word and act accordingly.
>
> (2) In such a case the injured party is not ordinarily bound to treat the contract as discharged; The law gives him a choice. He may treat the contract as discharged or he may disregard the repudiation and treat the contract as continuing in full effect, notwithstanding what has occurred. He can, in other words, elect to affirm it.
>
> (3) If the injured party elects to affirm the contract, both parties' rights and obligations under it remain completely unaffected; the renunciation is "writ in water", to use the well known expression of Lord Justice Asquith in *Howard v Pickford tool Co limited* [1951] 1 K.B. 417 at page 421.
>
> (4) The choice placed before the injured party is between inconsistent rights, and once the choice has been made and communicated to the other party to the contract, it is irrevocable. Unlike estoppel, election does not depend upon any change in position by the party to whom it is communicated.
>
> (5) Although the injured party is bound by his election once it has been made, the fact that he has affirmed the contract does not of course preclude him from treating it as discharged on a subsequent occasion if the other party again repudiates it.
>
> (6) The injured party will not be treated as having elected to affirm the contract in the face of the renunciation unless it can be shown that he knew of the facts giving rise to his right to treat the contract as discharged and of his right to choose between affirming the contract and treating it as discharged.

> (7) A binding election requires the injured party to communicate his choice to the other party in clear and unequivocal terms. In particular, he will not be held bound by a qualified or conditional decision.
>
> (8) Election can be expressed or implied and will be implied where the injured party acts in a way which is consistent only with a decision to keep the contract alive or where he exercises rights which would only be available to him if the contract had been firmed."

And at page 608 Moore-Bick J continued:

> "These comments seem to me to provide strong support for the view that the court should not adopt an unduly technical approach to deciding whether the injured party has affirmed the contract and should not be willing to hold that the contract has been affirmed without very clear evidence that the injured party has indeed chosen to go on with a contract withstanding the other party's repudiation. In my view the court should generally be slow to accept that the injured party has committed himself irrevocably to continuing with the contract in the knowledge that if, without finally committing himself, the injured party has made an unequivocal statement of some kind on which the party in repudiation has relied, the doctrine of estoppel is likely to prevent any injustice being done."

The judgment

[73] The Judge gave an extempore judgment. The facts were summarised in paragraphs 3-12. No criticism is made of those.

[74] The summary of the claim was provided at para. 15 and correctly stated that the claim is based based on alleged repudiatory breach.

[75] The Defendant's application was summarised at para. 16 and it is noteworthy that:

> "Mr Wilkins started his submissions by setting out his stall very clearly. The defendant is not saying that this is not a claim which could never be brought, but asked the court, bearing in mind a number of authorities and other matters, to consider all the circumstances, and in particular the fairness to the defendant, the overriding objective, the use of the court's resources, and the cost to the parties and to say that this is not a claim which in all the circumstances should be allowed to proceed."

Justiciability

[76] On the issue of whether the claim as pleaded was justiciable by the courts, the Judge considered *Clark v The University of Lincolnshire* [2000] 1 WLR 1988, and extracted relevant parts of the judgment at paras. 17-19 and then considered the examples in *Winstanley* and *Siddiqui* and decided as a matter of law that:

> "21. Based on all those authorities it is clear to me that cases which are based on breach of contractual rules are justiciable and, as Sedley LJ and Lord Woolf both said in different ways, it is a question of looking at all the circumstances to see if the court's process is being misused."

[77] I consider that the Judge rightly filleted out and concluded that failure of process is justiciable by the courts in the context of a breach of contract claim and that all of the circumstances must be considered to make that decision. She ruled that the claim was justiciable. The Appellant makes no appeal on justiciability in the perfected grounds of appeal and rightly so.

Issue estoppel/Abuse of process

[78] There is no ground for asserting that the Claimant is barred by Res Judicata or cause of action estoppel. The Claimant made no claim for damages or repudiatory breach in the judicial review claim.

[79] The Defendant sought to strike out the claim on issue estoppel or abuse of process because they assert that she *should* have included a claim for damages in the judicial review.

[80] At para 22 the Judge dealt with the issue estoppel claim/abuse of process assertion. She considered *Henderson* style abuse of process and quoted Lord Bingham in *Johnson v Gore-Wood* [2002] 2 AC 1. Then, descending into the evidence, the Judge considered the settlement negotiations and the scope of the settlement actually reached. She concluded that the draft Order offered by the Defendant (action withdrawn) was redrafted by the Claimant (to decisions quashed - an agreed fact) and noted that the settlement reached did not cover the Claimant's claim for damages put forwards before the settlement.

[81] I was struck during the appeal hearing by how Appellant's counsel asserted that "no claim for damages had been made before the settlement" an assertion based on Mr. Wilkins' witness statement. That submission was not factually correct. The email of 17 February 2017 made a claim for £93,800 in damages for 2 years delay due to the Defendant's soon to be quashed decisions. At para. 26 the Judge held as a fact that the Defendant was well aware that the Claimant was making a claim. There is no ground of appeal based on that finding of fact, nor could there be.

[82] At para. 26 the Judge ruled on the Defendant's submission that the damages claim should have been brought in the judicial review proceedings (the abuse/issue estoppel ground for appeal). She decided in the exercise of her discretion that it did not have to be included in the judicial review claim. She ruled that there were good reasons for not making the breach of contract claim until the judicial review was determined.

[83] In submissions before me it became clear to me how right this decision was. When the judicial review was issued the Claimant had no way of knowing how long it would take. It could have been settled in 2 weeks or dragged out, as it was, for over a year. The Claimant did not know the scope of the breaches she would succeed upon and had no way of calculating her loss and until the judicial review claim was evidenced, determined or settled.

[84] This Claimant wanted to quash the decisions which she considered were taken with improper process and then to decide what to do if she was right. 1.25 years after the judicial review claim was started, abandoning the Grounds of Response, the Defendant consented to the rustication decision being quashed. The Claimant was then in a position to take her judgment and apply elsewhere or see how the Defendant

would handle her degree course and any renewed process. I see no abuse in that, just good sense.

[85] Until the review had been determined and the Defendant's future approach was unclear. The Claimant was not to know whether she would be offered her degree course back free of further disciplinary process or subject to further process or what the process would be or who would be running it or how large her losses would be.

[86] The words underlined in *Virgin* above show that the test for issue estoppel is fact sensitive and suffused with public policy and private interest. The difference between could and *should* is the test on this ground. That issue was one for the Judge to consider on all of the evidence and in all of the circumstances by exercising her discretion. I consider that the Judge used the correct test and applied the correct criteria to determine that issue estoppel/abuse of process did not apply. She looked at the facts, she considered also the University's plea of harassment and she made a decision which I consider was not wrong in law and within the broad ambit of her case management powers – to leave the issue to the trial Judge.

Affirmation

[87] At para. 27 the Judge dealt with the Defendant's twin supporting grounds for their claim of affirmation, the first (1) because the Claimant brought the judicial review itself - asking for reinstatement, and the second (2) by the settlement agreement – seeking quashing of the decisions to rusticate her from the University and seeking to continue on the course.

[88] The bringing of a judicial review to strike down an unlawful decision cannot in my judgment be an unequivocal affirmation of the breaches of contract in full knowledge of the breaches with full knowledge of the innocent party's legal options. It is (inter alia) a route to identify the breaches and prove them. The fact that the Claimant also asked for the University to let her education on the course continue was the only possible foundation for the plea of affirmation and that was her wish at the time no doubt, but it was not in my judgment an affirmation, in the context of the request to quash the rustication decisions. It was a then current goal, dependent on the way the judicial review went.

[89] The Judge also found that the settlement agreement was not an affirmation. It did not determine how the Defendant would educate the Claimant going forwards or the form of the procedure for the reconsideration process. The Claimant, as the Judge so found, was already feeling the relationship had broken down and she expressed that feeling in the letter of 17.2.2017.

[90] It is a fact that the settlement did not cover the claim for damages made by the Claimant in the without prejudice correspondence in February 2017. The Defendant refused to make any offer on the asserted damages claim.

[91] The Claimant agreed to settle her judicial review claim when the Defendant gave up its defence thereto and offered to agree to have its own decisions quashed. In my judgment that was not on any objective view, an affirmation of the contract, it was the winning of the judicial review claim which might have (or may not have) the private law effect of proving either mere breaches of contract or perhaps repudiatory breaches

by the Defendant. The Claimant had achieved a public document (the Consent Order) which she could take to other universities to show her rustication was quashed and hence unlawful, irrational or perverse.

[92] However there was a recital in the quashing Order. The Defendant undertook as follows:

> "To reconsider the decision of the Practice Assessment Panel recommendation (sic) dated 22nd July 2015 that the Claimant not be offered another placement and the decisions …."

[93] It is noteworthy that the Claimant was not asked to give and undertaking to do anything in the recitals of the Order. She was not asked to return to campus or to her studies forthwith. She was not invited to lectures forthwith.

[94] In law mere inactivity cannot found affirmation. The Claimant was entitled to await the Defendant's next steps, having already informed the Defendant in her letter of 17 February that she had lost trust in them.

[95] I do not consider that there was any sufficient evidence before the Judge of an unequivocal affirmation by the Claimant expressly communicated to the Defendant either by reason of the bringing of the judicial review claim or the settling thereof. I consider there was quite the opposite, with the Claimant putting forwards a claim by which she sought to prove breaches which were unlawful and serious and then a second claim for damages arising from those alleged breaches and other alleged later ones, which as set out above, in law is not an affirmation.

[96] The judge made no finding that the Claimant made clear or unequivocal affirmation of the contract. Nor should she have on the evidence before her, in my judgment. I consider that the Judge's decision on affirmation was not wrong in law and was a decision open to her to make on the evidence and findings of fact which she made.

Alternative remedy

[97] The Defendant asserted that the Claimant should have gone through their proposed "concerns process" once again as a domestic remedy before making the second claim. The Judge ruled that the Claimant was arguably entitled to rely on her contractual right (at paras. 29-30). I consider that on the evidence before her that was a decision which was open to her to make.

Merits – prospects of success

[98] The Defendant asserts that the claim as pleaded has no prospects of success.

[99] After the settlement the Defendant's next steps were not taken quickly. March 2017 passed as did April with no steps taken by the Defendant. The Defendant was not performing an educational contract during those months. It did not offer lectures or support. If the contract was, as the University suggest, affirmed they were arguably not performing it.

[100] Then an urgent meeting was offered to the Claimant in the letter of 2nd May 2017 letter on terms which, on the Claimant's case once again breached the contractual

procedures laid out in the handbook. The Judge found that letter of 2nd May 2017 changed matters. She considered the Defendant's letter at para. 28 of her judgment. The parties were at issue over the Defendant's future disciplinary review process and whether it complied with the handbook. The Judge noted the various issues over this letter:

a. the same independent reviewer was proposed. In submissions the Claimant pointed out that the handbook required a reviewer who had not dealt with the concerns before.
b. There was to be no attendance by the CCC staff. (I note that the Claimant would have no opportunity to hear the witnesses' evidence against her or challenge and question the witnesses on that evidence.)
c. I note here that the letter did not set out the details of the allegations which the Claimant was to answer relating to 14th May.
d. The Claimant asserted the procedure in the offer letter did not match the correct procedures in the handbook in many respects as set out in the pleaded case.
e. The Judge noted that the procedure proposed did not involve any examination of the original issues.
f. The Judge noted that the letter proposed only one meeting to cover two wholly separate and sequential procedures in the handbook (which on the Claimant's case are separate).

[101] I also note that no offer of compensation was made for the lost 2 years of education or earnings after education ended and no support was offered to her personally to help her through the process.

[102] The Claimant asserted that the letter was part of the justification for her decision to terminate the contract. The Judge found at para. 29 that the above points were arguably further breaches of the contract by the Defendant and were therefore issues for the trial Judge. I consider that there were substantial evidential issues relating to the alleged breaches of contract, repudiatory breaches and the right to terminate, as the Judge so noted.

[103] In my judgment the judge's decision on the merits of the Claimant's case was within the ambit of her discretion on a strike out and a summary judgment application.

Delay

[104] At paras. 31-34 the Judge dealt with delay and ruled that the delay was caused partly by the Defendant and partly by court muddle. She held that this was not a ground to strike out the claim. I do not consider that the reasoning in the judgment on that issue is outside the scope of the Judge's discretion.

Fairness

[105] On fairness (para. 34 of the judgment) the Judge noted that the Claimant may have been treated unfairly by the decisions made by the Defendant and then quashed by consent. She ruled that it will be a matter for the trial Judge to decide whether or not the quashed decisions and the letter of 2nd May 2017 amounted to one or more fundamental breaches of the contract entitling the Claimant to terminate it.

[106] At the hearing before me the pleaded issue over the absence of the CCC witnesses in the Defendant's proposed "concerns" procedure after 2nd May 2017 was considered. At the root of the issue are 3 questions:

(1) is it inherently unfair for a student to be deprived of the detail of the criticisms in advance of any hearing at which she is to defend herself? and
(2) is it inherently unfair for a student to be deprived of the ability to hear the witnesses who make allegations against her at the hearing? and
(3) should such a student be entitled to cross question those making allegations against her?

[107] The Defendant asserted in submissions that there was no "common law" right to cross question your accusers in civil law. I asked counsel to provide any case law on the subject after the hearing ended. I am grateful to both counsel for doing so.

[108] In *R. v Davies [2008] UKHL 36,* the House of Lords held that it is a long-established common law principle that, subject to recognised exceptions and statutory qualifications, a defendant in a criminal trial should be confronted by his accusers so that he may cross examine them and challenge their evidence. In the context of a criminal case in which witnesses, who were given protection when giving evidence which hampered the Defendants ability to cross question them, Lord Bingham said this:

> *"The common law principle*
> 5. It is a long-established principle of the English common law that, subject to certain exceptions and statutory qualifications, the defendant in a criminal trial should be confronted by his accusers in order that he may cross-examine them and challenge their evidence. This principle originated in ancient Rome: see generally Coy v Iowa (1988) 487 US 1012, 1015; Crawford v Washington (2004) 124 S Ct 1354, 1359; David Lusty, "Anonymous Accusers: An Historical and Comparative Analysis of Secret Witnesses in Criminal Trials" (2002) 24 Sydney Law Review 361, 363—364. But in continental Europe the principle was greatly attenuated in early mediaeval times and the procedure of the Inquisition, directed to the extirpation of heresy and the preservation of society, depended heavily on evidence given secretly by anonymous witnesses whom the suspect was denied the opportunity to confront. In England, where proof of crime depended on calling live evidence before a jury to convince it of a defendant's guilt, there was no room for such procedures."

[109] In *R. (G) v X school* [2009] EWHC 504 (Admin), Stephen Morris QC sitting as a Deputy High Court Judge, dealing with an allegation of serious sexual nature against a student and the subsequent school disciplinary proceedings, ruled:

> "69. In my judgment, the gravity of the particular allegations made against the Claimant (sexual impropriety with a person under 18 and abuse of position of trust), taken together with the very serious impact upon the Claimant's future working life of a potential s.142 direction, are such that he was, and is, entitled to legal representation at hearings before the Disciplinary Committee and the Appeal Committee. On such matters, the Claimant could not fairly be expected to represent himself, and being accompanied by a trade union official or a work colleague (even if available) was not sufficient."

The reasons for needing legal representation at a hearing are of course not only to give advice but also to question witnesses.

[110] In *R. (Bonhoeffer) v GMC* [2011] EWHC 1585, Laws LJ and Stadlen J considered whether hearsay evidence alone should be received or whether the live witnesses should be called in disciplinary proceedings before the GMC concerning very serious allegations. Stadlen J ruled as follows:

> "43. Prima facie, the arguments for affording the Claimant the opportunity to cross examine Witness A are in my view formidable. The Claimant is an extremely eminent consultant paediatric cardiologist of international repute. The allegations against him could hardly be more serious. They involve allegations of sexual misconduct, the abuse of young boys and young men and the abuse of a position of trust. If proved, they would have a potentially devastating effect on his career, reputation and financial position."
>
> "65. Insofar as a general principle applicable to the question whether and in what circumstances fairness requires a person facing serious charges amounting to criminal conduct in disciplinary proceedings to be permitted to cross-examine the witness or witnesses on whose evidence the charges are based can be evinced from *Bushell* it is in my view that, in the words of Lord Diplock, whether fairness requires such a person to be afforded the right to cross-examine must depend on all the circumstances including in particular the nature of the subject matter of the proceedings."

[111] I draw from these authorities the propositions that the decision whether it would be fair to the person accused to:

(1) fail to give full details of the accusations in advance of the hearing; and/or
(2) to admit only written hearsay evidence instead of requiring the accuser witnesses to come to the hearing and to give their evidence, and/or
(3) to deprive the accused of the ability to question her accusers

depends on the factual matrix of the case. These are matters not for a strike out application in my judgment, but are weighty matters for the trial judge which may go directly to fundamental breach.

[112] I consider that in this claim the seriousness of the allegations, which could have been career ending for the Claimant, make the Claimant's case on the absence of the CCC witnesses at the proposed disciplinary hearings at the least arguably a serious unfairness in the procedure and at the most a powerful concern about the fairness of the proposed procedure. The Judge clearly had that in mind in para 28 of her judgment when she referred to "no input from the children's centre".

Conclusions

[113] For the reasons set out above I dismiss the appeal.

[114] The stay imposed by Stewart J on 11 June 2021 is ended.

[115] I intend to award the Claimant her costs of the appeal against the Defendant on the standard basis to be assessed if not agreed. I will accept written representations on costs and costs on account by 4pm on the 5th day after this judgment is handed down.

END