IN THE COURT OF APPEAL **Claim No.: CA-2022-000041**

BETWEEN:

PROFESSOR THEODORA KOSTAKOPOULOU

Claimant

-and-

(1) UNIVERSITY OF WARWICK (Corporate Body incorporated by Royal Charter under Royal Charter Number: RC0006678)
(2) PROFESSOR ANDREW SANDERS
(3) PROFESSOR CHRISTINE ENNEW OBE
(4) PROFESSOR ANDY LAVENDER
(5) MS DIANA OPIK

Defendants

SKELETON ARGUMENT

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1. I hereby wish to request permission to appeal against Sir Nicol's decision of 21 December 2021 striking out a claim that has emerged from prolonged injustice and suffering on the grounds that the decision was wrong and unjust. The claim has three limbs, namely, a) breaches of human rights and primary and secondary EU law (Articles 8 and 14 ECHR, 1,7, 21 and 31 EUCFR, 6(3) TEU, 20 and 45(2) TFEU and Article 7(1) of Regulation 492/2011 and the general principles of EU law of proportionality and the right to be heard), b) libel and/or c) malicious falsehood.

2. The strike out amounts to a denial of fair trial under common law and Article 6(1) ECHR and substantive legal rights and is not justified.

3. Guided by the Overriding Objective under r 1(1) CPR of the fair and just disposal of a case and her duties to assist the Court in furthering the Overriding Objective under r 1(3) CPR, the Appellant submitted to a detailed factual background of the case in paras 7-42 of the Particulars of Claim as well as in paras 1-104 of her Skeleton argument for the High Court hearing of 18th and 19th October 2021. Extensive documentary evidence provided to the HC and the Defendants' legal team between June and October 2021.

4. Instead of relying on the *Thomas* principle, namely, in a strike out application before a defence is filed the facts pleaded in the Particulars of Claim have to be assumed to be true (*Thomas v News Group Newspapers [2001] EWCA Civ 233* at [3]), the Appellant sought to prove the facts she relied upon on 18th and 19th October 2021 in the High Court.

5. The factual background of the Judgment from that Hearing does not accurately depict those facts. Instead of writing another factual background, the Appellant will outline the omissions and inaccuracies.

6. In paras 13-16 of the Judgment, there is no reference to the facts that on 23 June 2016, the day of the Brexit referendum, Professor Probert, former Head of Warwick Law School wrote a letter of commencement of disciplinary proceedings against the Appellant/formerly Claimant; the Claimant protested her innocence and complained about victimisation to HR Department on 27 June 2016 and to Professor Croft, Vice Chancellor of Warwick University on 9 July 2016 outlining the breaches of natural justice, the law and the University's procedures; on 22 July 2016, Professor Croft invited the Claimant to submit a grievance against Professor Probert, but following the Claimant's second letter of 24 July 2016 detailing the substantive unfairness of Professor Probert's actions, Professor Croft suspended the Claimant on baseless allegations of harassment without giving her an opportunity to be heard (POC, paras 9-14). The Claimant was on annual leave.

7. The Claimant suffered a psychiatric injury as a result of her mistreatment, and she suffered a second psychiatric injury when, having written to Professor Croft on 9 September 2016 protesting her innocence and requesting the lifting of her suspension, Professor Croft did not reply to her letter for more than 50 days and continued to keep her in suspension. Instead, he subjected her to disciplinary hearing which took place when the Claimant was ill and without her evidence and, when she appealed, her appeal was dismissed by Professor Ennew, the third defendant on 23 February 2017 (POC, paras 15-20).

8. Eighteen (18) applications the Claimant made to employment tribunals and courts for further information on what she was supposed to have done wrong were refused. Her applications to the ET on other matters in the proceedings she commenced at the Employment Tribunal in June 2017 were either refused or consistently ignored and to date she had not received decisions on them.

9. During the course of legal proceedings in the EAT and the Court of Appeal, the Claimant submitted information about her bullying and victimisation by Professor Sanders, the second defendant, Head of Warwick Law School, to the Civil Appeals Office on 18 October 2019, 18 November 2019 and 9 December 2019 (POC, paras 20-24). This is an important omission of facts because on 4 December 2019 Professor Sanders falsely reported the Claimant to the University for not meeting with him while he knew about the Claimant's pre-arranged contractual duties to other Universities and bodies off campus and had been offered by the Claimant several alternative days for a meeting. And although Professor Sanders had received the Claimant's email communication of 3 December 2019 and a memorandum relating to the completion of her tutorial responsibilities and he could independently verify this information at click of a button in Tabula, the University of Warwick's online student monitoring system and did not have any student complaint, he accused the Claimant of not fulfilling her contractual obligations on 4 December 2019.

10. In para 21 of Sir Nicol's Judgment, Professor Sanders' allegations are erroneously depicted as three (she had failed to comply with reasonable management requests, had failed to attend various meetings and not fulfilled her responsibilities in good faith), whilst evidence showed that it was the Claimant's unavailability to meet with Professor Sanders owing to her performance of pre-arranged professorial duties elsewhere that became a failure to comply with his reasonable management request. Similarly, despite the completion of her tutorial responsibilities, on 10 December 2019, the day of the national election, Professor Ennew widened the allegation so as to cover the entirety of the Claimant's duties and added a false 'bad faith' charge to the allegation without any particularisation or supporting evidence (Skeleton argument, paras 47-68).

11. Another significant material omission which would indicate the presence of a victimisation motive on the parts of both Professors Sanders and Ennew can be noticed in para 22 of the Judgment. The Defendants were named in the grievance the Claimant submitted on 6 January 2020 for breaches of the Equality Act, human rights, workplace health and safety and the professional code of conduct by making false accusations about the Claimant and subjecting her to a disciplinary investigation which had no legitimate aim (Skeleton argument, para 72-78; POC, para 29). As the Claimant wrote, she wished to report 'a serious incident of malice, bullying, and victimisation in our academic community which has been designed to put me in a detrimental position. It brings into play breaches of the law (EA 2010, PIDA 1998, EUCFR, ECHR), the Dignity at Warwick Policy, Warwick's Guiding Principles, the Disciplinary Policy and of Health and Safety Regulations'.

12. In para 23 of the Judgment, Sir Nicol did not truthfully depict the new fabricated defamatory allegations made by Professor Ennew, creating the misleading impression that complaints had been made by students whilst in reality there was no student complaint. The Judge wrote: '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'.

But the written fresh allegations, which resulted in the suspension of the Claimant are the subject matter of the claim, were:

'You have attempted to influence potential witnesses, specifically by questioning students in relation to complaints they may have made against you, in an effort to undermine the ongoing investigation into the fulfilment of your duties.

You have harassed and displayed threatening and intimidating behaviour towards students when questioning them in relation to complaints they may have made against you.'

13. The wording 'complaints they may have made against you', the absence of any evidence showing that the Claimant engaged in any conduct that falls within the definitions of harassment under the Dignity at Warwick Policy and threatening and intimidating conduct coupled with the absence of any informal or formal complaint made by a student under Students' Complaints Resolution Procedure or any signed witness statement by any student qua complainant of the Claimant's conduct have been edited out in this section of the Judgment.

14. The Claimant's formal internal grievance against Professor Ennew to Sir David Normington for malice, bullying and victimisation and for breaches of the law and the University of Warwick's policies submitted on 17 January 2020 has not been referenced.

15. Other significant factual omissions which also impact upon the conclusions reached by Sir Nicol with respect to the Defendants' consent ('Friend' case law) and qualified privilege submissions include (- as stated in Skeleton argument, para 165) are as follows.

16. The Claimant's formal internal grievance on 17 January 2020 against Professor Ennew's reprisal for malice, bullying and victimisation and for breaches of the law and the University's policies (DE, pp. 148-161) was followed by the Claimant's letter of 22 January 2020 to the Chair of the Council, Sir Normington, in which the Claimant complained that the University's

internal policies had not been complied with by Professor Ennew and Professor Sanders (that is, provisions 3.7 and 7.2 of the Disciplinary Procedure, 6.1 and 6.2 of the Dignity at Warwick Policy, 7.1, 7.2, 8.4 of the Grievance Procedure) and requested without any further delay the complaints/accusations in writing, signed and dated, and containing details of specific data, incidents, dates, times, what happened and so on and why these matters are matters of misconduct as well as the prima facie supporting evidence. As the Claimant wrote:

'*Their actions lend support to my formal grievances about targeted malice and a victimisation intention. After all, the above are basic requirements of fairness, due process and standard reasonable behaviour.*' (DE, pp. 326-328)

17. On 25 January 2020, the Claimant wrote again to Sir Normington requesting an investigation of her formal complaint of bullying, victimisation, abuse of power, malevolent and false allegations (DE, pp. 270-271).

18. On Friday 31 January, the Claimant wrote to Professor Lavender and Sir Normington, Chair of the Council, complaining about the breaches of the Dignity at Warwick policy, malice and falsehood and noting that Professor Sanders had breached internal procedures by writing this communication to HR (DE, pp. 195-198). She noted that neither the Student Complaints procedure of the University of the University of Warwick nor the Dignity at Warwick Policy permits a head of department to write complaints/allegations on behalf of a student. She requested Sir Normington to review and lift the suspension within hours and to right the wrongs inflicted by Professors Sanders and Ennew (DE, p. 198).

19. On 11 February 2020, the Claimant submitted an internal grievance against Professor Sanders complaining about serious acts of gross misconduct: '*Maliciously making false allegations and intentional and unwarranted statements violating the dignity of a professor, her honour, reputation and professional integrity in order to procure a suspension is not only unethical and unlawful behaviour but also gross misconduct.'*

20. In the Grievance, the Claimant write that the Disciplinary Policy of the University of Warwick does not confer upon Professor Sanders, and/or Professor Ennew, an unrestricted and unbridled licence for every possible attack upon the dignity of another employee and the abridgment of her rights, including her rights to health and well-being, to exercise her profession and teach her students and to an undisrupted and peaceful enjoyment of her private and family life.' (DE, pp. 306-325).

21. The Claimant subsequently requested formal written notification of the reasons for her continued suspension and the indication of the length of it as required by the law, case law, the ACAS code of practice and the University's own policy (Provision 10.3 of the Disciplinary Policy). She was not provided with this information. She also requested a review of her suspension (it had exceeded 30 days) and an explanation of how the tests of proportionality and reasonableness had been met. She was not provided with this information.

22. The Claimant continued to write letters and to protest for months. Although, it would take several pages to include all those dissenting submissions, the subsequent grievances should be mentioned.

23. The Claimant complained about the falsehoods in Professor Lavender's report to the Chair of the Council, Sir Normington, on 8 June 2020. This formal grievance contained detailed explication and substantiation of his mistruths (DE, pp. 227-49). On 6 June 2020, the Claimant had also written to the Chair of the Council of the University of Warwick, Sir Normington, and to the Deputy Chair, Ms Cooke (DE, p. 269

24. On 6 June 2020, the Claimant had also submitted to all the members of the University of Warwick's Council a long document (of more than 3,500 words) containing information not only about her mistreatment but also about the treatment of women in the law School (DE, pp. 272-280).

25. Other materially significant information absent from the judgement concern the following:

26. In para 26 of the Judgment, The Defendants' submission about the overlap of the cases at the High Court relates to the public law related claim only (- and not to the Particulars of Claim in the present proceedings as stated there).

27. In para 29, The Claimant complained about the falsehoods in Professor Lavender's investigation report and for continuing victimisation to Sir David Normington on 8 June 2020 by submitting a formal grievance. This was ignored.

28. In para 31, a disciplinary hearing was arranged when the Claimant was ill and the University of Warwick had been notified by means of a doctor's certificate. The hearing was chaired by Professor Caroline Meyer, Professor Ennew's Deputy who proceeded to dismiss the Claimant in absentia.

29. Concerning the procedural history section of the judgment, on the other hands, faithfulness to crucial facts would also require references to Defendants' refusal to engage with the Pre-action Protocol's requirements and the invitation to consider and participate in ADR with a view to procuring a resolution of the dispute.

30. Instead, they declared their intention to defend the whole claim on 20th May 2021 and shortly before the expiry of the prescribed time limit under CPR rules they sought a further extension of the service of the defence until 9 July 2021. Despite having obtained more than 60 days in order to serve their defence, the Defendants' legal representative, Mr Smith, then allowed the deadline, that is, 4.30 pm on 9 July 2021 as prescribed by the CPR 6.26 and 2.8 and Practice Directions 5B and 6A to expire. He subsequently applied for a strike out application and/or a summary judgment at 18.10 pm on 9 July 2021, having breached the CPR

and the HC's Oder with the intention of stifling the Claimant's right to activate CPR 15.3, that is, her CPR-based right to invoke the sanction provided for under the CPR rules. He did not apply for an extension of time for serving a defence.

31. The Claimant was concerned about the fact that the Defendants effectively sought twice to override or disapply the CPR and considered the Defendants' tactical late application as manifestly unfair to the innocent party. By that time, the Defendants had already imposed significant requirements on her as well as unreasonable demands to her with a view to, and explicit expectation of, filing their defence, such as (i) regular email communications and letters, (ii) the disclosure of 44 documents and files, (iii) 40 requests for further information containing c. 90 questions to which the Claimant responded on 25 June 2021, and (iv) a request for five more documents the following week thereby raising their own costs, as well as the costs of the Claimant, to a phenomenal level. She believed that on the balance of probabilities the Defendants had anticipated the non-submission of the defence but they had not complied with PD 23(A)(2.7).

32. The Claimant communicated her concerns to QBD and Master Sullivan in the morning of Monday 12 July 2021 stating that she had received by mimecast the Defendants' Notice of Application and enclosures after business hours on Friday, 9 July 2021 and intended to make submissions on the application which she regarded as an abuse of process and her applications within five working days. But on the same day, Mr Justice Nicklin, that is, on Monday 12 July, accepted the Defendants' application and promulgated an Order containing directions for a hearing of 1,5 hours of the Defendants' application which was sealed on Tuesday 13 July and was served to the Claimant by email at 8.58 am on 13 July 2021. Mr Justice Nicklin made this Order without giving the Claimant the opportunity to make submissions (- a serious procedural irregularity) essentially treating the Defendants' application as an application without notice and extended time for the defence without an application from the Defendants who had been in default. By means of an application of 20 July 2021, the Claimant requested Mr Justice Nicklin's order to be set aside on procedural and substantive grounds. This application was refused by Mr Justice Nicklin.

33. On 23rd July the Claimant requested the Court to order the Defendants to provide information particularising the charges they had made against her – information they had withheld for more than one year and half. She requested information on the dates, location, time, specific factual conduct, the names of the recipients of her conduct, that is, information on what, when and how she had allegedly committed gross misconduct. She argued that this information was mandated by natural justice, fundamental rights, and was needed for the preparation of her argumentation for the forthcoming hearing. The Claimant also argued that it was dictated by many judicial authorities, such as *King and Others v Stiefel and Others* [2021] EWHC 1045, at para 368: ' where particulars are required it is not permissible to avoid the need for giving particulars by saying that particulars will be given at a later stage'*, Duchess of Sussex v Associated Newspaper*s [2020] EWHC (Ch), [2020] EMLR 21 at para 59 noting that allegations of improper conduct should not be made, if the party cannot give details of what was done and when, and 'the suggestion, … that particulars cannot be provided or should not be expected until after disclosure is contrary to the long-standing principle that a party alleging misconduct must give particulars before obtaining disclosure'; the continuing obligation to disclose information and documents under *Scott v Inland Revenue* [2004] IRLR 713 CA and the common sense approach highlighted in *L. M. White v The University of Manchester* [1976] IRLR 218 at para 14 among others.

34 It was a brief (less than 10 questions) and proportionate request; the Claimant had responded to the Defendants' 90 questions (- answers to 14 more questions the Defendants required was provided by her on 25 August 2021).

35. Mr Justice Nicklin refused the Claimant's application on 29th July 2021 and refused it again on 13th September when it was renewed following misleading statements made by Smith to the HC. Mr Justice Nicol threatened the Claimant with a civil restraining order.

36. Because the requested information was of significant material importance, the Claimant had to embark upon additional and time-consuming work of drafting, submitting, filing, serving and substantiating with documentary evidence a number of Notices to Admit Facts in September 2021. These Notices to Admit Facts were included in the Bundle, were relied upon at the High Court Hearing of Monday 18 and Tuesday 19 October. They made it clear that the Claimant had been unlawfully framed and defamed by Professors Sanders and Ennew. There was no evidence of any harassing behaviour, any threatening and intimidating conduct by her nor was there any student complaint under stage 1 or 2 of the University of Warwick's student complaints and resolution procedure and, in order for the Defendants to harm the Claimant, they had breached the University's own procedures and data protection law. More importantly, both Ms Opik, the fifth Defendant, and Student X, her boyfriend at that time, had received excellent care by the Claimant – Student X had their meetings with the Claimant in weeks 1, Term 1 (2019) and 1 Term 2 (2020) and Ms Opik had frequent meetings in her first year (the Claimant saw her on almost a weekly basis) and had her Autumn term meeting in 2019 within 4 working days of request of service (on 18 November 2019). Accordingly, the filed documentary evidence showed that Student X never reported to the University of Warwick that he had been questioned by the Claimant in relation to complaints he might have made against her and that the Claimant had attempted to influence him when he met with the Claimant during her office hours on Thursday 9 January 2020 in her office and that Professor Ennew's reference to 'students' in plural was untrue.

GROUNDS OF APPEAL

<u>HUMAN RIGHTS and EU LAW RELATED GROUNDS 1-11</u>

37. The right to a fair legal process constitutes a fundamental right and an integral part of the rule of law. The gravity of a strike out of a legitimate claim cannot be underestimated. It deprives a party of a fair trial, substantive legal rights and remedies. A hearing is just only

when it is consonant with the rules of natural justice. One such important requirement is that the court acts in good faith respecting the fundamental rights of the parties [Mr Justice Slynn in referring to the comments of Harman J in the case of *Byrne v Kinematograph Reuters Society Ltd* [1958] IWLR 762]. The ECtHR has held that the requirement of fairness applies to proceedings in their entirety and not only to the final hearing (*Stran Greek Refineries and Stratis Andreadis v Greece*, para 49).

38. Fairness also requires that when a Claimant brings claims to a court and makes pleadings, these must be 'actually heard', that is duly considered and properly examined. They cannot be ignored. There is a positive legal duty on the part of the adjudicator to address the legal questions and issues and to provide a reasoned decision on them. Following the enactment of the Human Rights Act 1998, courts and tribunals have a positive obligation to render their decisions fundamental rights compliant and it has long been accepted that a person must pursue his/her claims to judicial protection in conditions which respect his/her fundamental rights and demonstrate that she is truly heard because her submissions have been taken seriously (*Donadze v Georgia*, para 35). In other words, the Judge has a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties (*Kraska v Switzerland*, para 30; *Hurk v the Netherlands*, para 59). In order for the right guaranteed by Article 6(1) ECHR to be effective, the authorities must exercise 'diligence' (*Kerojarvi v Finland*, para 42; *Frette v France*, para 49).

39. By affirming the equality of arms and ensuring the highest standard of protection of fundamental rights, judicial authorities render law fully effective and safeguard the essence of the right to a fair hearing. Having a right to something that is purely illusory and cannot be acted upon is worthless.

40. The Claimant brought a number of false and defamatory allegations and statements before the HC made by the Defendants. These were framed in a general and vague way without factual references to names, dates, places, specific characteristics of conduct and

why those fell within the definitions of misconduct under the policies of the University and the law and without any signed and dated complaint by any recipient of the alleged conduct in accordance with the University of Warwick's own procedures. The Claimant acted swiftly to protest her innocence and demonstrate this by submitting documentary evidence. She demanded the right to know the facts and complained about malicious bullying allegations and victimisation. Her integrity and dignity as a professional and human being were assailed. She was suspended in a humiliating way while there was no prima facie evidence for Professor Ennew believing that she had committed misconduct and without being given an opportunity to make representations. She did not hesitate to inform the Defendants about the negative impact of her mistreatment on her dignity, reputation, health and well-being, private and family life and the breaches of the law. She made internal and external disclosures about Warwick University's practice of punitive suspensions of indefinite duration and the breaches of laws, the ACAS guidelines, human rights and health and safety. Her defamation remained acute causing her distress and professional harm for several months and the suspension had no end. She was rendered an invisible woman with no voice and was treated with profound disrespect by the First Defendant which is obliged to comply with its own policy of Dignity at Warwick, its whistleblowing code, the public sector equality duties and human rights and EU law related obligations. She made valid claims as a matter of law and had the legitimate expectation that the Court would restore her reputation and afford her just satisfaction for the breach of her fundamental and EU law related rights.

41. E. J. Woffendon at Birmingham Employment Tribunal made it clear in her decision of 27 October 2021 granting a stay in the proceedings that although the ET must act compatibly with Convention rights, there is no free standing jurisdiction to award damages for breaches of those rights in the employment tribunal. Nor is there a free standing right for any breaches of EU law in the ET and that the appropriate venue would thus be the High Court.

42. Despite this, Sir Nicol wrote in para 70: '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)'. By abdicating his legal obligation to deal with the alleged

infringements of fundamental rights under EU law, Sir Nicol essentially deprives the Claimant from effective judicial protection and effective remedies.

43. Sir Nicol struck out the human rights and EU law claim without engaging with the Claimant's protection under Article 8 ECHR (the right to respect for private and family life) which includes the right to good reputation (*Perez v France* [70]) and one's right to engage in social relationships and contacts with the outside world and the complementary equality clause under Article 14 ECHR which prohibits unjustified differential treatment. Limitations to this right are permitted if they are provided for, respect the essence of the right, can be justified and meet the test of proportionality.

44. The test of proportionality involves questions of the suitability of the limitation to address the problem identified, its necessity and whether the aim pursued could be achieved by less restrictive means. This legal test was not performed with respect to the Claimant's pleaded breaches of her rights under Articles 8 and 14 ECHR and 7 and 21 of the EUCFR. The First Defendant had no lawful justification or excuse to concoct damaging disciplinary allegations against the Claimant, to suspend her, to maintain them for six months and to dismiss her.

45. In paragraph 70 of the Judgment, Sir Nicol wrote that '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', but this does not amount to an adequate justification and a duly reasoned argument explaining why the false and defamatory statements used to dismiss the Claimant did not interfere with her Convention and EUCFR rights. The Claimant has not argued that all dismissals engage Article 8 ECHR; she requested the Court to deal with the defamatory underpinnings of her own dismissal.

46. Article 1 EUCFR, on the other hand, is an absolute right. It permits no limitations. Bespattering a person with foul imputations and making defamatory statements to produce hurtful and harmful effects concerning a fellow human being and college infringe human

dignity. Respect for human dignity also constitutes an integral part of the general legal tenets of EU law. The protection of the dignity of a worker is also enshrined in Article 31 EUCFR on fair and just working conditions respectful of one's health, safety and dignity which is a directly effective right invokable in national courts.

47. Directly effective rights also stem from Article 20 TEFU (EU Citizenship) and the right to equal treatment as regards other conditions of work and employment under Article 45(2) TEFU which has been implemented by Regulation 492/2011 (Article 7(1) of Reg. 492/2011 on non-discrimination of EU nationals in respect of other conditions of employment and work) replacing Regulation 1612/68. None of the Claimant's British colleagues in Warwick Law School has been targeted in a similar way and has been recipients of a similar hostile and undignified treatment.

48. The right to be heard before a decision affecting the rights of an individual is taken is based on the common law principle of legality (also known as Simms principle of legality) and is a mandatory requirement of natural justice (- the earliest case I am aware of is Dr Bentley's case against Cambridge University in 1723 where it was held that 'the objection for want of notice can never be got over'; see also *Att-Gen v Ryan* [1980] AC 718 and *Ridge v Baldwin* [1964] AC 40). It is also a general principle EU law (Case C-413/06P *Bertelsman and anor v Independent Music Publishers and Labels Association* [2008] ECR I-4951; Case 85/76 *Hoffman-La Roche v Commission* [1979] ECR 361] the violation of which is a ground for the annulment of a measure and a ground for an action for damages. The Claimant was not afforded the right to be heard by Professor Ennew, the third Defendant. Instead, she was presented with the suspension letter and was ordered to leave her office and the University of Warwick and not to come back on 16 January 2020. This renders her suspension unlawful, but Sir Nicol overlooked this.

CONSENT OR LEAVE AND LICENCE AND FRIEND

AG 12. The Judge misdirected himself in holding that Friend provides an unanswerable defence for the Defendants in this case and wrongly proceed to strike out the defamation limb of the claim on this basis

49. In *Friend* it was held that it was only the republication of the defamatory statement was covered by the employee's consent since the limitation period of the original publication of the written memoranda had expired. At p16-7 Hirst LJ (with whom Millett and Brooke LJJ agreed) explicitly referred to an employee's '*consent to the re-publication of the accusation or complaint'* and accepted that Captain Friend's case was an exceptional one because he could not challenge the original defamatory statements because the limitation period had passed.

50. If this limitation had not existed, Captain Friend could have sued over the original publications and could have obtained damages from their republications. As L.J. Hirst put it clearly: '*..but the present problem, which must be rare if not unprecedented, stems entirely from Captain Friend's predicament that any claim in relation to the original publications is statute-barred*' (p. 23). The time of the original publication of the defamatory statement was thus the crucial issue - not whether the defamatory statements were published in the context of an activated disciplinary procedure or not. And discerning the time of a publication is a matter of fact.

51. Professor Ennew's statements were articulated for the first time on 16th January 2021 and are thus original publications. The evidence shows that on 16 January 2020 Professor Ennew made the original allegations of '*You have attempted to influence potential witnesses, specifically by questioning students in relation to complaints they may have made against you, in an effort to undermine the ongoing investigation into the fulfilment of your duties. You have harassed and displayed threatening and intimidating behaviour towards students*

when questioning them in relation to complaints they may have made against you.' These statements had not been articulated before the 16th of January 2020.

52. The Claimant has also submitted in para 162 of her skeleton argument that all the statements complained of with respect to Professor Ennew in paras 50-52 of the POC, Professor Lavender in paras 95, 96, 98 of the POC and 101 and Professor Sanders and Ms Opik with the exception of Professor Sanders' email communication of 12 January 2020 (- its date will be proved) are original publications (two are republications of original publications within the time limit) and thus do not fall within the 'Leave and Licence' scope of *Friend*. There is no re-publication and thus no scope for the application of Friend and consequently the strike out.

AG 13. The Judge arrived at an erroneous conclusion of fact in para 72 concerning to what the Claimant had actually consented as part of her contract of employment as well as the evidential absence of consent in in 2019/2020.

53. The Claimant's contract of employment contained an overarching dignity clause (clause 33). Accordingly, she had consented to be treated by the University of Warwick '**with dignity and respect at all times during the employment and all members of staff are required to conduct themselves in accordance with this principle. The University is committed to ensuring that no harassment or victimisation in the workplace, whatever the motivation or manner, is overlooked or condoned**' as well as to work within a healthy and safe working environment (clause 21 of the employment contract). The clear and unambiguous wording of the prohibition of violations of dignity at work at Warwick University which is also enshrined in Statute 11 of the University means that any activation and operation of the disciplinary policy and procedure had, and has, to take place in full compliance, and not in contravention, with the Dignity at Work Policy and Procedure. In this respect, the wording of paragraph 72 of the draft judgment is not factually accurate; it cannot be assumed that by signing a contract

of employment which includes a disciplinary code, any false and malicious allegation is made with the employee's agreement.

54. A disciplinary procedure does not give licence to tell lies, to engage in bullying complaints and victimising campaigns and to harm one's profession and reputation. For this reason, disciplinary procedures (including Warwick University's) explicitly make false and malicious complaints disciplinary offences. An abusive or unjust activation of a disciplinary process is also viewed as a repudiatory breach of contract on the part of the employer.

55. In addition, explicit and strong dissent, opposition and protest against the bullying, vexatious allegations and the defamatory statements of the Defendants and requests for retractions were displayed consistently by the Claimant (Claimant's skeleton argument para 165). There is voluminous documentary evidence on this.

AG 14. The Judge erred in law by not giving sufficient weight to legal authorities pre-dating and post-dating Friend and to statutory requirements enacted following Friend.

56. At a fairly early stage, the British judiciary found it necessary to distinguish between knowledge of a risk (sciens) and consent to assume the risk (volens) (*Smith v Baker and Sons* (1891) AC 325). Knowledge of the risk of injury is not enough. Instead, 'volens' presupposes an act of conscious balancing of facts and various options and their relevant future consequences; a free choice to opt for a certain course of action and thus to assume a risk of injury; and an agreement to waive any rights and/or damages if the risk materialises and some form of harm takes place. Because the prospect of such a freely given agreement in the workplace is rather unlikely since there is a clear power imbalance among the parties, it has been established that *volenti non fit injuria* only seldomly applies to the relationship of subordination between employers and employees.

57. In any case, an employee's consent must be informed as well as unequivocal. In *Otuo v Morley* [2017] EWHC 2186 (QB), Justice Eady confirmed that by arguing at [1] and [9]: 'In order to succeed, defendant must show that the claimant has unequivocally consented to the publication of the defamatory allegations and with full knowledge. That will turn on issues of disputed fact. It must be very unusual, therefore to find a case where such a defence is so clear that the case can be disposed at the pre-trial stage'. 'It has to be shown that the Claimant's consent was given with a full understanding of the relevant circumstances and that it was unequivocal'.

58. This means that an employee is entitled to deny or revoke it at any time – a fact that makes the application of *Friend* not so straight forward.

59. Further complications are generated by a number of post-Friend legislative acts. These were: the Human Rights Act 1998 and the protection of reputation under Article 8 ECHR, the Data Protection Act 1998 with its requirements about lawful and fair processing of personal data and informed consent and the Public Interest Disclosure Act 1998. More followed afterwards: the Employment Equality (Religion or Belief) Regulations 2003 SI 2003/1660, the Employment Equality (Sexual Orientations) Regulations 2003 SI 2003/1661, the Employment Equality (Age) Regulations SI 2006/1031, the Equality Act 2010, and its public sector equality duties to eliminate victimisation and discrimination as well as the EU Charter of Fundamental Rights which prohibits any restriction on the absolute right to human dignity and which has the status of primary EU law.

60. It is impossible for one to abrogate such rights and duties today as well as to assume that a person/employee can lawfully consent to his/her bullying, victimisation and discrimination, to injuries to his/her health and well-being, to breaches of his/her fundamental right to data protection and his/her defamation. Accordingly, by signing a contract of employment an employee can never consent, either expressly or impliedly, to an unwarranted and

disproportionate limitation of his rights under Article 8 ECHR. Public authorities, in turn, have a distinct duty to prevent any such limitations.

61. In the field of data protection law, too, any data employers collect must observe the data protection principles and its processing must be based on the employee's qua data subject's informed consent. Employers are not free to contrive false and malicious pieces of information about employees, to keep them in employees' files and to re-circulate them without giving an employee's rights to access that information and to demand the correction and removal of the incorrect information without any delay.

62. *Friend* is not consonant with data protection law principles today. Employers have reinforced duties to process employee data, and thus, any complaint about a named employee, a) fairly and for a legitimate purpose, b) with the employee's freely given and informed consent and c) in strict observance of the data protection principles which include fair and lawful processing, accuracy and in accordance with the rights of data subjects. There is no consent that is implied within the parameter of data protection law; instead, it has to be freely given, informed, specific and unambiguous and can be withdrawn at any time. And in the light of data subjects' rights of rectification and restriction of processing of inaccurate data, an employer is also duty bound to take reasonable steps to verify the accuracy of the data.

63. The Defendants do not have an unanswerable defence based on Friend and the claim was wrongly struck out.

QUALIFIED PRIVILEGE

AG 15. The Judge erred in failing to explain his conclusion why 'there is not arguable case of malice' and 'the present pleading is hopeless' and to provide reasons by engaging with the Claimant's sufficiently particularised in the pleadings about each Defendant in the particulars of claim, her skeleton arguments and the evidence that has been produced

64. The conclusion reached by Sir Nicol is based on general assertions without engaging with the particularised pleadings of the primary facts relied on.

65. There has been considerable evidence of lying on the part the Defendants and the making of bogus disciplinary allegations provides a strong prima facie case of malice which the Defendants would have to answer in trial. The grossest kinds of libel is charging somebody with acts she never committed, placing someone in a disciplinary process lasting nine months and under suspension for six months while at the click of a button there exists clear evidence about the falsity of the allegations. Nobody sits down to write false and defamatory grounds in good faith and nobody seeks to force those false statements on an innocent person for several months. Defamation does not happen by necessity; it is purpose-driven.

66. The Judge's statement that the present pleading is hopeless is not justified by the weight of evidence which was not rebutted by Mr Munden by means of the production of documentary evidence and witness statements showing that the Defendants made statements that were fair or reasonable and made in good faith. As a brief example to illustrate the above point, no evidence has been produced to rebut the Claimant's pleadings in the Particulars of Claim with respect to Professor Ennew in para 58 of the Particulars of Claim:

' 58. Finally, the Third Defendant, Professor Ennew, made false and defamatory statements with malice, that is, with knowledge of the statements' falsity or reckless disregard as to whether they were true or false in that:

(a) Professor Ennew authored those statements without any regard to the facts and despite the absence of substantive and quantifiable evidence to support her statements;

(b) the statements were authored in a vague and non-particularised way, typical of standard bullying allegations which tend to make no reference to dates, names, factual descriptions of conduct and of how those fall within the ambit of misconduct in accordance with the rules and procedures of an organisation, with the actual intent to cause distress and to hurt the Claimant;

(c) Professor Ennew disregarded direct evidence, that is, the email communication of the Claimant with Ms Opik, which did not support any of the statements she authored and Tabula, the University's online student monitoring system, which at a click of a button could disprove any information she had received. In so doing, she was not simply misinterpreting the Claimant's actions but she was fabricating a situation and was falsely referring to 'harassed, intimidated and threatened students' in plural, with the actual intention of damaging the Claimant's reputation;

(d) Professor Ennew did not take into account the absence of any written and signed complaint from Ms Opik or any student as the recipient of the Claimant's conduct in accordance with the established procedures of the University of Warwick, preferring, instead, to rely on unverified hearsay;

(e) Professor Ennew failed to investigate the information Professor Sanders, the Second Defendant, was conveying and to gather prima facie evidence about the true nature of the situation by interviewing the Claimant, Ms Opik and/or her boyfriend at that time either separately or jointly;

(f) Professor Ennew failed to verify that the Dignity at Warwick Policy of the University had been followed and had been correctly applied to the Claimant's case substantively as well as procedurally;

(g) Professor Ennew ignored the requirements of natural justice which are part of the contractual obligations of all employees of Warwick University, health and safety requirements and her non-delagable duty of care and did not provide any information about the specificity of her statements to the severely distressed Claimant who wrote to her on 16 January 2020 at 18.14 pm. On the contrary, in an email communication sent to the Claimant on 20 January 2020, Professor Ennew wrote: 'Fuller details of the complaint will be shared with you at the investigation meeting and you will be able to respond to the complaint. The University is not obliged to provide you with this information in writing at this stage of the process';

(h) Professor Ennew displayed a reckless disregard about the impact of her statements on the falsely accused Claimant's dignity, human rights and professional reputation;

(i) The statements were written in retaliation, and in deflection from, the formal complaint of victimisation and bullying the Claimant had made against Professor Ennew and Professor Sanders on 6 January 2020 to Sir Normington, Chair of the Council of the University of Warwick;

(j) Professor Ennew had injured the Claimant in the past by upholding a disciplinary sanction against the Claimant on no evidence of any wrongdoing on the Claimant's part which was the subject of ongoing litigation at the time of writing the defamatory statements. In this respect, she did not have a fair and unbiased state of mind.'

AG 16 The Judge acted upon wrong principles in arriving at his conclusion that the defendants have an unanswerable defence of qualified principle given that malice is a question of assessment on the facts.

67. As the Defendants have not filed a defence and the Claimant has not provided reply, at this stage the correct test is not whether the Claimant has proven malice, but whether on the basis of the primary facts pleaded, an inference of a victimisation motive or dishonesty or

reckless disregard for the truth or falsity of the defamatory statements is more likely than an inference of innocence or negligence. Lying tilts the balance and justifies an inference of dishonesty. If it does, the case needs to go forward. The same applies with respect to the Claimant's protracted suffering owing to a failure to discover falsity when the circumstances dictated further inquiry and prompt action.

68. For a summary judgment application to succeed, as May LJ stated at 342 in *S v Gloucestershire County Council* [2001] Fam 313, the Court 'would need to be satisfied that all substantial facts, which are reasonably capable of being before the court, are before the court and that these facts are undisputed or that there is no real prospect of successfully disputing them; and that here is no real prospect of oral evidence affecting the court's assessment of the facts'. It cannot be argued that this test has been met and that all relevant documents and factual evidence are in the possession of the court. Witness statements and witnesses cross-examination would enable the Judge to determine where the truth lies and to test the evidence. This generally makes the issues of qualified privilege and malice unsuitable for a summary determination.

69. The same conclusion is derived from the application of the *Easyai*r principles (*Easyair Ltd v Opal Telecom* [2009] EWHC 339 [15]: in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial; 'although the case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment';… 'if it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success…' For this reason, the evidence that would be produced at a trial and the defendants' own testimonies would be paramount.

T**HE JOHNSON PRINCIPLE**

AG 17 The Judge erred in law in that it wrongly proceeded to apply the Johnson principle concerning the manner of the dismissal to causes of action, such as breaches of human rights, breaches of EU law rights, of proportionality and the right to be heard and malicious falsehood, which is not even dependent on proof of actual damage if the words were calculated to cause pecuniary damage in respect of the Claimant's office, profession and so on, which accrued six months before the dismissal and are independent of it.

70. The human rights, EU law causes of action and malicious falsehood are unrelated to the *Johnson* principle. The prescribed remedies for these are corrective in the sense of aiming to put the Claimant in the position she would have been without those breaches and, if the claim is struck out, the principles of effectiveness of EU law would also be breached since the remedies are required to be 'effective, proportionate and dissuasive'.

AG 18 The Judge erred in placing the defamation cause of action and the suspension of the Claimant on 16 January 2016 within the Johnson exclusion area

71. When the Claimant was subjected to false and malicious accusations and was suspended on 16 January 2016, there was no dismissal process. A disciplinary hearing in absentia which led to the Claimant's dismissal took place on 20 July 2020. Similarly, the objectionable defamatory statements in January, February, March, April and May 2020 were not made in the course of the dismissal. They are not part of the same process. Sir Nicol was incorrectly wrote in para 91 '*The Claimant was suspended in the course of the dismissal process*' and in para 100 that '*it is for the Employment Tribunal and not this court to determine Claimant's complaints about the manner of the dismissa*l'. Both those statements are not factually correct. Similarly, the statement in para 95 '…*Lord Dyson in Chesterfield expressly considered*

the manner of the 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 in her position' inaccurately entangles the defamatory and/or malicious falsehood statements made by the Defendants seven months before the dismissal with the manner of the dismissal.

72. It was submitted in writing (para 131 of the skeleton argument) and orally that in *Edwards* (paragraph 99) a separate claim for defamation is envisaged and that suspension can give rise to a separate claim, independently of any unfair dismissal claim. Suspensions which are humiliating, such as mine, have a negative impact on one's reputation and impair human dignity and result in restricted future opportunities (- this was elaborated upon during the hearing) are cases in point. E. J. Woffendon has confirmed that the Employment Tribunal cannot adjudicate defamation and malicious falsehood complaints. Nor can the Employment Tribunal fruitfully address breaches of human rights law and EU law.

AG19 Sir Nicol erred in failing to apply the principle in Hoddinott concerning the effect of the statutory submission to the Court's jurisdiction

73. As regards *Hoddinott* (*Hoddinott v Persimmon Homes (Wessex) Ltd* [2007] EWCA Civ 1203), I respectfully submit that this point relates exclusively to the Defendants' argument that the Employment Tribunal has exclusive jurisdiction to determine loss arising by reason of the Claimant's dismissal and not to 'the other bases for strike out' as it is stated in paragraph 93 of the Judgement.

74. The pleading was that the Defendants had fully accepted that the High court has jurisdiction over the whole claim and that it should exercise its jurisdiction. They did not tick the relevant box on the filed acknowledgment of service form of 20 May 2021 indicating that the jurisdiction is being challenged and did not issue an application notice seeking an order

declaring that the court has no jurisdiction or should not exercise any jurisdiction it might have because the claim is barred by the principle on Johnson or the claim for loss as a result of the dismissal is so barred within the following 14 days (CPR 11(4)). This statutory submission to the jurisdiction in terms of Part 11 CPR and *Hoddinott* as well as their subsequent conduct (i.e., the failure to withdraw the acknowledgment of service with the permission of the court (see CPR Part 10, PD 54), being granted a further extension to serve to defence, serving a Part 18 request for information to c. 90 questions and so on) which confirmed continuous unequivocal submission to the Court's jurisdiction meant that they had waived any subsequent jurisdictional objection be it on *Johnson* or on any other hypothetical future ground (Skeleton argument, paras 134-142).

75. This is a rigorous test (*Deutsche Bank AG London Brance v Petromena ASA* [2015] 1 WLR 4225).

76. Accordingly, the written statements in para 94, 'an alternative way of putting the procedural objection was articulated by the Claimant', '*it was not now open to them to argue that they did not need to serve a defence at all*', '*again, it was unreasonable for them to argue now that the claim should be struck out*' do not present the pleading accurately.

77. The same applies to the statement in paras 96 and 97 of the Judgment '*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*' and '*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*'. The Appellant's pleading does not concern strike outs and it is not an alternative way of putting the procedural objection.

Statement of Truth

I believe that the facts stated in this witness statement are true and I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Theodora Kostakopoulou

Signed: 

Appellant

11 January 2022