IN THE SUPREME COURT OF GIBRALTAR

Neutral Citation Number 2021/GSC/19

2020/ORD/35

BETWEEN:

DR HELENA CILLIERS

Claimant

-and-

GIBRALTAR HEALTH AUTHORITY

Defendant

Freddie Vasquez Q.C. and **Imogen Lawson-Cruttenden (**instructed by Triay Lawyers**)** for the **Claimant**

Philip Mead, **Julian Santos** and **Kenneth Navas (**instructed by Kenneth Navas Barristers and Solicitors**)** for the **Defendant**

Judgment date: 19 July 2021

JUDGMENT

RESTANO, J:

Introduction

1. The Claimant, Dr Cilliers was employed by the Defendant ("the GHA") as a consultant ophthalmologist with effect from 9 January 2017. Some four months later on 15 May 2017, she attended a meeting at which she was dismissed from her employment. This decision was followed by a letter of dismissal the next day. As well as

bringing a claim for unfair dismissal in the Employment Tribunal against the GHA, Dr Cilliers commenced this claim on 14 May 2020 for damages and loss of earnings based on breach of the contract of employment, breach of a duty of care, libel, malicious falsehood and slander. On 9 November 2020, the GHA filed an application for a strike out of this claim and also for a related summary judgment application.

2. The GHA's application is primarily based on its contention that the claim falls within the '*Johnson* exclusion area'. This refers to the decision of the House of Lords in *Johnson v Unisys Ltd* [2001] UKHL 13; [2003] 1 AC 518 which decided that complaints concerning the dismissal of an employee should be exclusively pursued in the Employment Tribunal under the statutory unfair dismissal regime. There are also a number of other objections directed at the defamation claims mostly concerning alleged deficiencies in the way those claims have been pleaded.

3. The details of Dr Cilliers' claim are set out in her Particulars of Claim dated 14 September 2020 and the various appendices which follow. No defence has yet been filed by the GHA pending the outcome of this application.

Background

4. Prior to taking up her appointment in Gibraltar, Dr Cilliers had been employed as a consultant ophthalmologist at South Warwickshire NHS Foundation Trust Hospital ("South Warwickshire Hospital") from January 2011 to June 2016. Dr Cilliers states that in an attempt to improve patient care there, she inadvertently breached South Warwickshire Hospital's corporate governance guidelines relating to data protection which led to a confidential investigation. Dr Cilliers recognised and apologised for her error and this led to additional

training being provided to her on data protection issues. It was around this time that Dr Cilliers applied for the position in Gibraltar which she did by completing a form entitled 'application for consultant appointment' dated 28 March 2016.

5. Dr Cilliers states that she was not required to disclose that she was the subject of a confidential, internal investigation which had not yet concluded in this application form. As a result of this process, however, Dr Cilliers' General Medical Council ("GMC") revalidation, a process that ensures that practising doctors are fit to practice and up to date, was deferred pending the outcome of that confidential internal investigation. A note on the GMC's system stated that the revalidation was delayed pending the conclusion of an "ongoing process". In the event, Dr Cilliers states that the internal investigation at South Warwickshire Hospital concluded without any disciplinary sanctions being made against her and the matter was not deemed serious enough for a referral to be made to the GMC or the Information Commissioner's Office. Dr Cilliers alleges that as a result of an oversight, her Responsible Officer at the time who evaluated her fitness to practice failed to update her entry on the GMC system to reflect the fact that the ongoing process had concluded without consequences.

6. Dr Cilliers terminated her employment at South Warwickshire Hospital at the end of June 2016 and took up a temporary position in the Cayman Islands before starting work at the GHA in January 2017. The terms of Dr Cilliers' contract of employment are contained in a letter to her from the GHA's director for Human Resources dated 13 July 2016 confirming that Dr Cilliers was being offered the position of Consultant Ophthalmologist with effect from 9 January 2017. This letter of appointment forms the basis of Dr Cilliers' contractual claim and insofar as is material, paragraph 1 states that the appointment was on contract terms for a period of three years with the possibility of renewal. Further, this states that in the event that any of the parties

wished to terminate the appointment, a period of six months' notice was to be given in writing. Paragraph 4 of the letter of appointment stated that the appointment was subject to Colonial Regulations, Government Security Instructions, Accounting Instructions, Stores Instructions, Departmental and General Orders ("General Orders") and the Information Technology Security Policy. Insofar as is material for the purposes of this application, section 11 of General Orders provides that appointments to public offices will normally be terminated for prescribed reasons only and subject to the procedure set out elsewhere in General Orders. In addition to these contractual terms, Dr Cilliers alleges that the GHA owed her various duties in tort namely, taking reasonable care for her health, safety and welfare, protecting her from suffering foreseeable psychological injuries, not acting in a way that is likely to destroy or damage the relationship of mutual trust and confidence and protecting her from bullying and harassing.

7. Professor Burke, the GHA's head of governance since 9 July 2018 and formerly the medical director at Sheffield Children's Hospital was appointed by the GHA as Dr Cilliers' Responsible Officer for her GMC revalidation which was due in February 2017. This process was deferred, however, because Professor Burke was on sabbatical at that time. In around March 2017 when Professor Burke started the revalidation process, he contacted Dr Cassaglia, the GHA's medical director at the time to inform him that Dr Cilliers' revalidation had been deferred in January 2016 and asked him whether he knew about this and whether he should proceed with the revalidation. As Dr Cassaglia was not aware of this, they agreed that he would speak to Dr Cilliers about this whilst Professor Burke made his own inquiries.

8. On 10 May 2017, Dr Cilliers was summoned to a meeting with Dr Cassaglia and Christian Sanchez, the GHA's Human Resources manager the purpose of which she was told was to clarify some issues arising from her revalidation status with the GMC and the reference

provided by her previous employer. This meeting was scheduled to take place on 12 May 2017 but was then postponed until 15 May 2017 so that Dr Cilliers could attend with her union representative. At the meeting on 15 May 2017, Dr Cilliers was summarily dismissed and the following day Dr Cilliers received a letter of dismissal dated 15 May 2017 from Dr Cassaglia explaining that the dismissal was based on gross misconduct arising from her failure to disclose the fact that she had been found guilty of professional misconduct when she completed the application form when applying for the position at the GHA.

9. Dr Cilliers alleges that the charge of gross misconduct was nothing more than an excuse to lend a veneer or legality to an arbitrary decision taken to dismiss her summarily and that the decision to dismiss her had been taken even before the GHA became aware of the internal investigation at South Warwickshire Hospital. Further, she alleges that subsequent exchanges which she has obtained by means of Data Subject Access Requests in England confirm that the GMC's view was that Dr Cilliers' "information processing lapse" did not amount to misconduct.

10. Dr Cilliers then appealed the dismissal which led to a hearing before an appeal board on 26 July 2017. The appeal board's decision which was set out in a letter dated 2 August 2017 recommended that the GHA withdraw her dismissal on the grounds of gross misconduct, that her application be made voidable and that the contract be rescinded. Dr Cilliers alleges that this process and its outcome were both flawed.

11. On 10 August 2017, Dr Cilliers commenced proceedings in the Employment Tribunal for unfair dismissal where she alleges that the true reason for her dismissal was because that she had made a series of protected disclosures to the GHA regarding shortcomings with the clinical governance at the Eye Unit at St Bernard's Hospital.

12. In the first part of this claim, Dr Cilliers alleges that the GHA has fundamentally breached its contractual obligations to her and have accordingly repudiated the contract of employment. These allegations are based on the fact that Dr Cilliers was summarily dismissed without establishing any of criteria set out in section 11.1.1 of General Orders and without complying with the disciplinary procedures set out in section 7 of General Orders. Further, she alleges that the GHA has breached the term of trust and confidence implied in the contract of employment by lying about the reasons for her dismissal and concealing e-mail exchanges which undermined the reasons given for the dismissal. As stated above, there is also a concurrent tort claim. Although a breach of the duty of care alleged has not been pleaded, Mr Vasquez Q.C. who appeared for Dr Cilliers at the hearing confirmed that this was an oversight and that permission to amend the Particulars of Claim would be sought to correct this.

13. The second part of the Particulars of Claim deals with the claims for libel, malicious falsehood and slander. The libel and malicious falsehood claims are based on the letter of dismissal dated 15 May 2017 which states as follows:

> *"Your failure to make this disclosure falls well below the required professional standards to the extent that it puts your integrity and honesty into serious doubt. This conduct on your part constitutes gross misconduct and entitles the GHA to terminate your employment for good and sufficient cause with immediate effect from today."*

14. It is alleged that these words are false and that they were published maliciously to the following people:

(1) The person to whom it was dictated;
(2) The person who transcribed it on a computer;
(3) Any person or persons who filed it or otherwise dealt with the letter or a copy of the letter after it had been written by Dr Cassaglia;

(4) Mr Christian Sanchez;
(5) Ms Leslie Louise;
(6) Professor Burke;
(7) Mr Neil Costa, at that time Minister for Health and Justice;
(8) The Employment Liaison Officer and/or other persons unknown at the GMC.

15. As for the slander claim, it is alleged that (1) on 15 May 2017, Dr Cassaglia spoke "the words defamatory of the Claimant" to Mr Costa by way of report relating to Dr Cilliers' dismissal; and (2) on 2 June 2017 Dr Cassaglia and/or Professor Burke "spoke and published the words defamatory of the Claimant to Colin Pollock at the General Medical Council contained in the letter by reporting to him the contents of the same and confirming to him that the Claimant had been dismissed for gross misconduct".

16. Following on from all these claims, a claim is made for special damages in relation to loss of earnings, pension and employment related benefits as well as future earnings and other miscellaneous costs. Further, Dr Cilliers claims that she has suffered personal injury loss and damage and makes a claim for psychiatric damage, a claim for general damages for loss of reputation, aggravated damages for libel, slander and malicious falsehood and punitive/exemplary damages.

The strike out and summary judgment applications

17. The GHA's application notice seeks the following:

(1) That the claim for damages at common law for breach of contract and/or under a common law duty of care arising as a result of the termination of Dr Cilliers' employment, as pleaded at paragraphs 3

to 96 be struck out pursuant to CPR r.3.4(2) as disclosing no reasonable grounds for bring the claims;

(2) Summary judgment pursuant to CPR r.24.2 on the issue of publication of the statement complained of to Professor Burke, Mr Costa and to Dr Pollock, the Employment Liaison Officer at the GMC as pleaded in paragraphs 101(5), 101(7) and 101(8) of the Particulars of Claim on the basis that this did not take place.

(3) That the claim in libel, malicious falsehood and slander as pleaded in paragraphs 97 – 108 be struck out pursuant to CPR r.3.4(2).

18. In support of the applications, the GHA relies on the witness statement of Nicholas Isola, Dr Daniel Cassaglia and Professor Derek Burke all dated 9 November 2020. In response to the applications, Dr Cilliers filed her own witness statement dated 18 May 202 as well as the witness statement of Dr Keti Pachkoria Gogoli dated 26 February 2020 filed in the Employment Tribunal proceedings.

The *Johnson* exclusion area

Submissions

19. The GHA's oral submissions at the hearing were divided into two parts. Mr Mead dealt with the strike out of the contractual and personal injury claims and Mr Santos dealt with the strike out of the defamation claims. In support of the submission that the claim should be struck out because it fell within the *Johnson* exclusion area, Mr Mead undertook a detailed review of the relevant case law starting with the House of Lords decision in *Addis v Gramophone Co Limited* [1909] AC 488, where an employee's contract of employment provided that he could be dismissed with six months' notice without cause. It was held that the employee in that case who had been humiliatingly dismissed from his managerial role could not recover

damages for injured feelings, mental distress or damage to his reputation arising from the manner or fact of his dismissal. He was entitled to six months' salary together with the commission which he would have earned during that period.

20. He then referred to *Johnson v Unisys Ltd* where the rule in *Addis* was considered by the House of Lords. In that case, Mr Johnson obtained compensation of £11,691.88 in the Industrial Tribunal for unfair dismissal. He then brought a claim for damages at common law based on breach of contract or negligence. The contractual claim was based on the alleged breach of various implied terms in his contract of employment, in particular the implied term of trust and confidence. Alternatively, it was alleged that Mr Johnson's employer owed him a duty of care. The employer relied on the fact that it could terminate the employee's contract on four weeks' notice without cause.

21. The House of Lords decided that while Mr Johnson had been dismissed unfairly, there could be no compensation for the manner of his dismissal if that exceeded the statutory limit on compensation laid out in the Employment Rights Act 1996 that could be sought in the Employment Tribunal. It was held that while a common law right to full compensation for breach of contract might exist, it would be an improper exercise of the judicial function to circumvent the intention of Parliament that such claims should be heard by specialist tribunals with limits on the compensation available for dismissals. Lord Hoffman made it clear that this applied both to the part of the claim which was based on an implied term of trust and confidence and the part of the claim which was based on a duty of care. The strike out of Mr Johnson's claim was therefore upheld.

22. Continuing with his detailed exposition on this area of the law, Mr Mead then turned to *Eastwood v Magnox Electric plc; McCabe v Cornwall County Council* [2004] UKHL 35; [2005] 1 A.C. 503 which concerned two employees who pursued not only claims for unfair

dismissal before the tribunal but also claims for personal injury in the ordinary courts. The contracts of employments in these cases were again terminable on notice without cause. On the assumed facts of these cases, it was held that the claimants' respective causes of action had accrued before their dismissal which meant that they were independent of the dismissal process and did not fall within the *Johnson* exclusion area. In his speech, Lord Nicholls clearly demarcated the boundary line of the *Johnson* exclusion area by reference to whether the cause of action arose before an employee's dismissal, in which case the cause of action remained unimpaired or whether it arose by reason of his dismissal, in which case it fell squarely within the *Johnson* exclusion area. Further, he stated that exceptionally financial loss may flow from psychiatric or other illness caused from pre-dismissal unfair treatment in which case the employee has a common law cause of action which precedes, and is independent of, his subsequent dismissal.

23. The final stop in Mr Mead's review of the relevant jurisprudence was *Edwards v Chesterfield Royal Hospital NHS Foundation Trust; Botham v Ministry of Defence* [2011] UKSC 58; [2012] 2 A.C. 22. The question in this case was whether the *Johnson* exclusion area applied so as to preclude recovery of damages for loss arising from the unfair manner of a dismissal in breach of an express term of an employment contract. A seven-justice Supreme Court held that damages were not recoverable for breach of contract in relation to the manner of a dismissal even where the breach in question concerned an express term of the contract of employment regulating the disciplinary procedures leading to dismissal. Lord Dyson stated that Parliament had specified the consequences of a failure to comply with provisions for disciplinary procedure and that the inclusion of provisions about disciplinary procedures in contracts of employment did not give rise to a common law claim for damages for all the reasons given by the House of Lords in *Johnson* in relation to the implied term of trust and confidence.

24. Based on these principles, Mr Mead advanced the following six propositions:

(1) That a claim for personal injury could not be brought whether in relation to the fact or manner of a dismissal.
(2) There was no parallel remedy at common law whether in contract or in tort for unfair dismissal and that a contractual claim fell within the *Johnson* exclusion area.
(3) A failure to comply with contractually binding disciplinary procedures does not give rise to a common law claim for damages.
(4) At its lowest, an action for wrongful dismissal only yields damages for the contractual period of notice although there may be a higher claim for liquidated damages based on the applicable contractual provisions.
(5) An employers' failure to act fairly in the steps leading to the dismissal does not of itself cause an employee financial loss. The loss arises by reason of an employee's dismissal and falls squarely within the *Johnson* exclusion area.
(6) It is necessarily to be inferred that unless the parties agree otherwise, they do not intend the failure to comply with contractual binding disciplinary procedures to give rise to a common law claim for damages.

25. Mr Mead submitted that Dr Cilliers' common law claims in contract and tort referred to the summary dismissal of Dr Cilliers and not to any antecedent breaches. Accordingly, he said that these claims fell squarely within the *Johnson* exclusion area and should be struck out as disclosing no cause of action.

26. Towards the end of his oral submissions, Mr Mead accepted that the wrongful dismissal claim for liquidated damages totalling £381,766 i.e. thirty months' salary due under the three-year contract, could be

pursued although in his view this claim needed to be re-pleaded. He maintained, however, that the personal injury claim seeking non-pecuniary losses should be struck out as those losses were not referable to the breach of contract claim.

27. Mr Santos adopted Mr Mead's submissions on the application of the *Johnson* exclusion area to the defamation claims and further referred to *Parris v Ajayi* [2021] EWHC 285 (QB) as a recent example of the application of the *Johnson* exclusion area to a defamation claim. That case concerned libel and malicious falsehood claims arising from a statement provided by the claimant's line manager to a human resources manager, which statement was then relied on as the basis for the claimant's dismissal. Richard Spearman Q.C. (sitting as Judge of the Queen's Bench Division) summarised the decisions in *Johnson*, *Eastwood* and *Edwards* and set out the parts of those judgments which showed the applicability of the *Johnson* exclusion area to defamation claims. This included a reference to paragraph 40 of the judgment of Lord Dyson in *Edwards* (reproduced in paragraph 130 of the judgment in *Parris*) where he stated that a dismissal might be unfair because defamatory findings were made which damages an employee's reputation but that those complaints had to be pursued in the specialist Employment Tribunal and not in the ordinary courts, free from the limitations carefully crafted by Parliament. Some of the pleas in *Parris* were accordingly struck out.

28. Mr Santos observed that some of the claims struck out in that case, such as the claim for loss of reputation arising from the dismissal, mirrored the claims being made in this case. Mr Santos also observed that the libel claim which was not struck out in *Parris* concerned a letter which came before the dismissal and could conceivably stand as an independent claim. Mr Santos submitted that the libel and malicious falsehood claims in this case could not stand as independent claims as the dismissal letter came after the dismissal and no

distinction was made between the losses suffered as a result of the dismissal itself and the reputational damage alleged. Similarly, the slander claim related to statements made on the day of the dismissal and afterwards. As such, he said that these claims also all fell squarely within the *Johnson* exclusion area.

29. In response, Mr Vasquez Q.C. submitted that the *Johnson* line of authorities dealt with contracts of employment which could be terminated without cause and were not only distinguishable in relation to the contractual claim but more generally. Mr Vasquez said that Dr Cilliers' contract of employment provided security akin to that enjoyed by civil servants as the employment could only be terminated in the circumstances set out in section 11.1.1 at chapter 4 of General Orders and in accordance with the disciplinary procedures contained in chapter 2 of General Orders which he said had not been adhered to. In support of his submission, Mr Vasquez relied on the *obiter* statements of Lady Hale and Lord Mance in their judgments in *Edwards* that there was nothing to suggest that Parliament intended to take away the entitlement of those few employees who had a contractual right not to be dismissed without cause to bring a claim in the ordinary courts.

30. Mr Vasquez placed particular emphasis on the decision of the Royal court of Jersey in *Alwitry v The States Employment Board* [2019] JRC014, a case concerning the withdrawal of a job offer made to Mr Alwitry who was also a consultant ophthalmologist based on an allegation by the employer that summary dismissal was justified. Mr Alwitry's terms and conditions of employment provided for termination for cause only and the court held that the contractual damages claimed were not limited by the *Johnson* exclusion area. Mr Vasquez pointed out that despite the above having been made clear in the letter before action letter dated 26 May 2020, the concession in relation to the strike out of the contractual claim had only come at the end of Mr Mead's oral submissions. He also said that whilst he

accepted that there might be difficulties in claiming non-pecuniary losses as part of the claim in contract, it was nevertheless possible. He referred to paragraphs 5-015 – 5-035 from McGregor on *Damages* (19th ed., Sweet & Maxwell) which refers to the fact that whilst at one time only compensation for financial loss was possible in contractual claims, this was no longer the case and that various heads of non-pecuniary loss can be claimed for a breach of contract.

31. Further, he submitted that although there was no direct authority on the point, once the contractual claim fell outside the *Johnson* exclusion area, there was no reason in principle why the same was not also true of the concurrent tort claim. At the very least, he said that this was a point which had not yet been considered by the courts and therefore needed to be researched, examined and argued exhaustively in the course of a substantive hearing. In support of this submission, he referred to Lord Browne-Wilkinson's statement in *Barrett v Enfield London Borough Council* [2001] 2 AC 550; [1999] 3 All ER 193, where he stated as follows:

> *"In my speech in the Bedfordshire case [1995] 2 AC 633 , 740-741 with which the other members of the House agreed, I pointed out that unless it was possible to give a certain answer to the question whether the plaintiff's claim would succeed, the case was inappropriate for striking out. I further said that in an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out."*

32. Further, Mr Vasquez rejected that the defamation claims were concerned with the fact of Dr Cilliers' dismissal. In his submission, it was the reasons given for the dismissal which were defamatory and unjustified as was the manner in which the dismissal had taken place.

Discussion

33. The parties agreed that for the purposes of this application, the statutory unfair dismissal regime which applies in Gibraltar is materially the same as that in England & Wales and I will therefore proceed accordingly. The House of Lords in *Johnson* has made it clear that an employee is not entitled to circumvent the statutory unfair dismissal regime and bring a claim at common law for damages for breach of contract. In that case, it was alleged that the employee's dismissal was in breach of the implied term of trust and confidence in the employment contract. Lord Hoffman stated as follows:

> *54. My Lords, this statutory system for dealing with unfair dismissals was set up by Parliament to deal with the recognised deficiencies of the law as it stood at the time of Malloch v Aberdeen Corpn [1971] 1 WLR 1581 . The remedy adopted by Parliament was not to build upon the common law by creating a statutory implied term that the power of dismissal should be exercised fairly or in good faith, leaving the courts to give a remedy on general principles of contractual damages. Instead, it set up an entirely new system outside the ordinary courts, with tribunals staffed by a majority of lay members, applying new statutory concepts and offering statutory remedies. Many of the new rules, such as the exclusion of certain classes of employees and the limit on the amount of the compensatory award, were not based upon any principle which it would have been open to the courts to apply. They were based upon policy and represented an attempt to balance fairness to employees against the general economic interests of the community. And I should imagine that Parliament also had in mind the practical difficulties I have mentioned about causation and proportionality which would arise if the remedy was unlimited. So Parliament adopted the practical solution of giving the tribunals a very broad jurisdiction to award what they considered just and equitable but subject to a limit on the amount.*
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> *55. In my opinion, all the matters of which Mr Johnson complains in these proceedings were within the jurisdiction of the industrial tribunal. His most substantial complaint is of financial loss flowing from his psychiatric injury which he says was a consequence of the unfair manner of his dismissal. Such loss is a consequence of the*

dismissal which may form the subject matter of a compensatory award. The only doubtful question is whether it would have been open to the tribunal to include a sum by way of compensation for his distress, damage to family life and similar matters. As the award, even reduced by 25%, exceeded the statutory maximum and had to be reduced to £11,000, the point would have been academic. But perhaps I may be allowed a comment all the same. I know that in the early days of the National Industrial Relations Court it was laid down that only financial loss could be compensated: see Norton Tool Co Ltd v Tewson [1973] 1 WLR 45 ; Wellman Alloys Ltd v Russell [1973] ICR 616 . It was said that the word "loss" can only mean financial loss. But I think that is too narrow a construction. The emphasis is upon the tribunal awarding such compensation as it thinks just and equitable. So I see no reason why in an appropriate case it should not include compensation for distress, humiliation, damage to reputation in the community or to family life.

56. Part X of the Employment Rights Act 1996 therefore gives a remedy for exactly the conduct of which Mr Johnson complains. But Parliament had restricted that remedy to a maximum of £11,000, whereas Mr Johnson wants to claim a good deal more. The question is whether the courts should develop the common law to give a parallel remedy which is not subject to any such limit.

57. My Lords, I do not think that it is a proper exercise of the judicial function of the House to take such a step. Judge Ansell, to whose unreserved judgment I would pay respectful tribute, went in my opinion to the heart of the matter when he said:

> *"there is not one hint in the authorities that the ... tens of thousands of people that appear before the tribunals can have, as it were, a possible second bite in common law and I ask myself, if this is the situation, why on earth do we have this special statutory framework? What is the point of it if it can be circumvented in this way? ... it would mean that effectively the statutory limit on compensation for unfair dismissal would disappear."*

58. I can see no answer to these questions. For the judiciary to construct a general common law remedy for unfair circumstances attending dismissal would be to go contrary to the evident intention of Parliament that there should be such a remedy but that it should be limited in application and extent.

34. The decision in *Edwards* extends the *Johnson* exclusion area to cases in which the breach relied upon relates to express contractual disciplinary procedures. These cases all concerned contracts of employment which could be terminated without cause where the claim would be limited to the notice period plus an additional award for the period in which the employer's dismissal procedure should have taken place. The present case on the other hand, concerns a contract of employment which provides for termination only with cause and it is therefore distinguishable because the employment relationship between the parties has been contractually fettered. Baroness Hale made the following *obiter* observations on claims arising from contracts of employments which provided for termination with cause only in her dissenting judgment in *Edwards*:

> *"113. But let us suppose a contract of employment where the employer is only entitled to dismiss the employee for good cause. Rightly or wrongly, most university teachers employed under the contracts of employment which were current in the 1960s believed that they could only be dismissed for cause. If judges, instead of being office holders, were employed under contracts of employment, they could only be dismissed for cause. Under such a contract, if the employer dismisses the employee without good cause, the employee is entitled to be compensated for the consequences of the loss of the job. Obviously, the calculation of damages will have to take account of contingencies such as the possibility of good cause arising in the future. This is the application of the ordinary principles of the law of contract.*
>
> *121. We have seen how the "Johnson exclusion area" has been productive of anomalies and difficulties. There is no reason at all to extend it any further than the ratio of that case. As the Court of Appeal held in this case, it should be limited to the consequences of dismissal in breach of the implied term of trust and confidence. The House of Lords was persuaded that the common law implied term, developed for a different purpose, should not be extended to cover the territory which Parliament had occupied. In fact, the territory which Parliament had occupied was the lack of a remedy for loss of a job to which the employee had no contractual right beyond the contractual notice period. Parliament occupied that territory by requiring employers to act fairly when they dismissed their employees. But there was and is nothing in the legislation to take away the existing contractual rights of employees. There was and is nothing to suggest that Parliament intended to limit the*

> *entitlement of those few employees who did and do have a contractual right to the job, the right not to be dismissed without cause. It is for that reason that I am afraid that I cannot agree that the key distinction is between the consequences of dismissal and the consequences of other breaches. The key distinction must be between cases which must rely on the implied term to complain about the dismissal and cases which can rely on an express term."*

35. Lord Mance further stated as follows at paragraph 105 in his judgment in *Edwards*:

> *"Baroness Hale JSC's approach would treat damages as recoverable at large for any breach of any contractually provided disciplinary procedure, irrespective of whether dismissal followed or led to the loss claimed. For reasons indicated in paras 90–94 above, I do not agree with that approach. The case of an employee with an express contractual right not to be dismissed save for cause is not before us, and gives rise to different issues to those which are. Damages for wrongful dismissal in breach of such a contract would on the face of it be measured on the basis that the contract would have continued unless and until the employee left, retired or gave cause for dismissal (in relation to the prospects of all of which an assessment would have to be made), but questions would no doubt also arise as to whether the employee had accepted or had to accept the dismissal and/or had to mitigate or had mitigated his or her loss.*

36. After referring to these statements, the court in *Alwitry* went on to find that the *Johnson* line of authorities did not address cases where the employer's right to terminate had been contractually fettered so that the employer could only be terminated for cause. The court held that in the case of Mr Alwitry's dismissal the question was not one about the fairness of the dismissal but its validity. It was further held that the dismissal was invalid and that the damages claimed in that case were not limited by the *Johnson* exclusion area.

37. In my view, the reasoning applied in *Alwitry* based on the *obiter* statements in *Edwards* referred to above applies to the contractual claim in this case too. This is also a case where it is being alleged that the right to terminate has been contractually fettered and that the

employer breached the contract of employment when it terminated the contract. As such, if Dr Cilliers' contractual claim is successful it is not limited by the *Johnson* exclusion area. In these circumstances, the strike out application is dismissed insofar as it relates to Dr Cilliers' claim in contract.

38. I turn now to Dr Cilliers' personal injury claim for non-pecuniary losses arising from her dismissal. In *Johnson*, the employee brought a claim not just for breach of the implied term of trust and confidence (as well as other implied terms) but also an alternative claim in tort based on an alleged duty of care owed to him by Unisys on the basis that it ought reasonably to have foreseen that such injury was likely to result from dismissing him in the way that it did. In concluding that all these claims were within the jurisdiction of the exclusive Industrial Tribunal, Lord Hoffman said as follows:

> *"The same reason is in my opinion fatal to the claim based upon a duty of care. It is of course true that a duty of care can exist independently of the contractual relationship. But the grounds upon which I think it would be wrong to impose an implied contractual duty would make it equally wrong to achieve the same result by the imposition of a duty of care."*

39. Lord Millet agreed with Lord Hoffman on these key points and noted at paragraphs 80 to 81 of his speech that the existence of overlapping systems would be a recipe for chaos and would lead to a loss of coherence in employment laws. The key points which arise from this decision were then reinforced by the Supreme Court in *Edwards. Johnson* therefore firmly established the principle that the unfair dismissal statutory regime trumps common law claims, including claims based on a duty of care. Common law claims cannot therefore be brought to challenge a dismissal because Parliament has occupied that territory.

40. In *Eastwood* a claim in negligence for special damages was allowed but that was only because it was confined to the period prior to dismissal. In this case, however, we are not concerned with any alleged antecedent breaches and the claim clearly arises from Dr Cilliers' dismissal. The decision in *Alwitry* clarifies the position to the extent that it dis-applied the *Johnson* exclusion area to contractual claims where a dismissal can only take place with cause because that was the bargain which the parties had struck but the effect of that decision and the reasoning underlying it can be taken no further. Whilst claims in tort as well as in contract were originally brought in *Alwitry*, the tort claims were later withdrawn. The *obiter* statements in *Edwards* do not assist either in this regard. Further, there is no force in the submission that a meaningful distinction can be drawn in this case between the dismissal itself and the reasons given for it as the claim is clearly based on the dismissal and the manner in which it was carried out.

41. There is therefore no principled basis to conclude that the *Johnson* exclusion area does not apply to a tort claim just because a contractual claim can proceed. In my view, therefore, the personal injury claims for non-pecuniary losses fall squarely within the *Johnson* exclusion area, whether a concurrent claim in contract can be pursued or not. Although there is no direct authority dealing with which side of the *Johnson* boundary line a tort claim falls on in a case where a contractual claim can be pursued, I do not consider that this is an area of the law which can be properly regarded as one which is developing or which raises a novel point of law or that there is any other good reason to postpone adjudication on this issue to trial. The application for a strike out of the claim insofar as it relates to the personal injury claim is therefore granted.

42. Whilst this same reasoning applies to the defamation claims, before reaching a final conclusion as to whether or not that part of the claim also represents an impermissible incursion into the *Johnson* exclusion

area, a determination is required as to whether those claims are independent of the dismissal or not. It is clear from *Parris*, following the reasoning in *Eastwood*, that if a defamation claim is independent of the dismissal it may fall outside the *Johnson* exclusion area.

43. The libel and malicious falsehood claims as pleaded clearly refer to the dismissal letter and do not concern a statement giving rise to the dismissal which could conceivably stand as an independent claim (as in *Parris*) but to the dismissal letter itself. The slander claim refers to the defamatory words being spoken by Dr Cassaglia to Mr Costa on the 15 May 2017 which is the day the meeting took place at which Dr Cilliers was dismissed and by way of report relating to Dr Cilliers' dismissal on 2 June 2017. This shows that the defamation claims are clearly linked to the dismissal and can hardly be said to be independent of it.

44. There is no real distinction between the losses suffered as a result of the dismissal itself and the reputational damage alleged. As Mr Spearman Q.C. concluded in *Parris* echoing the words of Lord Kerr in *Edwards*, if the reputational damage alleged is inextricably linked to the fact of the dismissal such that the cause of action in respect of that reputational damage did not exist before the dismissal, financial loss claimed as a consequence of the dismissal can only be brought in an unfair dismissal claim. This is precisely the case here. The losses claimed are focussed exclusively on the dismissal itself and the events which followed and which relate back to that dismissal. As these claims cannot be divorced from the dismissal they therefore fall foul of the *Johnson* exclusion area and should also be struck out.

45. For the sake of completeness, I should add that the GHA's application notice also contended that the claim was improperly brought because it was an attempt to litigate the issues that were already the subject of an unfair dismissal claim and which came within the sole jurisdiction

of the Employment Tribunal. This part of the strike out application based on the rule in *Henderson v Henderson* (1843) 3 Hare 100 but was not really pursued by the GHA and appeared to be nothing more than another way of the GHA saying that the *Johnson* exclusion area applied to these claims. Mr Vasquez made the point that the issues in the Employment Tribunal proceedings were completely different to the issues raised in this claim but in the light of my conclusions on the application of the *Johnson* exclusion area, I do not consider it necessary to form a view on this point.

Further challenges to the defamation claims

46. Mr Santos advanced a number of other grounds in support of the strike out of the defamation claims. I have already found that the *Johnson* exclusion area applies to those claims and that they should be struck out on that basis but in the event that I am wrong about that, I will now consider those further grounds.

The Summary Judgment application

47. Dealing first with the summary judgment application, this relates to the claims for libel and malicious falsehood arising from the dismissal letter dated 15 May 2017 and asks that summary judgment be entered under CPR r.24.2(a)(i) and CPR r.24.2(b) on an issue, namely that the letter was not published to Professor Burke, Mr Costa and Dr Pollock or other persons at the GMC who are the last three persons or categories of persons listed in paragraph 101 of the Particulars of Claim and set out in paragraph 14 above. This application is in effect a precursor to the strike out of the libel and malicious falsehood claims under *Jameel (Yousef) v Dow Jones & Co. Inc* [2005] QB 946 to which I will turn later.

Submissions

48. In support of this application, Mr Santos relied on the witness statements of Professor Burke and Dr Cassaglia which he submitted provided incontrovertible and unchallenged evidence that publication to these three individuals or categories of individuals had not taken place. Professor Burke confirms that he never received the dismissal letter and that as a result, he never forwarded the letter to either Dr Pollock, the Employment Liaison Officer of the GMC or any other person at the GMC. This is confirmed by Dr Cassaglia who states that he never sent the letter to Professor Burke and/or the Employment Liaison Officer of the GMC at the time or anyone else at the GMC. Dr Cassaglia also states that Neil Costa who was the minister at the time was notified about the decision to terminate Dr Cilliers' contract of employment and what had happened but that he was not sent a copy of the letter.

49. Mr Santos submitted that these credible statements from the two alleged publishers showed that Dr Cilliers has no real prospects of success in proving publication to these individuals. Further, he said that the evidence filed by Dr Cilliers in response to this application failed to provide positive evidence of publication to these individuals despite the burden having shifted to her in the light of the GHA's evidence and despite the time that had passed and the many investigations she had undertaken. Instead, this evidence only sought to make forensic points and challenge Dr Cassaglia's credibility on a very slender basis. Similarly, the statement of Dr Pachkoria filed in the Employment Tribunal claim which referred to the alleged "rumours spread by the GHA" did not address publication of the letter.

50. In support of this part of the application, Mr Santos relied on *Wallis v Valentine* [2002] EWCA Civ 1034; [2003] EMLR 8 where the alleged publishees of an affidavit confirmed that they had not been shown the

affidavit and where there was no positive evidence of publication to them. The Court of Appeal held that the judge had been justified in entering summary judgment where there was no positive evidence of publication to two alleged publishees, where there was evidence from independent witnesses contradicting the alleged publication and there was no indication that any other evidence would be forthcoming. Sir Murray Stuart-Smith stated as follows at paragraph 21 of his judgment:

> *"Mr Price now submits that the judge should not have usurped the function of the jury; they might have disbelieved Mr Valentine, Mr Eke and Mr Mills and concluded that what was said in the letter of July 12, 2000 only bore the meaning sought to be put upon it by Mr Wallis, namely that the affidavit had been shown to Mr and Mrs Eke. I do not agree. There was no positive evidence of publication to them. In addition to Mr Valentine's evidence, there was that of his solicitor and Mr Eke, an independent witness; there is now a statement from Mrs Eke, who is also independent. There is no indication that any other evidence could be forthcoming. There is no material upon which Mr Mills or Mr and Mrs Eke could be cross-examined to show that they are lying. Admittedly Mr Valentine could have been cross-examined on the basis of the letter of July 12. But it seems to me that for a jury to hold that they were satisfied that Mr Valentine was lying, and the other witnesses as well, flies in the face of reality and would be perverse. The judge would be wholly justified in ruling that there was no evidence for it to be considered by the jury."*

51. Mr Santos submitted that, just as it flew in the face of reality that all the witnesses in *Wallis v Valentine* were lying, it was similarly perverse for Dr Cilliers to suggest that Professor Burke and Dr Cassaglia were both lying in the absence of positive evidence of publication and that this aspect of the case should proceed solely to allow the cross-examination of those witnesses.

52. In response, Mr Vasquez submitted that Dr Cilliers had good reason to express reservations about the GHA's lack of candour especially because of an e-mail exchange between Dr Cassaglia and Dr Kumar which took place between 26 and 28 March 2017. This e-mail

exchange starts with an email from Professor Burke to Dr Cassaglia dated 26 March 2017 where Professor Burke states that when he reviewed Dr Cilliers' GMC connect file he noted that she was deferred in 2016 as there was an on-going process in South Warwickshire and he asks Dr Cassaglia whether he was aware of this. After some exchanges between Professor Burke and Dr Cassaglia about this, Dr Cassaglia sent an e-mail on 27 March 2017 to Dr Kumar the Chairman of the Gibraltar Medical Registration Board where he stated that the GMC had contacted him to let him know that Dr Cilliers was subject to an on-going process. Mr Vasquez submitted that this gave the false impression that the GMC were investigating Dr Cilliers' practice at that time which was not the case and that in fact the GMC had not contacted Dr Cassaglia at all. He also referred to a further e-mail from Dr Kumar dated 28 March 2017 where he asked Dr Cassaglia whether the GMC had contacted him and/or Professor Burke on behalf of the employer and noted that there was no reply to that query.

53. Mr Vasquez also referred to the fact that the GHA's witnesses had limited themselves to saying that they had not sent or received a copy of the letter and that it was extremely unlikely that these individuals had not had a copy of the letter read to them or that they had not been made aware of its contents. He made the point that a repetition of the libel constituted a dissemination of the libel and invited the court to draw an inference that the libel had been repeated by reference to an extract from Duncan and Neill on *Defamation* (Lexis Nexis, Fourth ed.) at paragraph 8.06 (proof of publication where the claimant relied on an innuendo meaning). The passage he relied on states as follows:

> *"But there will be cases involving newspapers and similar media where the relevant facts, though not generally known, are known sufficiently widely to enable the claimant to rely in the circumstances on a presumption or inference that some persons who read the statement knew those facts. It is submitted that in such cases the claimant will be able to discharge the burden of proving publication by establishing:*

(a) that the newspaper containing the article (or case the case may be) was circulated among a substantial number of people; and
(b) *that the special facts were widely known among persons who were likely to read the article."*

54. Mr Vasquez said that this application did not dispose of this claim and that it was acceptable for the claim to have been pleaded in the way that it had until more evidence came to light. He also referred to an extract from *Gatley* stating that the manner of the dismissal could in itself convey a defamatory imputation. He rejected the criticism that this was a fishing expedition and said that the spread of the reasons for Dr Cilliers' dismissal beyond the small group of people who were involved in the drafting of the letter showed that the libellous statement had been published. Mr Vasquez relied on the witness statement of Dr Pachkoria in this regard who says that her perception of Dr Cilliers had been tainted because she had received information that Dr Cilliers had been guilty of some gross misconduct concerning her management of confidential patient records and that she had falsified documents prior to her interview at the GHA, including her medical diploma which made her question her good character. At paragraph 55 of her witness statement, Dr Pachkoria states as follows:

> *"Knowing what I do now, I appreciate that the assessment was not complete and was based on rumours spread by the GHA about Dr Cilliers and that had I been aware fully of the completely unconscionable unfair way she had been treated by the GHA and the total lack of justification for the appallingly harsh treatment that she had received, I would have answered those comprehensive questions fully and differently."*

55. In conclusion, Mr Vasquez submitted that Dr Cilliers had more than a fanciful prospect of success and said that no real advantage would be gained by the GHA securing an order for summary judgment which did not dispose of all the defamation claims in any event

56. In reply, Mr Santos said that the misguided attack on Dr Cassaglia's credibility could hardly make up for Dr Cilliers' failure to establish publication. Further he said that the attack was unjustified because Dr Cassaglia's reference to an 'ongoing process' was nothing more than a quote from the NHS website which was copied into the e-mail sent to Professor Burke. Further, the reference by Dr Cassaglia to being contacted by the GMC when in fact it had been the other way around was a very subtle and flimsy point which hardly supported the view that Dr Cilliers had a realistic chance of success at trial on the issue of publication to these individuals or classes of individuals especially when Professor Burke, against whom similar criticism was not levelled, clearly states that he neither received nor passed on the letter to the GMC.

57. Whilst Mr Santos accepted that in principle oral repetitions of libel could give rise to a claim (although he made the point that no such case had been pleaded) he submitted that there was no evidence that such a claim could be traced back to the letter or that any such alleged repetitions had given rise to what Dr Pachkoria had written on the form which seemed to be based on nothing more than vague rumours. Further, he said that what appeared to be happening was that the libel claim was eliding into an unspecified and unpleaded claim in slander where special damage had not even been pleaded. Similarly, Mr Santos said that the suggestion made that the manner of Dr Cilliers' dismissal alone amounted to a new publication should have been pleaded and had in fact been raised for the first time by Mr Vasquez in his oral submissions.

58. In Mr Santos's submission, therefore, Dr Cilliers' case in relation to the issues which were the subject of the summary judgment application had no real prospects of success and amounted to nothing more than micawberism and the forlorn hope that something would turn up at trial.

Discussion

59. I will deal first with Mr Vasquez's challenge that this application does not dispose of all the defamation claims. In my view, that complaint is not a good reason to refuse the application nor does it undermine it. There is nothing improper about seeking summary judgment on an issue as provided for in the Civil Procedure Rules. Further, when taken together with the strike out application based on *Jameel* abuse, it has the potential to dispose of the libel and malicious falsehood claims and could potentially narrow down the issues at trial.

60. Turning first to the alleged publication to Professor Burke and to Dr Pollock or anyone else at the GMC. Professor Burke is clear in stating that he neither received the letter from the GHA nor did he forward it to Dr Pollock or anyone else at the GMC. Dr Cassaglia also confirms that he never sent the letter to Professor Burke, Dr Pollock or anyone else at the GMC. Dr Cilliers has failed to provide any positive evidence of publication in response to this. Even if Dr Cilliers was given the benefit of the doubt about wanting to cross-examine Dr Cassaglia at trial, this still does not provide an answer to the evidence of Professor Burke and the speculation about rumours circulating hardly provides a sound basis for this specific claim. On the material before me, this part of Dr Cilliers' claim is unsubstantiated and, like *Wallace v Vallentine,* flies in the face of reality. There is no reason to conclude that this will change if the matter proceeds to trial or that this is the sort of case where an inference should be drawn that these individuals were made aware of the contents of the letter of dismissal. The extract from Duncan and Neill on *Defamation* which Mr Vasquez relied on refers to cases of innuendo meaning in relation to widely circulated newspapers and similar media and is not authority for the proposition that it is appropriate for an inference can be drawn in a case such as this.

61. I do not consider that it is appropriate either for an inference to be drawn that these individuals were informed (in some unspecified way) about the essential contents of the letter or that there was a repetition of the libel. This was all based on speculation and the spread of rumours within the GHA which, if anything, points to a slander claim. It is not unusual that there would have been some talk amongst GHA staff members about the departure of Dr Cilliers especially as she left rather suddenly but this does not provide an answer to the clear evidence relied on by the GHA that the dismissal letter was not published to these individuals. The possibility of a libel claim based on the manner of dismissal which has not even been pleaded does not answer the evidence relied on by the GHA either. In the circumstances, I do not consider that Dr Cilliers has a realistic prospect of success on the libel and malicious falsehood claims in relation to publication to Professor Burke and Dr Pollock or others at the GMC. Had I not already held that this claim fell within the *Johnson* exclusion area, I would have ordered that summary judgment be entered on this issue in favour of the GHA.

62. I turn now to the allegation that the letter was published to Mr Costa. Mr Vasquez points out that Dr Cassaglia who states that he did not send a copy of the letter to Mr Costa concedes that Mr Costa was notified of the decision to terminate Dr Cilliers' contract. There is, however, no witness statement from Mr Costa stating that he did not receive the dismissal letter in similar terms to the one filed by Professor Burke. Whilst Dr Cassaglia signed the letter and it is likely that if anyone were to have provided the letter to Mr Costa it would have been him, there were a number of people involved in this process and one of the other officials involved might well have provided the letter to Mr Costa. This is therefore an area where more evidence might become available at trial and I do not consider that Dr Cilliers' claim in relation to the alleged publication to Mr Costa can be said to be fanciful at this stage. I would therefore have refused the application for summary judgment in relation to publication to Mr

Costa. In any event, for the reasons set out below, this would not make any difference to the outcome of the related strike out application under the *Jameel* jurisdiction to which I now turn.

Strike out of libel and malicious falsehood claims based on *Jameel*

Submissions

63. Following on from the summary judgment application, Mr Santos submitted that the claims in libel and malicious falsehood should be struck out under CPR r.3.4(2)(b) pursuant to the jurisdiction recognised in *Jameel (Yousef) v Dow Jones & Co. Inc* [2005] QB 946; [2005] EWCA Civ 75. In *Jameel*, as the defamatory words had been published to only five subscribers in England the court held that vindication was likely to be very limited given that there had been very small injury to the claimant's reputation and the claim was struck out.

64. Mr Santos also referred to *Wallis v Valentine*, where the claim was struck out as an abuse of process on the grounds that even if successful, damages would have been very modest due to limited publication which did not justify the costs of a lengthy trial. Another case relied on by Mr Santos was *Lonzim plc v Sprague* [2009] EWHC 2838 (QB) where a slander claim in respect of allegations made to a small number of shareholders was struck out.

65. Mr Santos submitted that on any view, the publication in this case was very limited. Of the eight persons or categories of persons set out in paragraph 101 of the Particulars of Claim, he submitted that three should be eliminated following the summary judgment application. Although I have found that in fact only two of these persons or categories of persons should be eliminated and not Mr Costa, Mr Santos submitted in the alternative that because Mr Costa authorised Dr Cilliers' dismissal over a month before the letter was published,

even if it had been published to him it could hardly be said to have had any impact on him.

66. As for Mr Sanchez and Ms Louise, Mr Santos relied on the evidence of Mr Isola and Dr Cassaglia which confirmed that they had both assisted in the preparation of the letter of dismissal and that following *Watts v Times Newspapers* [1997] QB 650, they should therefore be considered to be publishers as persons who participated in, procured, authorised or secured publication. As such, he submitted that it was highly questionable whether publication to them could be actionable. Alternatively, he said that they had been involved in the dismissal process in one way or another and that it was entirely implausible for the letter to have had any impact on them either.

67. Mr Santos then said that this only left the vague references contained in sub-paragraphs 101(1) - (3) of the Particulars of Claim to the person to whom the letter was dictated, the person who transcribed it onto a computer and the persons who otherwise dealt with and filed the letter. Mr Santos submitted that these vague categories of individuals were also directly involved in the publication process and thus should be considered publishers of the letter or alternatively, no damage to reputation could have been suffered given their involvement.

68. As a result, Mr Santos submitted that any publication was negligible and did not give rise to a real and substantial tort, that any damages would be either nominal or minimal and that the libel and malicious falsehood claims were entirely disproportionate and should be struck out. He made the further point that a significant time had passed since the publication of the letter and that it was therefore best to let sleeping dogs to lie as observed by Arden LJ (as she then was) in *Cammish v Hughes* [2012] EWCA Civ 1655; [2013] E.M.L.R. 13.

69. In response, Mr Vasquez submitted that this was a real and substantial claim which went beyond a small group of GHA employees. He said

that Dr Cilliers was at a clear disadvantage in establishing details of the dissemination of the publication, reserved the right to add more individuals and said that the claim could be pleaded in a general fashion until further evidence of dissemination came to light. Further, Mr Vasquez submitted that as Mr Costa was not involved in the decision to dismiss he could not be deemed to be a publisher nor could the secretarial staff who assisted with the preparation and filing of the letter for the same reason. In conclusion, Mr Vasquez said that the defamation had had a devastating effect on Dr Cilliers' reputation and that there was no better way for her to re-establish her reputation than by securing a judgment with her defamation claims.

Discussion

70. *Jameel* is authority for the proposition that when it is established that there is no real and substantial tort within the jurisdiction, the court can take a proactive approach and strike out a defamation claim as an abuse of process on the grounds that it is disproportionate for it to continue. The claim which was struck out in *Jameel* concerned a serious accusation made in a website that two people were funding terrorists. The website was immediately removed and made virtually inaccessible and it was discovered that only five people had accessed it and as such the damage alleged was held to be insignificant. The court stated as follows:

> *"54. …It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice…*
>
> *69. If the claimant succeeds in this action and is awarded a small amount of damages, it can perhaps be said that he will have achieved vindication for the damage done to his reputation in this country, but both the damage and the vindication will be minimal. The cost of the exercise will have been out of all proportion to*

what has been achieved. The game will not merely not have been worth the candle, it will not have been worth the wick.

70. …It would be an abuse of process to continue to commit the resources of the English court, including substantial judge and possibly jury time, to an action where so little is now seen to be at stake. Normally where a small claim is brought, it will be dealt with by a proportionate small claims procedure. Such a course is not available in an action for defamation where, although the claim is small, the issues are complex and subject to special procedure under the CPR."

71. *Lozim plc v Sprangue* is a good example of the application of the *Jameel* jurisdiction. Mr Justice Tugendhat stated as follows in *Lozim*.

"*31. I am at a loss to understand what vindication the Claimants might obtain from the verdict of a court, or why, or on what grounds, this claim in slander is being brought at all. The professional people and (I shall assume) the one or two shareholders of LonZim, to whom the alleged slanders were spoken, were at the AGM to vote, or attend upon the vote, in respect of resolutions, including that proposed by AMB. Mr Lenigas and Mr White won on the resolutions which were eventually put to a vote at an EGM of LonZim held on 30 July 2009. This dispute is already history. I cannot imagine why the opinions of any of alleged publishees concerning the Claimants would be influenced one way or another by any verdict on these matters to be given by a jury or judge. Any such verdict could only be given many months after the underlying dispute had been resolved. It has in practice been resolved through the votes in the meetings of LonZim, and the subsequent disposals by AMB of their shareholdings. What Mr Sprague is alleged to have said is clearly opinion, and whether his opinions were right or not will be proved (if at all) by the gains or losses that may eventually be made by LonZim on the assets in question. The publishees themselves were as well placed as Mr Sprague to form their own opinions. The meanings complained of do not relate to the personal reputations of Mr Lenigas and Mr White (LonZim, as a corporation, has no personal reputation for this purpose), but only to their professional judgment or competence.*

32. The prospect of the Claimants obtaining an injunction is unreal. Any damages could only be very small. They would be totally disproportionate to the very high costs that any libel action involves.

> *33. It is not enough for a claimant to say that a defendant to a slander action should raise his defence and the matter go to trial. The fact of being sued at all is a serious interference with freedom of expression: Jameel paras [40] and [55]. The prospect for a shareholder at a company meeting of being sued by claimants such as these, for expressing opinions or views such as those alleged here to be slanders, would inhibit free expression. It would be very much against the public interest. The public interest in relation to company meetings is that there should be a free expression of views, and that differences be resolved by the votes cast.*
>
> *34. If the expression of such views is to give rise to a slander action, there must be reasonable grounds for bringing that action. It is the duty of the court to bring to an end proceedings that are not serving the legitimate purpose of defamation proceedings, which is to protect the claimant's reputation. I have no hesitation in categorising this part of the claim as an abuse of the process of the court. The claim is vexatious."*

72. With that guidance in mind, I will now turn to the facts of this case. In the light of my conclusion following the summary judgment application, the alleged losses in relation to this part of the claim relate to the person to whom the letter was dictated, the person who transcribed it onto a computer, the persons who otherwise dealt with and filed the letter, Mr Costa, Mr Sanchez and Ms Louise.

73. Mr Isola's unchallenged witness statement confirms that Mr Sanchez and Ms Louise assisted with the preparation of the letter. I agree that publication to themselves is either not actionable or cannot be said to have had any impact whatsoever on their opinion of Dr Cilliers given their role in the dismissal process. This conclusion also applies to the person to whom the letter was dictated, the person who transcribed it onto a computer and the persons who otherwise dealt with and filed the letter. At best their secretarial role would have been very limited and having played a part in the preparation of this letter, publication of this letter to them cannot have had any impact such as to give rise to real and substantial tort. This therefore only leaves Mr Costa. Dr Cilliers' pleaded case is that on 5 April 2017 and following the exchanges which took place between Dr Cassaglia and Professor

Burke a meeting took place between Dr Casaglia and Mr Costa when the decision to dismiss her was taken. I cannot see how in those circumstances, publication of the letter to Mr Costa can be said to have had a real impact on his opinion of Dr Cilliers and this does not therefore disclose a real and substantial tort either.

74. The effect of all of this is that, at best, the alleged defamatory words have been published to a small number of people who were already involved in one way or another in the dismissal process. I do not consider that there is any evidence to suggest that if Dr Cilliers is given further time, details of the publication of the dismissal letter such as to give rise to a claim will emerge. It seems to me that this is based on nothing more than speculation, largely based on vague references to the spread of rumours within the GHA. There is, however, a world of difference between these vague references which if anything point to some sort of unpleaded slander claim and the sort of positive evidence of publication required to prove the libel and malicious falsehood claims.

75. Consequently, I do not consider that this claim gives rise to a real and substantial claim in libel and malicious falsehood. Had I not already found that the *Johnson* exclusion area applies to the libel and malicious falsehood claims, I would have struck them out under *Jameel*.

Strike out application of the defamation claims based on pleading deficiencies

76. Mr Santos then provided an extensive list of alleged pleading deficiencies for each of the defamation claims which he said resulted in non-compliance with CPR Part 53 and Practice Direction 53B. I will deal with each of these pleading complaints in outline as I have already concluded that the *Johnson* exclusion area applies to all these claims and, in the case of the libel and malicious falsehood claims, that they should be struck out under *Jameel* in the alternative.

The libel and malicious falsehood claims

Submissions

77. Before I turn to the alleged pleading deficiencies of this part of the claim, I will deal with the allegation that Dr Cilliers is obliged to publish the defamatory words every time she applies for employment. Mr Santos said that this claim was flawed because the fact that the finding of gross misconduct had been withdrawn on appeal meant that details of the dismissal letter did not need to be provided by Dr Cilliers when she applies for new jobs. Further, Mr Santos said that there was no English or Gibraltar authority for the proposition that a claimant repeating a libel gives rise to a cause of action and Mr Vasquez's reliance on the so-called doctrine of enforced disclosure was based on a decision of the Minnesota Supreme Court which illustrated the novel nature of this claim. In any event, he said that there were several other US decisions where such claims had failed.

78. Mr Santos then turned to the alleged pleading deficiencies and submitted that the libel claim failed to plead particulars as to publication and meaning and did not disclose reasonable grounds for bringing the claim. As regards publication, Mr Santos referred to CPR PD 53BPD.11, paragraph 4.2(2) which states that the claimant must set out in the particulars of claim:

> *"…when, how and to whom the statement was published. If the claimant does not know to whom the statement was published or it is impracticable to set out all such persons, then the particulars of claim must include all facts and matters relied upon to show (a) that such publication took place, and (b) the extent of such publication."*

79. Further, Mr Santos referred to paragraphs 26.5 and 26.7 in Gatley on *Libel and Slander* (12th ed., 2017) which states as follows:

> *"Unless there are good grounds for variance, the particulars of claim should allege, in respect of each publication relied on as a cause of action, that the words were published by the defendant on a specific occasion to a named person or person other than the claimant."*
>
> *"If the claimant does not know the name of the person or persons to whom publication is alleged, they must nevertheless be sufficiently described as to enable them to be identified. In very exceptional cases, particulars of claim may be permitted to stand notwithstanding that they fail adequately to identify the circumstances in which or the person or persons to whom the defamatory words are alleged to have been published. This may arise, for example, where the particulars of publication are essentially within the knowledge of the defendant and not of the claimant…The court will not, however, entertain an action of a speculative nature and such a course will only be permitted where the claimant can show by uncontradicted evidence that publication by the defendant has taken place."*

80. Mr Santos submitted that three years after publication took place, the claimant had still not identified the persons at paragraphs 101(1) - (3) of the Particulars of Claim referred to in paragraph 14 above and that this was not a case which fell into the 'very exceptional category' referred to in *Gatley* where particulars of claim would be permitted to stand despite failing to identify the persons to whom the defamatory words were alleged to have been published.

81. Mr Santos went on to submit that in breach of Practice Direction 53B, paragraph 4.2(4), Dr Cilliers had also failed to plead the natural and ordinary defamatory meaning that the words complained of were alleged to bear. In *Lucas-Box v News Group Newspapers Ltd* [1986] 1 WLR 147, Ackner LJ at pp.151-152 stated as follows:

> *"It has become the settled practice for a plaintiff, where the meaning of the words complained of is not clear and explicit, to plead the meanings which he says the words bear. This enables the defendant to know what case he has to meet and to prepare his defence accordingly. Such a practice is, further, of considerable assistance to the court since it thus clearly provides to the trial*

judge the meanings upon which he must rule in deciding whether the words published are capable of being so understood."

82. Mr Santos submitted that there were further failings in relation to the malicious falsehood claim based on the dismissal letter, namely the failure to plead why the contents of the dismissal letter were false and that the insufficiency of the particulars of falsity. Mr Santos further submitted that, apart from a bare assertion made at paragraph 106 of the Particulars of Claim, Dr Cilliers had failed to plead a case on special damage arising from the alleged malicious falsehood (as opposed to the dismissal) which was required when making a malicious falsehood claim. In support of this submission, he relied on the judgment of Tugendhat J. in *Tesla Motors Ltd v BBC* [2011] EWHC 2760 (QB) where a claim for malicious falsehood by the car manufacturer in respect of the well-known television programme 'Top Gear' was struck out because it was so lacking in particularity that it could not be allowed to proceed unless capable of remedy. Finally, Mr Santos said that Dr Cilliers could not rely on the statutory exception under section 9(1) of the Defamation Act which allowed claims for malicious falsehood to proceed without special damage as no such case had been pleaded.

83. In response, Mr Vasquez said that the GHA could hardly suggest that Dr Cilliers should be anything than entirely candid when applying for new jobs especially given the reasons for her dismissal. Further, whilst accepting that this part of the claim was novel he said that the doctrine of compelled self-publication was a concept recognised in various jurisdictions and that there was nothing in principle preventing this claim being advanced under Gibraltar law. He referred to paragraph 6.20 of Gatley which states that if a claimant is under a duty to pass on a charge made against him the person who first made the charge may be responsible.

84. Mr Vasquez said that this was a case where the Particulars of Claim should be allowed to stand as drafted because despite any drafting deficiencies, the extent of publication would only become clear when disclosure had taken place and witness statements exchanged. He said that paragraph 4.2 of CPR 53B PD provided a certain latitude in this regard and he referred to the introductory words to paragraph 26.5 of *Gatley* which state that: "*The general principle demands only that the defendant be given due notice of the case he has to meet, and there is no fixed rule as to what amounts to a sufficient averment of publication.*"

85. As regards meaning, Mr Vasquez submitted that although this had not been specifically pleaded it was clear from the extract from the dismissal letter quoted at paragraph 98 of the Particulars of Claim. Further, he referred to paragraphs 99 and 100 of the Particulars of Claim which alleged that Dr Cilliers' behaviour had fallen well below required professional standards such as to put her integrity and honesty into serious doubt and which justified the termination of her employment based on gross misconduct.

86. In the course of oral submissions, Mr Vasquez also referred to paragraph 8.17 of Duncan and Neill on *Defamation* (which in turn referred to *McManus v Beckham* [2002] EWCA Civ 939; [2002] 1 WLR 2982) which states that damages can be recovered in respect of republication of a libel although Mr Santos pointed out that such a claim had not been pleaded and was unsupported by evidence.

87. As for the malicious falsehood claim, Mr Vasquez said that there was no genuine misapprehension on the part of the GHA about what was being claimed in relation to this part of the claim as in other parts of the claim. Further, he said that his client was entitled to rely on section 9(1) (b) of the Defamation Act or alternatively that she would have no difficulty establishing special damage. In support of this

submission, he referred to Dr Cilliers' evidence which showed how difficult obtaining employment was proving for her and paragraph 5.2 of Gatley (10th ed.) which states that the requirement of special damage is satisfied where there is loss or refusal of an office or employment.

Discussion

88. The authorities relied on by Mr Vasquez in relation to the enforced self-publication claim point to this being a novel and challenging area of law as he acknowledged. Footnote no.170 accompanying the extract from Gatley relied on by him refers to New Zealand, Australian and American authorities and, amongst other things, states as follows: "Some courts in the United States hold that there is an actionable publication when a dismissed employee relates the reason for dismissal to a prospective new employer". Although novel and challenging, I do not consider that it follows that this is a claim which is necessarily doomed to fail and should be struck out. Any final findings on a claim of this sort should be based on actual findings of fact and, had I not already struck out the libel claim, I would not have struck out this part of the claim because of its novel nature. I would, however, have required Dr Cilliers to plead more fully the reasons why she alleges that she is obliged to publish the defamatory words and what precisely those defamatory words are as I consider that this part of the claim is sketched out far too lightly in the Particulars of Claim.

89. As for pleading deficiencies, it is not satisfactory for Dr Cilliers to say that the defamatory meaning relied on is clear when this has not been properly pleaded although this is something which could be addressed in an amendment. Similarly, the particulars of falsehood in relation to the malicious falsehood claim have either been improperly pleaded or consist or bare assertions. For example, the allegation that Dr Cilliers' non-disclosure was not the reason for the dismissal even if

true does not establish the falsity of the words complained of. Similarly, the allegation that Dr Cassaglia and Professor Burke did not really believe that this put her integrity and honesty into serious doubt does not go to the allegation that the words complained about were false. Dr Cillers has also failed to adequately address the claim for special damages or reliance on section 9(1)(b) of the Defamation Act in her Particulars of Claim. Despite these deficiencies, I would have been minded to give Dr Cilliers an opportunity to cure them had this been the only basis on which the challenge was made but I have already concluded that there is no real and substantial tort disclosed in relation to these claims which disposes of them, quite apart from the application of the *Johnson* exclusion area.

The slander claim

Submissions

90. The slander allegations are contained in paragraphs 102 and 103 of the Particulars of Claim and refer to two conversations which took place on 15 May 2017 and 2 June 2017 with Mr Costa and Mr Pollock at the GMC respectively. Mr Santos submitted that this part of the claim was also deficient for lack of particularity and that contrary to CPR PD 53B, paragraph 4.1(2) and 4.2(1), no attempt had even been made by Dr Cilliers to identify the precise defamatory words alleged to have been spoken by Dr Cassaglia and on which the claim was based. Further, as with the libel and malicious falsehood claims, he said that the alleged defamatory meaning of the (unidentified) words allegedly spoken had not been pleaded. Mr Santos also repeated the complaint made in the malicious falsehood claim that no special damage claim had been pleaded arising from the alleged slander as opposed to the dismissal. Further, he submitted that the allegations on their face did not disclose a plausible slander case especially when on Dr Cilliers' own pleaded case, Mr Costa had agreed to dismiss her some six weeks

earlier and that the GMC's view was that Dr Cilliers could not be regarded as having been dishonest.

91. In response, Mr Vasquez's accepted that paragraphs 102 and 103 of the Particulars of Claim did not specify what the "words defamatory" were but said that it was clear and that any doubts about meaning could easily have been clarified if the GHA had made a request for further information rather than taking the disproportionate step of applying for a strike out of the claim.

Discussion

92. I also consider that the pleading in relation to the slander claim is deficient. The alleged defamatory words have not been properly identified, meaning has not been pleaded nor has the special damage claim been addressed in the Particulars of Claim. As above though, I would have provided Dr Cilliers with a short period to time to rectify her statement of case had I not already struck out the claim on the basis that it falls within the *Johnson* exclusion area.

Conclusion

93. In summary, my conclusions as set out above are as follows:

(1) The strike out application is dismissed insofar as it relates to Dr Cilliers' claim in contract for wrongful termination as the right to terminate has been contractually fettered and that claim does not therefore come within the *Johnson* exclusion area.

(2) The strike out application is granted insofar as it relates to the personal injury claim which falls within the *Johnson* exclusion area.

(3) The strike out application is also granted in relation to the defamation claims as they are exclusively linked to the dismissal and therefore also fall within the *Johnson* exclusion area.

(4) Alternatively, the summary judgment application is granted in relation to the libel and malicious falsehood claims insofar as publication is alleged against Professor Burke and the Employment Liaison Officer and/or other persons unknown at the GMC as there is no realistic prospect of success in relation to those claims. I refuse, however, the application for summary judgment in relation to the alleged publication to Mr Costa. This, however, does not affect my conclusion that following the outcome of the summary judgment application, the libel and malicious falsehood claims should in any event be struck out under *Jameel* on the grounds that they do not disclose a real and substantial tort.

(5) Dr Cilliers' defamation claims contains a number of pleading deficiencies but I would not have struck those claims out on that basis alone. In the event, this does not arise as I have struck out the defamation claims for the reasons set out above.

94. In the light of these conclusions, I will hear the parties on any consequential matters which arise from the handing down of the judgment including case management directions going forward.

Mr Justice Restano
Puisne Judge

Date: 19 July 2021