Neutral Citation Number: [2021] EWHC 3454 (QB)

Case No: QB 2021 000171

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 December 2021

Before:

Sir Andrew Nicol

- -

Between :

Professor Theodora Kostakopolou	**Claimant**
- and -	
(1) University of Warwick (corporate body incorporated by Royal Charter No RC0006678) **(2) Professor Andrew Sanders** **(3) Professor Christine Ennew OBE** **(4) Professor Andy Lavender** **(5) Ms Diana Opik**	**Defendants**

- -
- -

Richard Munden (instructed by **BLM**) for the **Defendants**
The Claimant in person

Hearing dates: 18th and 19th October 2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

SIR ANDREW NICOL

Sir Andrew Nicol :

1. This is the hearing of applications:

    i) By the Defendants to strike out the claim or for summary judgment in their favour.

    ii) By the Claimant for judgment in default of a defence.

    iii) By the Claimant to strike out certain passages in the witness statements of Timothy Smith, a solicitor for the Defendants.

2. The Claimant was employed by the 1st Defendant as Professor of Law. She was Professor of European Law, European Integration and Public Policy.

3. The 1st Defendant is the University.

4. The 2nd Defendant was head of Warwick Law School and the Claimant's line manager.

5. The 3rd Defendant was the Provost of the University of Warwick.

6. The 4th Defendant was an investigator appointed by the 3rd Defendant.

7. The 5th Defendant was a law student at the University of Warwick.

8. As against the 1st Defendant the Claimant seeks damages under the Human Rights Act 1998 for breaches of her rights under ECHR Articles 8 and 14 taken with breaches of Articles 1, 7 and 21 of the EU Charter of Fundamental Rights ('EUCFR'). The Claimant also says that the 1st Defendant is vicariously liable for the torts of the 2nd – 4th Defendants.

9. The claim against the 2nd Defendant is for libel or malicious falsehood in respect of words published or caused to be published in January 2020 and March-June 2020.

10. The claim against the 3rd Defendant is for libel and/or malicious falsehood for words published on 16th January 2020, 20th January 2020 and 1st June 2020.

11. The claim against the 4th Defendant is for libel or malicious falsehood for words published in a letter of 23rd January 2020 and a confidential investigation report dated 13th May 2020. The Claimant also alleges that she was slandered by the 4th Defendant in statements at a disciplinary hearing on 20th July 2020.

12. The claim against the 5th Defendant is for libel or malicious falsehood in a publication by the 5th Defendant in March or April 2020.

Factual Background

13. The Claimant was appointed to a chair in the University in 2012.

14. In 2016 disciplinary proceedings were commenced against the Claimant, accusing her of disruptive and inappropriate behaviour at a staff meeting on 15th June 2016.

15. On 2nd August 2016 the Claimant was suspended by Professor Croft, the Vice Chancellor of the University of Warwick.

16. A disciplinary hearing took place on 29th November 2016. Thereafter Professor Simon Gilson (Chair of the Arts Faculty of Warwick University) notified the Claimant on 9th December 2016 that he upheld all of the complaints against the Claimant. He issued a written warning that would remain on the Claimant's file for 2 years. He also notified the Claimant that her suspension had been lifted with immediate effect. The Claimant appealed against Professor Gilson's sanction, but her appeal was unsuccessful, as she Claimant was told on 23rd February 2017.

17. On 27th June 2017 the Claimant issued a claim in the Employment Tribunal ('the 2017 ET claim') The Respondents were the University, and others. She alleged that she was being subjected to detriment because of her whistleblowing and other protected acts. She also alleged race and sex discrimination, breaches of her human rights and EU law.

18. On 13th November 2018 Employment Judge Camp struck out much of the 2017 ET claim. The Claimant appealed against his decision to the Employment Appeal Tribunal which ordered a preliminary hearing of whether Judge Camp was correct to strike out the whistleblowing claim and to remove the individual respondents from the claim.

19. The remainder of the 2017 ET claim was dismissed in April 2019 by Employment Judge Monk because of the Claimant's failure to comply with an Unless order regarding disclosure. The Claimant appealed that decision to the EAT.

20. The Claimant applied to the Court of Appeal for permission to appeal, but on 18th May 2020 she was refused permission to appeal by Lewison LJ.

21. On 4th December 2019 disciplinary proceedings were started against the Claimant. The allegations were that she had failed to comply with reasonable management requests, had failed to attend various meetings and not fulfilled her responsibilities in good faith. The disciplinary proceedings were started by the 3rd Defendant who appointed the 4th Defendant as the Investigating Officer.

22. On 6th January 2020 the Claimant submitted a formal grievance to Sir David Normington, the Chair of the Council of University and Ms Cooke, the Deputy Chair.

23. The allegations against the Claimant were expanded on 16th January 2020 by the 3rd Defendant, so as to include allegations that the Claimant had attempted to influence potential witnesses and had harassed students in relation to complaints that they had made.

24. On 16th January 2020 the 3rd Defendant suspended the Claimant, alleging that the Claimant had sought to harass potential witnesses against her.

25. On 29th January 2020 the investigation into the disciplinary matter was suspended because of a grievance which the Claimant had made against the 3rd Defendant. That suspension continued until 29th July 2020 when the Claimant was dismissed by the University.

26. On 25th February 2020 the Claimant issued a second set of proceedings in the Employment Tribunal ('the February 2020 ET claim'). The February 2020 ET claim was brought against the 1st - 3rd Defendants in the present proceedings. She claimed that she had been subjected to a detriment as a result of protected acts under the Equality Act 2010 and the Employment Rights Act 1996 because of the commencement of disciplinary proceedings against her. The Defendants submit that there is considerable overlap between allegations in the February 2020 ET claim and the Particulars of Claim in the present proceedings.

27. On 1st April 2020 the disciplinary investigation resumed.

28. On 21st April 2020 a statement was provided by Student X on condition of anonymity.

29. The disciplinary investigation report was completed on 20th May 2020 and is dated 13th May 2020.

30. On 1st June 2020 the 3rd Defendant informed the Claimant that a disciplinary hearing would take place on 29th June 2020.

31. The Claimant was dismissed by the 1st Defendant on 29th July 2020. This was the conclusion of the disciplinary hearing chaired by Professor Ennew's Deputy, Professor Caroline Meyer.

32. In August 2020 the Claimant issued a third Employment Tribunal claim ('the August 2020 ET claim'). The August 2020 ET claim was against the 1st and 3rd Defendants. The claims included wrongful dismissal, unfair dismissal, interference with the Claimant's Article 8 ECHR rights and for breaches of her rights under Articles 1 and 7 of the EUCFR. The Defendants submit that there is substantial overlap between the August 2020 ET claim and the present proceedings.

33. As part of the August 2020 ET claim, the Claimant sought interim relief under the Employment Rights 1996 s.128. The application was refused by Employment Judge Dean on 3rd November 2020. The Claimant says that she appealed his refusal to the EAT.

34. The February 2020 ET claim and the August 2020 ET claim have now been conjoined.

35. The Claimant appealed her dismissal to a panel which comprised Professor Sparrow, Professor Roberts and Ms Stuart. The appeal was dismissed on, I believe, 27th August 2020.

36. The Claimant has asked the Employment Tribunal to stay the ET proceedings while this High Court claim is litigated (see further below).

Procedural history

37. The Claim Form was issued on 15th January 2021. It said that it was in respect of:

    i) Libel and malicious falsehood regarding statements published by the 1st Defendant between January and 17th September 2020.

ii) Libel and malicious falsehood in publications by the 2nd Defendant in January - June 2020.

iii) Libel and malicious falsehood in publications by the 3rd Defendant between January and June 2020.

iv) Libel and malicious falsehood by the 4th Defendant in respect of publication of a letter of 23rd January 2020, a confidential investigation report of 13th May 2020 and slander regarding statements spoken at a hearing on 20th July 2020.

v) Libel and malicious falsehood by the 5th Defendant in a statement in March or April 2020.

vi) Damages under the Human Rights Act 1998, Articles and 8 and 14 of the European Convention on Human Rights (‘ECHR’) and for breaches of Articles 1, 7 and 21 of the Charter of Fundamental Rights of the European Union (‘EUCFR’) and breaches of the General Principles of EU law, including the right to be heard and proportionality and other primary EU law.

38. The Claimant served her Particulars of Claim on 5th May 2021.

39. The Defendants acknowledged service of the claim form on 20th May 2021.

40. The Defendants served a request for Further Information of the Particulars of Claim. The Claimant served her response on 25th June 2021.

41. The Claimant responded to a second request for Further Information on 5th September 2021.

42. On 7th June 2021 the Defendants applied for an extension of time for their defence. The Defendants relied on the 1st witness statement of Timothy Smith, a solicitor in BLM, solicitors for the Defendants. His first witness statement was dated 8th June 2021.

43. It seems that the Defendants’ Application Notice (for an extension of time for the defence) was only served on 8th June 2021.

44. On 9th June 2021 Master Sullivan treated the application as having been made without notice. He extended time for the defence until 9th July 2021.

45. On 10th June 2021 the Claimant made a witness statement in response to the Defendants’ application for an extension of time to serve their defence.

46. On 9th July 2021 the Defendants applied to strike out the claim or for summary judgment in respect of the claim. The application was supported by the 2nd witness statement of Timothy Smith (dated 9th July 2021).

47. On 13th July 2021 Nicklin J.

i) Directed that the Defendants’ strike out/summary judgment application should be listed before a Judge in the Media and Communications List and gave directions for that hearing.

ii) Directed that time for the defence was extended until 21 days after determination of the Defendants' application.

48. On 16th July 2021 the Claimant applied for judgment in default of defence ('default judgment application').

49. On 20th July 2021 the Claimant applied to set aside the order of Nicklin J. of 13th July 2021 ('set aside application').

50. On 22nd July 2021 Nicklin J.

i) Refused to set aside his order of 13th July.

ii) Directed that the default judgment application should be heard with the Defendants' application for strike out/summary judgment.

iii) Gave further directions for the hearing of the Defendants' application.

51. On 23rd July 2021 the Claimant applied for Further Information of the Defendants' intended defence.

52. On 29th July 2021 Nicklin J. refused the application for further information

53. On 23rd August 2021 the Claimant sought various orders in relation to the witness statement of Timothy Smith dated 9th July 2021. Her application was supported by her witness statement also of 23rd August 2020.

54. On 31st August 2021 Nicklin J. directed that the Claimant's application regarding the witness statement of Timothy Smith should be listed at the hearing to be heard by a High Court Judge and he gave directions regarding the service of evidence in relation to that application.

55. On 27th August 2021 the Claimant again applied for an order that the Defendants provide further information of their intended defence.

56. On 2nd September 2021 Mr Smith made his 3rd witness statement.

57. On 9th September 2021 the Claimant applied for directions from the High Court concerning inaccuracies in Mr Smith's witness statements of 2nd and 3rd September 2021.

58. On 13th September 2021 Nicklin J. refused the Claimant's applications of 27th August and 9th September and certified them as totally without merit.

59. Thus, there are before the Court the following matters:

i) The Defendants' application to strike out the claim or for summary judgment.

ii) The Claimant's application for judgment in default of defence.

iii) The Claimant's application to strike out certain passages of Mr Smith's various witness statements.

60. On 2nd November 2021 the Court was notified:

    i) That on 27th October 2021 Employment Judge Woffenden had granted a stay of the conjoined proceedings in the ET and directed that the stay should continue until 28 days after my decision;

    ii) Employment Judge Woffenden had also apparently confirmed that the ET did not have jurisdiction to consider the Claimant's EU and human rights claims.

61. I understand that EJ Woffenden has said that a written judgment will be produced. However, in the meantime, I have seen a note of the Employment Judge's oral decision which was made by the Claimant and which is largely agreed by the Defendants. I am grateful to the parties for their co-operation in this way and I consider that in the circumstances it is not necessary for me to wait for the written decision of EJ Woffenden.

62. After this judgment was distributed in draft to the parties, the Claimant made further substantive submissions. I shall come to those in due course.

Defendants' application to strike out the claim or for summary judgment in their favour

63. This has several bases:

    i) The defendants have an unanswerable defence that the words complained of were published with the Claimant's leave and licence by virtue of her agreement to her contract of employment which included provisions for disciplinary procedures in the course of which the alleged defamatory statements were published. c.f. *Friend v Civil Aviation Authority* [1998] IRLR 253 ('*Friend*').

    ii) The Defendants have an unanswerable defence that the words complained of were published on an occasion of qualified privilege and the Claimant has no realistic prospect of establishing malice.

    iii) So far as the claim seeks damages flowing from the Claimant's dismissal, it is barred by reference to the principle in *Johnson v Unisys Ltd* [2003] AC 518 ('*Johnson'*).

    iv) The claims for malicious falsehood and the claims in slander against the 4th Defendant require proof of special damage, but the claim for special loss is barred by *Johnson* and there is no other ground for bringing these claims.

    v) The Claimant has no realistic prospect of being able to establish that the Claimant suffered serious harm to her reputation.

    vi) The claims are an abuse of process pursuant to the principle in *Jameel (Yousef) v Dow Jones Inc.* [2005] EWCA Civ 75 ('*Jameel*') because there is no realistic prospect of the litigation yielding an advantage to the Claimant to make the costs of litigating worthwhile.

    vii) As against the 1st Defendant the claims are an abuse of process by reference to the principle in *Henderson v Henderson* [1843] 3 Hare 100 ('*Henderson*').

64. It is convenient to consider these submissions individually and the Claimant's response to each.

Leave and licence and Friend

65. Mr Munden for the Defendants submits that, when the Claimant joined the Faculty of Law of the University of Warwick, she agreed as part of her contract of employment to submit herself to any disciplinary proceedings that were taken against her and that, inevitably, as part of the disciplinary process, it would be necessary for the allegations against her to be repeated and examined. It is a feature of natural justice that complaints or disciplinary matters should be fairly examined. The disciplinary process of the University expressly provided for the means by which that examination was to occur, and it included the possibility of the appointment of an investigating officer.

66. Mr Munden argues that the Claimant did not sue over the initial allegations against her for the good reason that those publications would now be time barred. This contrasts her case with that of *Parris v Ajayi* [2021] EWHC 285 (QB) where the disciplinary investigation had not begun at the time of the publications complained of. By contrast, in the Claimant's case all of the publications were subsequent to, and part of, the disciplinary process. The disciplinary process began in December 2019 and the first publication of which she complains was in January 2020.

67. The Claimant responds by submitting first that *Friend* was decided in 1998. That was before the commencement of the Human Rights Act 1998, the Equality Act 2010 and the obligations which the UK assumed by being party to the EU Charter of Fundamental Rights.

68. The Claimant also argues that the University's procedure was not properly followed: there was no complaint by any student and so the initiation of the process was flawed. She was not given a fair opportunity to put her case and she was not treated in the dignified manner that the University's policies require. She also submits that she objected frequently to the manner in which the complaints against her were being investigated. There was therefore no leave and licence or consent to the publications.

69. In my judgment, *Friend* remains good law notwithstanding the passage of time and the legislation to which the Claimant refers. *Parris* (which was a decision of Richard Spearman QC (sitting as a Deputy Judge of the High Court)) was decided in 2021 and shows that he considered that *Friend* remained good law and I respectfully agree with him.

70. So far as the Human Rights Act 1998 is concerned, this incorporated into UK law certain parts of the European Convention on Human Rights ('ECHR') but I agree with Mr Munden that there is not an arguable breach of Article 8 ECHR, otherwise any disputed dismissal would engage Article 8 and that is not so. Further, in my view complaints of breaches of the Human Rights Act which bore on the Claimant's employment or dismissal (which are the focus of the Claimant's grievance) are more conveniently considered when I turn to the part of the strike out application which relies on *Johnson*. As far as the EUCFR is concerned, the impact of this would also be a matter for the Employment Tribunal (so far as it has any bearing on the Claimant's employment). Mr Munden denied that the University had not followed the appropriate procedure (he submitted for instance that the Student Complaint procedure had not been

followed because this was not a student complaint) but, if the Claimant was right it would go to her claims for unfair or unlawful dismissal which were the proper province of the Employment Tribunal. I agree with Mr Munden about this.

71. I did not see the relevance of the Equality Act 2010. She does not rely on this as a cause of action and, if she did, it would be in the context of the treatment of her by the University and that, too, would be a matter for the Employment Tribunal. Likewise, I do not consider that the Claimant's references to the principle of non-discrimination against EU nationals took the argument any further. Such discrimination is not pleaded in the Particulars of Claim and, if it were, since any such discrimination would be in the context of her employment, that, too would be a matter for the Employment Tribunal.

72. I also agree with Mr Munden that the Claimant plainly did agree, as part of her contract of employment, to the University's disciplinary process and all of the publications were part of that process. The Claimant may have objected to the manner in which the disciplinary proceedings occurred but that is immaterial to the submission that she had consented at the time of her contract to the disciplinary process being the way in which allegations were to be investigated and therefore all the publications which were part of that process were made with her agreement. She objects that the disciplinary process was not properly followed, but that, too, would be a matter for the Employment Tribunal to examine.

73. I have mentioned that, after this judgment was distributed in draft, the Claimant made further substantive submissions. She did so by an email to the Listing officer of 10th December 2021. She said that relevant authorities had not been drawn to my attention. She was referring to *Spencer v Sillitoe* [2003] EWHC 1651 (QB) a decision of Eady J. and to *Imperial Chemicals Ltd. v Shatwell* [1965] 1 AC 656 I invited submissions from the parties as to how I should proceed. I set a timetable for submissions and submissions in reply. The Defendants submitted that the distribution of a judgment in draft was not to enable further argument on the substance of the matter, but to give the parties an opportunity to suggest corrections of a typographical or factual nature and to try to agree an order which should follow from the draft judgment. The Defendants submitted that the Claimant's submissions went beyond this and were an impermissible attempt to reargue the applications which were before me.

74. In any event, Mr Munden disputed that either case was germane. *ICI v Shatwell* concerned a claim for breach of statutory duty, but the Claimant was not claiming for breach of statutory duty. Her claims were in defamation and malicious falsehood. *Spencer v Sillitoe* had been a case on its particular facts and there was some uncertainty as to whether the publications relied on had occurred during the disciplinary proceedings.

75. In my view neither case is material to the issues which I have to decide. I agree with Mr Munden that *Spencer* turned on its particular facts and *Shatwell* concerned a different legal situation.

76. I would strike out the claim on the basis that the Defendants have an unanswerable defence based on leave and licence.

Qualified Privilege

77. Mr Munden submitted that it was plain that all of the publications complained of were published on occasions protected by qualified privilege and that the Claimant had no arguable case of malice.

78. I observed to Mr Munden that the usual time to plead malice was in a Reply to a Defence. Since there was, as yet, no Defence, how, I asked, could I judge the sufficiency of a yet unpleaded reply.

79. Mr Munden's answer was that the Claimant had chosen to rely on malicious falsehood as well as defamation. It was therefore incumbent on her to set out her plea of malice in the Particulars of Claim. I could assume that the Claimant had advanced the best case that she could, in that regard, and I could, therefore, judge the adequacy of the pleading in respect of both causes of action (i.e. both defamation and malicious falsehood). Mr Munden drew attention to the onerous burden which a Claimant must assume in pleading and proving malice. Malice is akin to an allegation of fraud – *Henderson v London Borough of Hackney* [2010] EWHC 1651 (QB) [40] per Eady J. and it must be pleaded with the same care, as was said in *Turner v MGM* [1950] 1 All ER 449,455a-e per Lord Porter. Thus,

> "each piece of evidence must be regarded separately [I]f the result is to leave the mind in doubt, then that piece of evidence is valueless as an instance of malice whether it stands alone or is combined with a number of similar instances' (at p.455 b-c)."

80. Mr Munden submits that the Claimant has not set out a proper case of malice in her Particulars of Claim and, I can assume, she could do no better in her Reply. He argues that it was incumbent on the University to investigate the allegations against the Claimant and no arguable basis for malice is shown. So far as the student, the 5th Defendant, is concerned, the contemporary documents are not necessarily inconsistent with her account. That was a matter for argument within the disciplinary process, but the emails do not show that the 5th Defendant's publication was arguably malicious.

81. The Claimant would wish to argue that the publications of which she complains were not protected by qualified privilege, but, if they were, the privilege is defeated by malice.

82. She reminded me that the present occasion was not one which should turn into a mini-trial.

83. In my judgment, the Defendants are right. The occasions of each of the 10 publications relied upon were ones where the authors had an undoubted interest in being able to speak freely to those to whom the words were published. In my view the contrary is not arguable. I also agree with Mr Munden that, where the Claimant has relied on malicious falsehood as well as defamation, I should assume that she has put forward the best pleading of malice that she is able to do. I agree with his propositions of law as to the standard that a plea of malice must attain. I also agree that the present pleading is hopeless.

84. I would also strike out the claim on the basis that the Defendants have an unanswerable defence of qualified privilege.

The Johnson principle

85. Mr Munden submits that the *Johnson* principle is an important acknowledgement of the distinct roles of the courts and the specialist tribunals (then Industrial Tribunals, now Employment Tribunals).

86. In *Johnson* itself, the House of Lords held that the restriction could not be circumvented by relying on a duty of care (see Lord Hoffman at [59]).

87. In *Eastwood v Magnox Electric plc* [2005] 1 AC 503, the issue was revisited by the House of Lords and the court repeated that the statutory code provides an exclusive forum for the statutory right not to be unfairly dismissed. Lord Nicholls said at [28]-[29],

> "[28] In the ordinary course, suspension apart an employer's failure to act fairly in the steps leading up 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 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 before the House now, when an employee suffers financial loss from psychiatric or other illness caused by his pre-dismissal unfair treatment, which precedes and is independent of his subsequent dismissal. In such cases an employee has a common law cause of action which precedes his dismissal…"

88. The Supreme Court again considered the *Johnson* principle in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust, Botham v Ministry of Defence* [2012] 2 AC 22, in which Lord Dyson said at [40],

> "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 of the dismissal 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 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 tribunals subject to the various constraints to which I have referred. Parliament did not intend that 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."

89. From these authorities, I consider that the following propositions are established:

    i) The *Johnson* principle remains good law. The courts must be vigilant to observe the exclusive jurisdiction which has been conferred on the specialist Employment Tribunals subject to their particular conditions and qualifications.

    ii) There is an exception where the cause of action accrued before and independently of the dismissal. Then the *Johnson* principle is not infringed if a claim in in respect of such matters in the ordinary courts is allowed to proceed.

    iii) The principle does extend to the manner of the dismissal even where that is said to involve defamatory imputations in the course of the dismissal process. That may be a reason why the dismissal is unfair and, if the Employment Tribunal finds that complaint is made out, it can award compensation for such unfairness.

90. In this case, Mr Munden argues that the *Johnson* principle is engaged and no exception to it applies.

91. Mr Munden asks me to observe from the following paragraphs of the Particulars of Claim that the Claimant makes repeated references to her dismissal and the loss of earnings flowing from it: 55, 77, 84, 104, 105 and the prayer sub-paragraphs (5) and (6).

92. The Claimant submits that this is not so. She is not seeking to litigate in this court the same issue which she has raised in the ET. Rather, she is seeking to raise matters (defamation, breaches of her rights under the ECHR and the EUCFR) over which the Employment Tribunal does not have jurisdiction.

93. The Claimant has a further procedural argument which applies to this and the other bases for strike out. She observes that the Defendants entered an unqualified acknowledgement of service on 20th May 2021. They did not indicate that they intended to challenge the jurisdiction of the court, nor did they issue an application notice raising that challenge. She asks me to note that in *Hoddinott v Persimmon Homes* [2007] EWCA Civ 1203 the Court of Appeal took a strict approach to the terms of Part 11 of the Civil Procedure Rules and the consequence of not taking the steps which Part 11 contemplates. That decision was followed in *Deutsche Bank v Petromina ASA* [2015] 1 WLR 4225.

94. An alternative way of putting the procedural objection was articulated by the Claimant. She submitted that the Defendants had sought extensions of time for service of their defence. It was not now open to them to argue that they did not need to serve a defence at all. She also argued that she had been put to trouble and time in responding to the Defendants' request for further information about her Particulars of Claim. Again, it was unreasonable for them to argue now that the claim should be struck out.

95. In my view Mr Munden is right that the present action infringes the *Johnson* principle and does not come within any relevant exception. It is notable that Lord Dyson in *Chesterfield* expressly considered the manner of a dismissal which might be unfair because of defamatory remarks made in the course of the dismissal and which, it was alleged had made it harder for the Claimant to obtain another job. That is precisely what the Claimant says is her position. However, the authorities show that she must seek any

remedy in that regard in the Employment Tribunal. The Claimant was suspended in the course of the dismissal process but, as I understand it, the suspension was on full pay and so the *suspension* did not cause her loss separate and distinct from the dismissal itself: certainly, no such loss is pleaded.

96. I do not accept the Claimant's procedural objection. These Defendants do not say that the court lacks jurisdiction. If the action is to continue, the High Court does have jurisdiction. However, for the various reasons which Mr Munden has given, it is argued that the claim should not be able to proceed. On this I agree with Mr Munden. It is notable that in the cases which went to the House of Lords or Supreme Court, no-one argued that the claims should be able to continue because the procedure in CPR Part 11 had not been followed.

97. As for the Claimant's alternative way of putting the procedural objection, I agree that, in exercising the court's discretion as to whether to accede to a defendant's application to strike out a claim as an abuse of process, the court can have regard to the stage at which the objection was taken. In this case the application to strike out the claim was issued on 9th July 2021. That was at a relatively early stage of the litigation. I do not consider that the timing of the application counts against the Defendants.

98. The Claimant alleges that the disciplinary procedure was not correctly followed and she was treated unfairly by the University, but it is for the Employment Tribunal to decide those matters, not this Court.

99. Accordingly, I would allow the Defendants' application additionally on the basis her claim infringes the *Johnson* principle.

100. I should make clear that precisely because it is for the Employment Tribunal and not this court to determine the Claimant's complaints about the manner of her dismissal, nothing that I have said should have a bearing on how the Employment Tribunal responds to the Claimant's claims to it.

Serious harm

101. In consequence of the Defamation Act 2013 s.1 a publication will not be defamatory unless it has caused or is likely to cause serious harm to the Claimant's reputation.

102. Mr Munden argues that, once the consequences for the Claimant's employment are disregarded (as they must be in line with *Johnson*) the Claimant does not have an arguable case that her reputation has been caused serious harm. He argues as well that any future impact on the Claimant's reputation is unlikely and will be overshadowed by the University's decision to dismiss her.

103. I do not find this part of the Defendants' argument convincing. On an application for striking out or summary judgment, I should only accede to the application if there is no point in having a trial because its outcome is plain, even at an early stage. I do agree with Munden that, consistent with *Johnson*, there has to be disregarded the elements of the claim which are properly to be determined by the Employment Tribunal. The Claimant may well have an up-hill struggle to show that the impact of the publications

did cause or was likely to cause serious harm to her reputation, but I cannot say that will be the outcome with the certainty that I must apply before giving summary judgment in the Defendants' favour.

104. Nothing follows from this conclusion however, since I am upholding the Defendants' strike out application on other grounds.

105. Having decided that the claim should be struck out on the grounds that I have, it is unnecessary for me to decide whether the claim should also be struck out on the remaining grounds argued by Mr Munden (*Jameel* and *Henderson*).

106. I have reached the conclusion that the claim should be struck out notwithstanding EJ Woffenden's decision to stay the conjoined Employment Tribunal proceedings. She was clearly aware of the Defendants' application to strike out the claim. She was not intending to influence the outcome of that application and it would not have been proper for her to seek to do so. It is apparent that she followed the decision of the Employment Appeal Tribunal in *Mindamaxnox LLP v Gover* (EAT decision of 7th December 2010 HHJ McMullen), but in that case, so far as I can see, there was no equivalent strike out application. The case was also procedurally different in that, in addition to the High Court proceedings there were also extant proceedings in the district court of Limassol, Cyprus. In any event, nothing that EJ Woffenden had to say deflects me from the conclusion to which I have, in any event come.

The Claimant's application for judgment in default of defence

107. In my view this application is hopeless. Nicklin J. extended time for the defence as I have said. The Claimant was unhappy with that decision and she exercised her right to apply to have the order set aside. Her application in that regard was unsuccessful. The Claimant did not seek to appeal his refusal. I am not saying that any such appeal would have had any prospect of success, but, absent the overturning of his order on appeal, the order stands and the time for the defence has been extended. Thus, the short answer to the Claimant's application is that the Defendants are not in default because the time for serving their defence has not yet expired. Mr Munden had a further argument that judgment in default of defence cannot be entered when there is an, as yet, undetermined application to strike, out the particulars of Claim or for summary judgment (see CPR r.12(3)(a)).

108. Since I would refuse the Claimant's application for judgment in default of defence in any event, it is not necessary for me to engage with this argument which might involve resolving at what precise time the application to strike out the Particulars of Claim was issued.

Claimant's application to strike out parts of the witness statements of Mr Smith

109. The Claimant disagrees with parts of what Mr Smith says in his witness statements. She goes so far as to say that he has lied in parts of his statements.

110. Mr Smith denies that he has lied and denies any impropriety in making any of his statements.

111. I do not regard this a fruitful use of the Court's time. It is, of course, a regular occurrence that parties to litigation disagree as to their view as to what facts are important, or indeed, what the facts are. That is why on contested applications the court gives both parties the opportunity to serve evidence in response to their opponents. That opportunity was afforded to the Claimant in this case and she took advantage of it. The role of the Court is then to come to a view as to what it makes of the evidence by reference to the law which the Court is obliged to apply. That is what I have done. So far as is material to the strike out application by the Defendants and the application for judgment in default of defence, I accept the evidence of Mr Smith. In my view it is not necessary or a proportionate use of the Court's time to go further and to investigate and rule on each of the Claimant's objections to Mr Smith's witness statements.

Summary of conclusions:

i) I will strike out the claim.

ii) I will refuse the Claimant's application for judgment in default of defence.

iii) I decline to rule on the application to strike out the passages of Mr Smith's witness statements to which the Claimant objects.