[2021 Gib LR 148]

CASSAGLIA v. STAGNETTO and GIBRALTAR HEALTH AUTHORITY

SUPREME COURT (Yeats, J.): April 29th, 2021

2021/GSC/08

Employment—bullying at work—meaning of "bullying"—single incident of offensive or intimidating behaviour not bullying—Employment (Bullying at Work) Act 2014, s.4(2)(a) provides that offensive or intimidating behaviour must be persistent

The first respondent brought a claim that he had been bullied at work.

The first respondent, Mr. Stagnetto, was a senior biomedical scientist in the Gibraltar Health Authority's pathology laboratory. He brought a claim against the GHA in the Employment Tribunal alleging that whilst at work the appellant, Dr. Cassaglia (the GHA's medical director at the time), had bullied him by physically pushing him into a room; shouting and swearing at him; and accusing him of interfering with an internal investigation being conducted by Dr. Cassaglia himself. Mr. Stagnetto sought declarations that he had been subjected to bullying by the GHA and compensation and ancillary orders. Dr. Cassaglia denied pushing Mr. Stagnetto but accepted that he had been frustrated and upset. He accepted that he might have used inappropriate language.

The GHA adopted a neutral position before the tribunal. Dr. Cassaglia was not a party to the proceedings before the tribunal but he was called as a witness by the GHA. The tribunal determined that the complaint by Mr. Stagnetto was well founded and made a number of findings of fact, including that Dr. Cassaglia had been angry and frustrated; had pushed Mr. Stagnetto into the room; had not shouted or insulted Mr. Stagnetto but had spoken to him in a raised voice; had sworn once in the course of the conversation; and might have pointed his finger at Mr. Stagnetto and invaded his personal space. The incident lasted for a few minutes. (A similar claim by another member of the pathology staff was dismissed.)

Mr. Stagnetto was awarded £7,000 by way of compensation and £327.94 in interest, to be paid by the GHA. For the purposes of determining the level of compensation, the Chairman found that the case fell within the "less serious" band.

The GHA filed a notice of appeal but this was later withdrawn.

Dr. Cassaglia appealed against the finding of the Employment Tribunal that the GHA was liable for the act of bullying by Dr. Cassaglia. The appeal was commenced as a judicial review claim but was reconstituted into an appeal under the Employment Tribunal (Appeals) Rules 2005 (judgment dated April 2nd, 2020, reported at 2020 Gib LR 123).

Dr. Cassaglia raised three grounds of appeal: first, that a single one-off incident of the type found by the tribunal was not capable of amounting to bullying under the Employment (Bullying at Work) Act 2014; secondly, if the court found that the conduct could amount to bullying under the Act, the GHA should not have been found liable because the conduct should not have been attributed to the GHA as employer; and thirdly, Dr. Cassaglia, as a person affected by the proceedings before the tribunal and its outcome, did not receive a fair hearing.

Section 4 of the Employment (Bullying at Work) Act 2014 provided insofar as material:

> "**Meaning of bullying.**
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> 4.(1) A person ('A') subjects another person ('B') to bullying where A engages in conduct which has the purpose or effect of causing B to be alarmed, distressed, humiliated or intimidated.
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> (2) In subsection (1) the reference to conduct includes—
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> (a) persistent behaviour which is offensive, intimidating, abusive, malicious or insulting;
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> (b) persistent unjustified criticism;
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> (c) punishment imposed without justification;
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> (d) changes in the duties or responsibilities of B to B's detriment without reasonable justification.
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> (3) Bullying does not include reasonable action taken by an employer relating to the management and direction of the employee or the employee's employment."

Rules 33–34 of the Employment Tribunal (Constitution and Procedure) Rules 2016 provided:

> "33. The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings and may remove any party.
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> 34. The Tribunal may permit any person to participate in proceedings, on such terms as may be specified, in respect of any matter in which that person has a legitimate interest."

Dr. Cassaglia submitted that (a) he had a right to appeal against the tribunal decision, particularly as the court had determined in its judgment of April 2nd, 2020 that he had such a right and the court was therefore *functus officio* on that point; (b) the findings of fact made by the tribunal were not challenged, although Dr. Cassaglia continued to deny that he had bullied Mr. Stagnetto; (c) a single one-off incident was not capable of

amounting to bullying under the Employment (Bullying at Work) Act as it was not persistent behaviour and Parliament had clearly not intended to impose strict liability on the employer pursuant to s.6(1); (d) s.4(2) did not contain a test requiring the tribunal to assess the seriousness of the behaviour, but if the court determined that it did then in any event the conduct in the present case was not sufficiently serious to meet the test; (e) s.4(2) of the Act did not contain an exhaustive list but qualified s.4(1); (f) Dr. Cassaglia's behaviour did not fall within s.4(2)(a) as it was not offensive, malicious or insulting; (g) if the court did find that the conduct could amount to bullying, the GHA should not have been found liable because the conduct could not be attributed to the GHA as employer, as it was a single incident of which the GHA had no prior knowledge; (h) Dr. Cassaglia as a person adversely affected by the proceedings had not received a fair hearing as he had only been involved in the proceedings as a witness and the GHA had adopted a neutral position before the tribunal without putting his case to the tribunal; and (i) the tribunal's decision should therefore be set aside.

Mr. Stagnetto submitted that (a) Dr. Cassaglia had no right to appeal against the tribunal's decision as a non-party to the tribunal proceedings and as the award only impacted the GHA; (b) s.4(2) of the Act gave examples of types of bullying but did not qualify or limit the general definition of bullying contained in s.4(1); (c) a violent act was not caught by s.4(2)(a); (d) Dr. Cassaglia's behaviour had been sufficiently serious to justify being classed as bullying and this finding of fact by the tribunal should not be disturbed by the court; (e) the Act made an employer vicariously liable for the actions of an employee and the employer therefore assumed responsibility for whatever the employee did in the course of his employment; (f) any unfairness to the employer was resolved by s.6(5) of the Act, which gave a defence to a claim if an employer showed that it had a bullying at work policy, that it had taken all reasonable steps to implement the policy, and that it took steps to remedy any loss, damage or other detriment suffered by the complainant; (g) Dr. Cassaglia's only interest in the claims before the tribunal was as a witness; and (h) Dr. Cassaglia's rights had not been infringed as the allegations had been known to him and his ability to practise as a doctor would be determined by the regulatory body as part of its own investigation.

The GHA accepted that Dr. Cassaglia's right to appeal had been determined in the judgment of April 2nd, 2020. In any event, the GHA agreed that Dr. Cassaglia had a sufficient interest in the appeal. The GHA submitted *inter alia* that (a) s.4(2) of the Act was an exhaustive list and conduct therefore had to fall within one of the four examples in s.4(2) to amount to bullying; (b) the Act made an employer vicariously liable for the actions of an employee and the employer therefore assumed responsibility for whatever the employee did in the course of his employment; (c) any unfairness to the employer was resolved by s.6(5) of the Act, which gave a defence to a claim if an employer showed that it had a bullying at work policy, that it had taken all reasonable steps to implement the policy, and

that it took steps to remedy any loss, damage or other detriment suffered by the complainant; and (d) the GHA had never told Dr. Cassaglia that his interests were being represented by the GHA.

Held, allowing the appeal:

(1) Dr. Cassaglia had a right to appeal against the decision of the tribunal. The court had already made such a determination in its judgment of April 2nd, 2020, which was put into effect by an order of June 26th, 2020. There was no appeal against that order and the court was therefore *functus officio* in relation to whether the appeal should have been brought by Dr. Cassaglia. Furthermore, this was an appeal by the person who was said to have done the act on which the declaration made by the tribunal was based. Dr. Cassaglia had been directly affected by the judgment and/or the award. The court was satisfied that it had jurisdiction to entertain the appeal (para. 33; para. 41; para. 44).

(2) The first ground of appeal was made out. The Chairman erred in law in holding that Dr. Cassaglia's conduct was capable of amounting to bullying under the Employment (Bullying at Work) Act 2014. Section 4(2) of the Act was not meant to be an exhaustive list of types of bullying behaviour. A single incident could amount to bullying under the Act. The word "conduct" in s.4(1) could mean both a single instance or repeated incidents. Bullying was usually a course of conduct or repeated behaviour but it need not necessarily be so. The examples in s.4(2)(c) and (d) could be single incident acts. If conduct fell within one of the examples in s.4(2), it could only amount to bullying if it met all of the criteria set out in the relevant sub-paragraph. There was no test of seriousness which would allow such conduct to be considered outside of the examples. Dr. Cassaglia's behaviour, as found by the Chairman, was intimidating or abusive behaviour within s.4(2)(a) of the Act. It was contained in a single isolated incident and was therefore not persistent behaviour. As such, it did not fall within the criteria set out in s.4(2)(a) and could not amount to bullying conduct under the Act. This, in effect, disposed of the appeal (paras. 67–75).

(3) If the court were wrong about the effect of s.4(2) on s.4(1) and the Chairman were correct to find that Dr. Cassaglia's behaviour did not need to be persistent because it was serious, Dr. Cassaglia contended that the Chairman erred in finding that his conduct met such a test. There were two different elements to s.4(1). First, there had to be conduct. Secondly, the conduct must have the purpose or effect of causing alarm, *etc*. The conduct had to be viewed objectively. Was the conduct complained of behaviour which, objectively, could cause alarm, distress, humiliation or intimidation? If the answer was yes, then a subjective test needed to be applied to whether it had the purpose or effect of causing those sentiments. Objectivity should have been applied to the findings of fact made by the Chairman. The court considered that a tribunal could quite properly find that the findings of fact in this case did amount to such conduct. The classification by the Chairman

of the conduct as a "less serious" case for the purpose of assessing the level of compensation did not detract from that (paras. 82–86).

(4) The second ground of appeal was also made out. Although the common law concept of vicarious liability extended to breaches of statutory duty by an employee and not just to common law wrongs, the Act did not provide for the liability of an employee. The Act only provided for the primary liability of employers. There was therefore no question of vicarious liability for bullying. There had to be a consideration of whether the behaviour or incident could be attributable to the employer for it to fall within s.6(1) of the Act. The fact that an employer had to *subject* an employee to bullying under s.6(1) for it to be liable tied in with the examples contained in s.4(2). In the present case, notwithstanding the fact that at the material time Dr. Cassaglia was the most senior person within the GHA, the claim against the GHA was brought on the basis that Dr. Cassaglia was an employee and not on the basis that he personified the employer. The behaviour found by the Chairman was a one-off isolated incident which could not have been foreseen by the GHA. The GHA could not therefore be said to have subjected Mr. Stagnetto to bullying and was not in breach of s.6(1) of the Act (paras. 92–93; paras. 95–96).

(5) The third ground of appeal was not made out. Dr. Cassaglia was entitled to a fair hearing. Had he made an application, the tribunal should have joined him as a party pursuant to r.33 or r.34 of the Employment Tribunal (Constitution and Procedure) Rules 2016. There were clearly issues between the parties and Dr. Cassaglia which needed to be determined for the purposes of r.33. He was also a person who had a legitimate interest in the proceedings for the purposes of r.34. Further, although the Presidential Guidance issued to tribunals in England was of no effect in Gibraltar, it was interesting to note that the guidance said that tribunals should permit a person to participate on matters in which they had a legitimate interest and that this involved not just when the person was liable for any remedy but included situations where the findings might directly affect them. It was indisputable that the findings affected Dr. Cassaglia in a significant manner. He had to step down from his post as medical director as a result of the tribunal's findings. His rights to exercise his profession, to his employment and to private and family life were seriously impacted by the tribunal's decision. Dr. Cassaglia was therefore entitled to a fair hearing. However, Dr. Cassaglia's right to a fair trial had not been breached. The court accepted his evidence that he had concerns about the workings of the pathology department and was trying to implement changes which were not well received by its managers. There was arguably a basis for saying that the witnesses to the bullying claim might have concocted the allegations against him. It was a matter which could have been raised in an adversarial process and Dr. Cassaglia could have called evidence in support of the assertion. The claimants and witnesses had been cross-examined to address the inconsistencies in their statements and to explore whether they had colluded but they had not been accused of making

up the allegations in order to thwart Dr. Cassaglia's reforms. The GHA had presented Dr. Cassaglia as a witness but expressly stated that it was not taking sides on the evidence, but it could not be criticized for taking a neutral stance as it was pursuing disciplinary proceedings against him. However, a person in Dr. Cassaglia's circumstances should have been afforded a fair hearing before the tribunal, which required full disclosure of the pleadings, witness statements and documents in the case, the right to be represented and examine the witnesses at the hearing, and to call his own witnesses. Had that happened, the conclusion reached by the tribunal might well have been different. However, Dr. Cassaglia had sufficient notice of the claims and in all the circumstances should have considered applying to join the proceedings as a party or to participate as a person with a legitimate interest in the outcome. His failure to do so meant that he could not now say that his right to a fair trial was violated (paras. 161–163; paras. 191–202).

Cases cited:

(1) *Ageas Ins. Ltd.* v. *Stoodley Advantage Ins. Co. Ltd.*, [2019] Lloyd's Rep. I.R. 1, considered.
(2) *Axel Springer AG* v. *Germany*, App. No. 39954/08, (2012), 55 EHRR 6; [2012] ECHR 227; [2012] EMLR 15; 32 BHRC 493, considered.
(3) *Bellman* v. *Northampton Recruitment Ltd.*, [2018] EWCA Civ 2214; [2019] 1 All E.R. 1133; [2019] ICR 459; [2019] IRLR 66, referred to.
(4) *Dilworth* v. *Commissioner of Stamps*, [1899] A.C. 99, considered.
(5) *Gray* v. *Boreh*, [2017] EWCA Civ 56, distinguished.
(6) *Hancock* v. *Coral Interactive (Gibraltar) Ltd.*, Case No. Ind. Tri. 21/2016, unreported, considered.
(7) *Inland Rev. Commrs.* v. *National Fedn. of Self-Employed & Small Businesses Ltd.*, [1982] A.C. 617; [1981] 2 All E.R. 93, considered.
(8) *MA Holdings Ltd.* v. *R. (George Wimpey UK Ltd.)*, [2008] EWCA Civ 12; [2008] 1 W.L.R. 1649; [2008] 3 All E.R. 859; [2008] C.P. Rep. 19, considered.
(9) *Majrowski* v. *Guy's & St. Thomas' NHS Trust*, [2006] UKHL 34; [2007] 1 A.C. 224; [2006] 3 W.L.R. 125; [2006] 4 All E.R. 395; [2006] ICR 1199; [2006] IRLR 695, considered.
(10) *Mohamud* v. *WM Morrison Supermarkets plc*, [2016] UKSC 11; [2016] A.C. 677; [2016] 2 W.L.R. 821; [2017] 1 All E.R. 15; [2016] ICR 485; [2016] IRLR 362, [2016] PIQR P11, referred to.
(11) *Monroe* v. *Hopkins*, [2017] EWHC 645 (QB); [2017] 1 W.L.R. 3587, referred to.
(12) *Multiplex Constr. (UK) Ltd.* v. *Honeywell Control Systems*, [2007] EWHC 236 (TCC); [2007] Bus LR D13, referred to.
(13) *R. (Ross)* v. *Life Assur. Unit Trust Regulatory Org. Ltd.*, [1993] Q.B. 17, considered.
(14) *R. (Wright)* v. *Health Secy.*, [2009] UKHL 3; [2009] 1 A.C. 739; [2009] 2 W.L.R. 267; [2009] 2 All E.R. 129; [2009] HRLR 13; [2009] UKHRR 763, considered.

(15) *Turek* v. *Slovakia*, App. No. 57986/00, (2007), 44 EHRR 43; [2006] ECHR 138, considered.
(16) *Vento* v. *Chief Const. (West Yorks.)*, [2002] EWCA Civ 1871; [2003] ICR 318; [2003] IRLR 102; [2003] Po LR 171, referred to.
(17) *W (A Child) (Care Proceedings: Non Party Appeal)*, *Re*, [2016] EWCA Civ 1140; [2017] 1 W.L.R. 2415; [2017] 1 F.C.R. 349; [2017] 1 FLR 1629, distinguished.

Legislation construed:
Employment (Bullying at Work) Act 2014, s.4: The relevant terms of this section are set out at para. 50.
s.6: The relevant terms of this section are set out at para. 50.
s.8: The relevant terms of this section are set out at para. 164.
s.9(1): The relevant terms of this subsection are set out at para. 164.
(2): The relevant terms of this subsection are set out at para. 52.
Schedule: The relevant term of this Schedule are set out at para. 83.

Employment Tribunal (Appeals) Rules 2005, r.3(1): The relevant terms of this sub-rule are set out at para. 32.

Employment Tribunal (Constitution and Procedure) Rules 2016, r.33: The relevant terms of this rule are set out at para. 160.
r.34: The relevant terms of this rule are set out at para. 160.

Equal Opportunities Act 2006, s.47(1): The relevant terms of this subsection are set out at para. 94.

G. Licudi, *Q.C.* and *R. Pennington-Benton* and *D. Martinez* (instructed by Hassans) for the appellant;
A. Cardona (instructed by Phillips) for the first respondent;
N. Cruz and *G. Tin* (instructed by Cruzlaw LLP) for the second respondent.

1 **YEATS, J.:** This is an appeal brought by Dr. Daniel Cassaglia against a decision of the Employment Tribunal ("the tribunal"). The decision which is being appealed is a finding by the tribunal that the Gibraltar Health Authority ("the GHA") was liable for an act of bullying said to have been occasioned by Dr. Cassaglia against Mr. Lawrence Stagnetto. Both are employees of the GHA. The appeal is brought on points of law alone.

Introduction

2 On December 19th, 2017, Mr. Stagnetto filed a claim in the tribunal against the GHA alleging that on September 20th, 2017, and whilst at work, Dr. Cassaglia had bullied him. A second claim, by Mrs. Audrey Olivares Smith, was also filed. She too alleged that Dr. Cassaglia had bullied her. Both claims were heard together by the tribunal over the course of a number of days in late March to mid-April 2019. On August 23rd, 2019, the tribunal's Chairman, Mr. Joseph Nuñez ("the Chairman"), handed down

his judgment determining that the complaint by Mr. Stagnetto was well founded but dismissing the complaint by Mrs. Olivares Smith. The GHA filed a notice of appeal on September 16th, 2019 but this was withdrawn on or about October 7th, 2019.

3 Although Dr. Cassaglia continues to deny that he bullied Mr. Stagnetto, the findings of fact made by the Chairman are not being challenged in this appeal. It is not this court's task to say whether it would have reached a different decision on the evidence to the decision arrived at by the tribunal.

4 The points of law upon which the appeal is based are the following. First, it is said that a single one-off incident of the type found by the Chairman is not capable of amounting to bullying under the Employment (Bullying at Work) Act 2014 ("the Act"). Secondly, if, contrary to that submission, the court finds that the conduct can amount to bullying under the Act, the GHA should not have been found liable because the conduct should not have been attributed to the GHA as the employer. Thirdly, it is in any event said that Dr. Cassaglia, as a person affected by the proceedings before the tribunal and its outcome, did not receive a fair hearing. (A fourth ground, that the Chairman's findings were irrational on the evidence was abandoned before the hearing of the appeal. It was however made clear that the fact that this ground of appeal was not being pursued was not a concession that Dr. Cassaglia agreed with the Chairman's findings of fact.)

5 This appeal first started off as a judicial review claim brought by Dr. Cassaglia on November 22nd, 2019 against the tribunal. The GHA and Mr. Stagnetto were named/added as interested parties. By a judgment dated April 2nd, 2020 (reported, *sub nom. R. (Cassaglia)* v. *Employment Tribunal (Gibraltar Health Authority)*, 2020 Gib LR 123), which followed an earlier permission hearing, I reconstituted the judicial review proceedings into an appeal under the Employment Tribunal (Appeals) Rules 2005 ("the Appeals Rules"). Dr. Cassaglia became the appellant and Mr. Stagnetto and the GHA became the respondents.

Background and allegations

6 At the material time, Dr. Cassaglia was the GHA's Medical Director. The Medical Director is the most senior position in the organization. Mr. Stagnetto was a senior biomedical scientist in the GHA's laboratory. Mrs. Olivares Smith was the Deputy Pathology Services Manager and the Quality Manager for the laboratory.

7 In August 2020, Dr. Cassaglia received a letter of complaint from the ombudsman about a child patient. In order to prepare a report for the ombudsman, Dr. Cassaglia required information from the laboratory regarding the patient's blood test results and the audit logs of who had previously accessed the results. (Blood test results are recorded by the

laboratory in a computerized system called Modulab.) In the course of the afternoon of September 20th, 2017, Dr. Cassaglia went to the laboratory to request the information he needed. He had a number of interactions with staff members and ultimately was able to view the information on a staff member's computer screen. He then asked for this to be emailed to him and left. In the event, the staff member did not immediately send the email. When Dr. Cassaglia queried this over the telephone, he was told that the provision of the information had to be authorized. He then returned to the laboratory and that is when the incidents complained of are said to have taken place.

8 Mr. Stagnetto and three other laboratory staff members (Mr. Mohit Mahbubani, Ms. Megan Davis and Ms. Jackie Barea) were by the door to the histology section within the laboratory. Dr. Cassaglia approached them and directed himself at Mr. Stagnetto. Mr. Stagnetto's case was that he was standing by the doorway and Dr. Cassaglia physically pushed him into the room. That Dr. Cassaglia used both hands to push him on his shoulders. Once alone in the room, he says that Dr. Cassaglia swore and shouted at him and aggressively accused him of interfering with an investigation by blocking the release of the Modulab information that he had requested. The incident, which was found by the Chairman to have lasted only a few minutes, had left him alarmed, intimidated and distressed.

9 Mrs. Olivares Smith's case was that she had returned to the laboratory from her lunch break and was told that Dr. Cassaglia was in the histology section with Mr. Stagnetto. She went to their location and saw Dr. Cassaglia shouting at Mr. Stagnetto, accusing him of blocking his request. She intervened and told Dr. Cassaglia that she had been the one who had asked the staff member not to forward the email. She then alleged that Dr. Cassaglia had started shouting at her, pointing his finger and towering over her, saying that no one should interfere with the investigation he was carrying out. She also said that she had been cornered in the corridor when they exited the room and told that no member of staff should look at the Modulab information that he was after.

10 Dr. Cassaglia denied pushing Mr. Stagnetto. He did accept that he had been frustrated and upset at having had his request for information blocked. Dr. Cassaglia also denied having used obscene language but further accepted that he may have used inappropriate language because of the frustration he felt.

11 Mr. Stagnetto reported the incident to the Pathology Services Manager, Dr. Alex Menez, that same afternoon. He also informed his Unite the Union ("the union") representative. The matter was then referred to GHA management.

The disciplinary proceedings

12 As a result of the report by Mr. Stagnetto, the then Chairman of the GHA (the Minister of Health, Care and Justice) referred the investigation of the incident to the Chief Secretary of H.M. Government of Gibraltar and an investigation board was convened to look into the allegations. On October 16th and 30th, 2017, the investigation board interviewed Mr. Stagnetto, Mrs. Olivares Smith, Dr. Cassaglia and the three other staff members who were present during the incident. On December 28th, 2017, the Government's Human Resources Department wrote to Dr. Cassaglia advising him of the following:

> "The Investigation Board has found that there is a prima facie case and the matter should therefore be dealt with formally under the GHA policy, as far as is reasonably practicable given the circumstances.
>
> A Disciplinary Board appropriate to the circumstances will therefore be constituted to conduct the hearing and determine any disciplinary action necessary in respect of the following charges to be brought against you by the GHA: (i) Pushing Mr Lawrence Stagnetto (ii) Using inappropriate/offensive language whilst addressing Mr Lawrence Stagnetto."

13 Thereafter a disciplinary board was constituted and on January 22nd, 2018, Dr. Cassaglia was informed that the charges of pushing and using inappropriate/offensive language were charges of "serious misconduct" contrary to General Order 6.1.1 (i)(b). The composition of the board (made up of three senior civil servants) was also confirmed.

14 To date the board has not held a final hearing. A chronology of interactions between Dr. Cassaglia's legal team and the board/ Government's Human Resources Department was prepared by Mr. Andrew Cardona, counsel for Mr. Stagnetto. This shows that there were extensive exchanges where queries were raised and objections to the process made on behalf of Dr. Cassaglia. A hearing was first set down by the board for July 12th, 2018 but this was adjourned at Dr. Cassaglia's request. In all, the hearing has been adjourned on six separate occasions. In April 2019, a decision was taken by the board to adjourn the disciplinary proceedings until after the claim in the tribunal was determined. The outcome of this appeal is now being awaited.

The Employment Tribunal proceedings

15 On December 19th, 2017, Mr. Stagnetto and Mrs. Olivares Smith filed their claims in the Employment Tribunal seeking declarations that they had been subjected to bullying by the GHA and seeking compensation and ancillary orders. Mr. Stagnetto's claim form stated that it was being filed "as a protective measure" as there is a three-month time limit within which

to issue proceedings under the Act. Mr. Stagnetto asserted that he was attempting to pursue an "amicable settlement" with his employer and also wanted to consider mediation.

16 A response to the claim was filed by the GHA on January 26th, 2018. The response referred to the disciplinary proceedings being extant and stated the following at para. 10 of the particulars to s.6.2:

> "In the circumstances, and pending the outcome of the disciplinary proceedings and such other action as the Respondent might consider appropriate to take in light of the Claimant's complaints, the Respondent denies that it is in breach of the Act and reserves its full right to amend this Response once the disciplinary charges against Dr Daniel Cassaglia have been determined by the Disciplinary Board."

17 In June and July 2018, the Chairman held a series of preliminary hearings and refused an application by the GHA for a stay. (A stay was sought until November 30th, 2018 on the basis that the GHA anticipated that the disciplinary proceedings would have been heard by then.) On July 12th, 2018, the Chairman gave directions which resulted in Mr. Stagnetto filing further and better particulars to his claim on November 28th, 2018 and the GHA filing its second amended response on December 14th, 2018. A third amended response was filed by the GHA on March 27th, 2019.

18 Ultimately, the GHA adopted a neutral position before the tribunal. In his judgment the Chairman recorded the following (at 6):

> "The Respondent, as a result of the fact that the disciplinary hearing against Dr Cassaglia has not ended, has taken a neutral stance with respect to each of the Claimant's cases and has therefore founded its case on the following submissions, namely:
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> (1) . . . a single one-off incident . . . cannot constitute 'bullying' for the purposes of the [Act]
>
> (2) [if it can] the claimants still have to prove that the conduct complained of constitutes bullying and the Tribunal cannot be satisfied on this point if it takes into account all the inconsistencies that exist if one takes into account the evidence given by the Claimants and their witnesses . . . [and] the evidence of Dr Cassaglia.
>
> (3) Although the Respondent called Dr Cassaglia as a witness, it does not takes sides on his evidence and therefore does not put forward his version of events as statements of fact but avers that if Dr Cassaglia's evidence as to what happened . . . is accepted by the Tribunal, then there was no conduct amounting to bullying."

19 The hearing, which was due to commence on February 19th, 2019, was delayed due to unforeseen circumstances. It eventually took place over the course of seven days between March 28th, 2019 and April 17th, 2019. Mr. Stagnetto, Mrs. Olivares Smith, Dr. Cassaglia and the three members of staff present during the incident gave evidence. Dr. Cassaglia was not himself a party to the proceedings before the tribunal.

Findings of fact by the tribunal

20 In reaching its conclusion that the bullying claim against Dr. Cassaglia was well-founded, the Chairman made a number of findings of fact. The findings of fact are contained in the Chairman's judgment (at 59, 60 and 67). The following are set out at 59 and 60:

(i) "Dr Cassaglia was angry and frustrated";

(ii) "Dr Cassaglia purposefully strode down the corridor directing himself towards Mr Stagnetto";

(iii) "Dr Cassaglia on reaching Mr Stagnetto (sic) location simultaneously asked to speak to him in private and pushed Mr Stagnetto on his shoulders with sufficient force to make him go backwards into the room . . . Dr Cassaglia did not intend to assault Mr Stagnetto, although legally it is an assault";

(iv) "Once in the room Dr Cassaglia did not scream or shout or insult Mr Stagnetto but he did speak to Mr Stagnetto in a raised and, at times raising voice";

(v) "Dr Cassaglia used the word 'fuck' but only by way of question in the course of conversation with Mr Stagnetto"; and

(vi) "Each time Mr Stagnetto denied preventing the sending of the e-mail Dr Cassaglia's frustration and anger increased and therefore so did his hand gestures, which could well have included pointing his finger at Mr Stagnetto and invading his personal space."

21 And then the Chairman said the following (at 67):

> "Dealing first with the issue of whether there was conduct that amounted to bullying. I have, as stated above, concluded that Dr Cassaglia (i) pushed Mr Stagnetto on both shoulders (ii) spoke to Mr Stagnetto in a raised and raising voice whilst gesticulating with his hands (iii) wrongfully accused Mr Stagnetto using inappropriate language on more than one occasion of preventing the release of the Modulab information and (iv) was angry and frustrated at the time. This all occurred in one continuing incident spanning a few minutes in time."

22 It is these findings of fact which need to be applied to the legal submissions advanced by the parties in the appeal.

The Employment Tribunal's award

23 On January 31st, 2020, the Chairman handed down a judgment entitled "Award." He awarded Mr. Stagnetto the sum of £7,000 by way of compensation and £327.94 in interest, to be paid by the GHA. He also made a declaration and a recommendation. The order that the Chairman made pursuant to s.9(1) of the Act ("the award") was set out in the judgment (at 13) and is as follows:

> "1. The complaint of bullying filed by the Claimant against the Respondent is well founded. The Claimant was bullied.
>
> 2. The Respondent to pay the Claimant the sum of £7,327.94 by way of compensation for the injury to feelings suffered by the Claimant.
>
> 3. It is recommended that the Respondent review within a reasonable time and in any event by no later than the 31st October 2020 its dignity at work policies and procedures so that there is a clear and unambiguous statement of the disciplinary procedure and the measures to be followed against employees, irrespective of their position within the organisation, who are alleged to have infringed the policy.
>
> 4. Liberty to apply with respect to paragraph 3 in the event of non-compliance."

Dr. Cassaglia's right to appeal

24 Having set out the background, the first matter which I need to deal with is whether Dr. Cassaglia does in fact have a right to appeal to this court. Mr. Cardona says that although I considered this when I reconstituted the judicial review into an appeal, this is something that I must consider afresh at this substantive hearing. That with the benefit of full argument on the point, and considering the evidence in the case, I will find that Dr. Cassaglia, as a non-party to the tribunal's proceedings, cannot actually appeal. Mr. Cardona submits that I need to apply two different tests. The first test to the first two grounds of appeal, which are *substantive* grounds, and the second test to the third ground of appeal, which is a *procedural* ground. To be able to appeal on the substantive grounds, Dr. Cassaglia needs to be directly interested in the award. Mr. Cardona submits that he does not have such an interest as the award impacts only upon the GHA and not directly on Dr. Cassaglia. As to the procedural ground of appeal, it is said that Dr. Cassaglia's procedural complaints do not fall within the narrow class of cases where non-parties are permitted to appeal

against the findings of a court when not actually interested in the decision itself.

25 Mr. Gilbert Licudi, Q.C., appearing for Dr. Cassaglia, urged me to proceed with the appeal. In my judgment of April 2nd, 2020, I determined that Dr. Cassaglia had a right to appeal. Therefore, Mr. Licudi submits that this court is *functus officio* as regards that finding. Further, he submits that even if I were to consider the matter afresh, the only conclusion that can be reached is that Dr. Cassaglia is entitled to bring the appeal. I shall turn first to whether I should reconsider the matter.

26 In my judgment of April 2nd, 2020, I said the following (2020 Gib LR 123, at para. 20):

> "20 Charles Salter, who appeared for Mr. Stagnetto, submitted that Dr. Cassaglia does not strictly have an interest in the outcome of the tribunal's proceedings. He has no interest in what damages Mr. Stagnetto may be awarded or in construing the Bullying at Work Act. Those proceedings are between Mr. Stagnetto and the GHA. They are not about the person carrying out the bullying but about how the employer has dealt with the events. Dr. Cassaglia's interests are limited to defending himself from the tribunal's findings. If he does have a grievance against his employer then that is a matter for a different forum. Whilst Mr. Salter is not wrong, in my judgment, Dr. Cassaglia is nonetheless a person with significant interest in the proceedings before the tribunal and in any appeal arising from its decision. Although the GHA were the respondents to the claim, the claim was premised on the acts said to have been occasioned by Dr. Cassaglia. He was found to have bullied Mr. Stagnetto. This is a finding which has the potential to cause him serious reputational damage and to have adverse practical consequences. It is unarguable to suggest otherwise. There has been a referral to the General Medical Council, although any disciplinary hearing which may follow has been placed on hold pending the outcome of this case. Dr. Cassaglia is a person who has been adversely affected by the tribunal's decision such that he should be able to bring an appeal pursuant to the Appeals Rules. He did not file a notice of appeal and has not therefore, strictly, exhausted his remedies prior to filing his claim for judicial review."

27 The reconstitution of the judicial review proceedings into an appeal brought under the Appeals Rules was set out in an order dated June 26th, 2020. No appeal was brought against that order. Indeed, when I formally handed down my judgment in court on April 2nd, 2020, I dispensed with counsel's attendance as we were in the midst of the first lockdown arising from the Covid-19 pandemic. I did however indicate, as counsel for Mr. Stagnetto asked me to do in correspondence with the Registry, that I would hear any application for permission to appeal at the first directions hearing.

No such application for permission to appeal was made and Mr. Licudi has now produced an email dated April 27th, 2020 sent by Mr. Cardona to the lawyers for the other parties in which he expressly stated that Mr. Stagnetto would not be appealing against my judgment of April 2nd, 2020. Mr. Licudi therefore submits that the "ship has sailed" insofar as any challenges on locus for this appeal are concerned. He referred me to two authorities on the point.

28 The first of these authorities was *Monroe* v. *Hopkins* (11), where Warby, J. held that the High Court did not have jurisdiction to hear an application for permission to appeal where either no application for permission had been made at the hand-down hearing of the judgment or the court had not been asked to adjourn such a proposed application. The second of the authorities was *Multiplex Constr. (UK) Ltd.* v. *Honeywell Control Systems Ltd.* (12). There, Jackson, J. held as follows ([2007] EWHC 236 (TCC), at para. 24):

> "It is clear that when a court gives judgment on a matter, the court's jurisdiction does not lapse in respect of that matter until the order giving effect to that judgment has been drawn up and sealed."

The order giving effect to my judgment of April 2nd, 2020 was made on June 26th, 2020 and according to the court's records it was then sealed on July 6th, 2020.

29 Mr. Cardona submitted that my order of June 26th, 2020 is akin to giving permission to appeal. That when I found that Dr. Cassaglia had a sufficient interest in the proceedings before the tribunal I could only have been applying a low threshold test as provided for in CPR 52.6 which deals with permission to appeal in first appeals. This provides that permission may only be given if the court considers that the appeal would have a real prospect of success or there is some other compelling reason for the appeal to be heard. The first limb (which would be the applicable one in this case) is in effect the summary judgment test. Is there a realistic, as opposed to a fanciful, prospect of success? When permission to appeal is given, it clearly does not bind the appeal court. Mr. Cardona referred to a particularly relevant example of this, that of the English Court of Appeal case *In re W (A Child) (Care Proceedings: Non Party Appeal)* (17). There, a single judge gave the appellants leave to appeal but the full court still went on to consider whether, as non-parties, they did in fact have such a right. (This is a case to which I shall return later in this judgment.)

30 I was also referred to the House of Lords case of *Inland Rev. Commrs.* v. *National Fedn. of Self-Employed & Small Businesses Ltd.* (7). This involved a judicial review brought by the Federation against a tax amnesty being proposed by the Inland Revenue for casual workers in the newspaper printing industry. The Federation thought the amnesty was unfair when

contrasted with the attitude of the tax authorities in other cases where tax evasion was suspected. The question in the appeal was whether the Federation had a sufficient interest to bring the appeal. Relevant to our case is the judgment of Lord Wilberforce, holding that the question of *locus standi* should not have been dealt with at a preliminary stage (the permission hearing) but should have been taken together with the legal and factual context of the case. He said ([1982] A.C. at 630):

> "There may be simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all, or no sufficient interest to support the application: then it would be quite correct at the threshold to refuse him leave to apply. The right to do so is an important safeguard against the courts being flooded and public bodies harassed by irresponsible applications. But in other cases this will not be so. In these it will be necessary to consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and to the breach of those said to have been committed. In other words, the question of sufficient interest can not, in such cases, be considered in the abstract, or as an isolated point: it must be taken together with the legal and factual context. The rule requires sufficient interest in the matter to which the application relates. This, in the present case, necessarily involves the whole question of the duties of the Inland Revenue and the breaches or failure of those duties of which the respondents complain."

This is relied on by Mr. Cardona to say that a final determination on whether there is sufficient interest has to take place at the actual hearing once the evidence is heard, and full arguments on the law are made.

31 The difficulty with Mr. Cardona's submissions is that permission to appeal is not required under the Appeals Rules. Rule 3(1) of the Appeals Rules provides a right to appeal—not following permission but as of right. Had Dr. Cassaglia appealed the tribunal's judgment within the time allowed, the matter would have proceeded straight to a hearing. (Of course, at a final hearing, the question of whether Dr. Cassaglia actually has a right to appeal could still be raised. It could possibly even have been dealt with as a preliminary point. But, there is no formal filtering process under the Rules. There is no permission stage.)

32 Mr. Cardona also submitted that he had not been able to find a provision which allowed him to appeal the grant of permission. That an appeal lies against an order and not a finding. He says that I did not order that Dr. Cassaglia had a sufficient interest. I simply ordered a reconstitution of the judicial review into the appeal. I disagree. To be able to make my order of June 26th, 2020, I had to find that Dr. Cassaglia had a sufficient interest in the proceedings before the tribunal such that he fell within the

definition of "any person" found in r.3 of the Appeals Rules. That was the principal point leading to the reconstitution and I could not have effected the reconstitution without that determination. Mr. Stagnetto could have sought permission to appeal against that order. (It was an interlocutory order and permission would have been required under s.22 of the Court of Appeal Act.)

33 I made a determination in my judgment of April 2nd, 2020 which was put into effect by my order of June 26th, 2020. There was no appeal against that order and this court is therefore *functus officio* as regards whether or not the appeal should have been brought by Dr. Cassaglia. I conclude that I cannot reconsider the matter and the appeal must proceed.

34 However, I recognize that the question of sufficiency of interest is one which raises important points and I therefore propose to deal with some of the arguments raised by Mr. Cardona.

35 The English Court of Appeal case of *Gray* v. *Boreh* (also known as *Boreh* v. *Republic of Djibouti*) (5) was relied on by Mr. Cardona. This concerned an application for permission to appeal by a solicitor, Peter Gray, against a finding that he had dishonestly misled the High Court. The finding was made in an application by Abdourahman Boreh to set aside a freezing order previously granted in favour of the Republic of Djibouti. Mr. Gray was not a party to the application by Mr. Boreh nor was any relief sought against him. The Court of Appeal had to determine whether it had jurisdiction to entertain an appeal by Mr. Gray. Mr. Gray had been dismissed from his employment following the court's judgment and was being disciplined by the Solicitors Regulatory Authority. The respondent conceded that the court had jurisdiction on the procedural grounds because these impacted on his private life rights, but not on the substantive grounds. Nevertheless, the court held that, in the exercise of its discretion, it would refuse permission to appeal. A number of points were made by Mr. Cardona based on this authority.

(i) The impact of the judge's findings on Mr. Gray were extremely serious and likely to be career ending. He lost his job and was being disciplined by his regulatory body. In contrast, the impact on Dr. Cassaglia is unlikely to lead to him being unable to continue practising his profession.

(ii) Despite the impact on his career, Mr. Gray was said not to have any personal interest in the order made by the judge. All he had was an interest in his reputation. The same, Mr. Cardona submitted, could be said of Dr. Cassaglia and this appeal.

(iii) That the procedural safeguards that Dr. Cassaglia enjoys by virtue of his constitutional right to family life (as set out in *Re W (A Child)* (17)) does not afford him a right to appeal simply because he disagrees with a judge's decision.

(iv) The court was not exercising any disciplinary jurisdiction over Mr. Gray. Similarly, it is said that the tribunal was not exercising any disciplinary or regulatory function over Dr. Cassaglia. Mr. Gray, like Dr. Cassaglia, would be able to seek vindication from the regulatory body. That said, in Mr. Gray's case the regulatory body opened its investigation as a result of the judgment of the High Court. In Dr. Cassaglia's case, the General Medical Council ("the GMC"), the UK regulatory body for doctors, is reviewing Dr. Cassaglia's fitness to practice but is awaiting the outcome of this appeal and of the disciplinary proceedings. Mr. Cardona says that the decision of the GMC to review Dr. Cassaglia's fitness to practice is not therefore "truly and in substance" as a result of the decision of the tribunal.

(v) That conferring on Mr. Gray a right to appeal could, if his human rights had been breached, result in a re-hearing. The court therefore had to balance Mr. Gray's rights with those of the actual parties to the litigation to have their case heard within a reasonable time and to have finality to litigation.

(vi) To allow Mr. Gray to appeal as a non-party in a commercial action on the basis that findings made have reputational consequences had the potential to open the floodgates to satellite litigation. That too, says Mr. Cardona, would be true if I determined that Dr. Cassaglia had a right to appeal.

36 *MA Holdings Ltd.* v. *R. (George Wimpey UK Ltd.)* (8) is an authority of the English Court of Appeal I referred to in my judgment of April 2nd, 2020. It concerned a landowner who wished to appeal a planning decision. At first instance, the court quashed a local plan adopted by the council. The council then decided not to appeal. The landowner was a person affected by the decision but had not been a party to the original proceedings. The Court of Appeal granted the landowner permission to appeal. Dyson, L.J. said ([2008] EWCA Civ 12, at paras. 9 and 19):

> "9. It would be surprising if the effect of the CPR were that a person affected by a decision could not in any circumstances seek permission to appeal unless he was a party to the proceedings below. Such a rule could work a real injustice, particularly in a case where a person who was not a party to the proceedings at first instance, but who has a real interest in their outcome, wishes to appeal, the losing party does not wish to appeal and an appeal would have real prospects of success."

> "19. In my view, therefore, giving the language its plain and ordinary interpretation, paragraph [52.1(3)(d)] . . . does not require an appellant to have been a party to the proceedings in the court below."

37 Mr. Cardona says the *Wimpey* case is in stark contrast to that of Dr. Cassaglia. Dr. Cassaglia, he says, has no personal or proprietary interest in

the award or is affected by it. Indeed, he goes further. Mr. Cardona submits that, had he applied to become a party in the tribunal, the application would have been refused. As a matter of law, Mr. Stagnetto could not have sought relief under the Act against Dr. Cassaglia. In those circumstances, how could he have been made a party?

38 *Re W (A Child)* (17) was a care proceedings case where the judge, at a fact-finding hearing, rejected the allegations of sexual abuse made by an older sibling of the children who were the subject of the application. The application was dismissed and neither the local authority nor any other party to the proceedings appealed the findings. The issue, however, was that the judge heavily criticized both an individual police officer and an individual social worker. They sought to appeal against the findings made by the judge that concerned them. They did not seek to appeal against the outcome of the case. The basis for appealing was that the adverse findings made by the judge had not been raised by the parties at the hearing nor had they been raised with the witnesses themselves. They had been raised, for the first time, in the judgment. The Court of Appeal held that it had jurisdiction to hear the appeals because the judge had acted in a way that breached the witnesses' rights to private life and to a fair hearing under arts. 6 and 8 of the European Convention of Human Rights ("the ECHR").

39 Mr. Licudi addressed the points made by Mr. Cardona. The first submission in reply was that Dr. Cassaglia has a statutory right to appeal and this therefore means that an appeal can lie on all three grounds of appeal. There is no need to distinguish between substantive grounds and procedural grounds. Secondly, that the decision being appealed was the judgment and not the award. It is of no consequence that the award does not strictly name Dr. Cassaglia when the reality is that the case was all and simply about Dr. Cassaglia's conduct. In this regard, Mr. Licudi referred to Mr. Cardona's opening written statement for the tribunal hearing. In the first paragraph of the statement Mr. Cardona said:

> "Both claims arise from the same incident on 20 September 2017 in which the Claimants allege that they were subjected to conduct amounting to bullying on the part of Dr Daniel Cassaglia, the Medical Director of the Respondent."

40 The same could be said of the findings of fact made by the Chairman and which I have already referred to in this judgment. In particular, the Chairman asked the question (at 67):

> "So are the above stated actions of Dr Cassaglia, viewed together and subjectively sufficiently serious to amount to a one off incident of bullying?"

It was therefore submitted that when the award declared that Mr. Stagnetto was bullied, it was clear that this meant that he had been bullied by Dr. Cassaglia.

41 I do not consider that Mr. Cardona's comment that I am "breaking new ground" in proceeding with this appeal would be correct. This is not a question of allowing a professional witness to appeal because he disagrees with a judge's criticism of his evidence, professionalism or conduct. This is an appeal by the person who is said to have done the act on which the declaration made by the Chairman in the award was based. As Gloster, L.J. said in *Gray* v. *Boreh* (5) ([2017] EWCA Civ 56, at para. 35):

> "ii) The decisions in *Cie-Noga SA* and *Re M (Children) (Judge's findings of fact: jurisdiction to appeal) supra* clearly demonstrate that, *normally, this court does not have jurisdiction to entertain an appeal against findings of fact* which do not amount to a determination, order or judgment, *unless they concern the issue upon which the determination of the whole case ultimately turns* or are otherwise subject of a declaration within the order." [Emphasis added.]

42 The circumstances of both *Gray* v. *Boreh* and *Re W (A Child)* (17) were very different from this case. There, neither of the appellants/ prospective appellants were truly interested in the orders made by the courts. It was only the findings made about them personally that they were complaining about. In this case, Dr. Cassaglia is complaining about the finding that he bullied Mr. Stagnetto. This was the central and only issue in the case. That was the issue upon which the determination of the whole case ultimately turned. The declaration made in the award is based on those findings. Mr. Licudi suggested that if the tribunal had found that Dr. Cassaglia had pushed and shouted at Mr. Stagnetto but then dismissed the claim on the basis that a one-off incident is not bullying under the Act, then that could be said to be analogous to *Gray* v. *Boreh*. Dr. Cassaglia would then have been concerned about the finding but not with the order. I agree.

43 Furthermore, I consider that Dr. Cassaglia has been directly affected by the judgment and/or the award (as will be discussed later in this judgment). In particular, he had to step aside from his role as Medical Director. Counsel also referred me to *Ageas Ins. Ltd.* v. *Stoodley Advantage Ins. Co. Ltd.* (1). It is an English County Court case referred to in the commentary to CPR 40.9 in the White Book. (CPR 40.9 provides that a person who is not a party, but who is directly affected by a judgment or order, may apply to set it aside.) Judge Cotter, Q.C. said ([2019] Lloyd's Rep. I.R. 1, at para. 40):

> "In my judgment the requirement to be 'directly affected', which should be considered flexibly in light of the overarching need to

ensure that injustice is not done to those affected by judgment or order, has two elements; firstly that the non-party be materially and adversely affected by the judgment or order and secondly that the effect is direct and not indirect."

44 I am satisfied that the court has jurisdiction to entertain the appeal.

45 I should also formally record the GHA's position on this issue. Mr. Nicholas Cruz, appearing in this appeal for the GHA, accepted that the matter had been determined in my judgment of April 2nd, 2020 and the question of whether Dr. Cassaglia had an interest was therefore settled. In any event, the GHA agreed that Dr. Cassaglia had a sufficient interest in the appeal. Even if Dr. Cassaglia has not been "hit in the pocket" (there is no evidence as to whether he has or has not been), there are cases where reputation is more important than money. Mr. Cruz suggested that a case of a medical professional at the very top of his career is one such example.

Evidence in the appeal

46 Evidence was filed in this appeal by Dr. Cassaglia and by the GHA. No evidence was filed by Mr. Stagnetto. The purpose of the evidence was limited. None of it related to the actual incident of September 20th, 2017 because this court is not re-hearing those facts. The evidence was restricted to two distinct issues. The first, described by Dr. Cassaglia's former counsel as the "unfairness evidence," was the evidence of Dr. Cassaglia supporting his contention that he did not receive a fair trial before the tribunal. Dr. Cassaglia was cross-examined on this part of his evidence. The second was described as the "materiality evidence." This is evidence also contained in the witness statements filed by Dr. Cassaglia and by three witnesses, Professor Derek Burke, Ms. Pamela Knowles and Mr. Nicholas Reyes. The materiality evidence is relied on by Dr. Cassaglia to show the evidence that he could have called before the tribunal, had he been able to do so, to support his assertion that the allegations against him had been concocted. It is not relied on in this appeal for the truth of what the statements say. Dr. Cassaglia was therefore not cross-examined on this evidence and neither were any of his three witnesses called to give live evidence. (I shall adopt the "unfairness evidence" and "materiality evidence" nomenclature.)

47 The GHA relied on the evidence of Ms. Lesley Louise and Mr. Mark Isola, Q.C. This related to the unfairness issue but the witnesses were not called to give live evidence because their evidence was not challenged.

48 I will set out what I consider to be the important parts of the evidence when I look at ground of appeal three. The first two grounds concern statutory interpretation and do not require analysis of any evidential matters.

The Employment (Bullying at Work) Act 2014

49 The parties appear to be correct when they say that this is the first case on the Act which comes before the Supreme Court. Prior to the tribunal's proceedings in this case, there was one other reported judgment in the tribunal, that of *Hancock* v. *Coral Interactive (Gibraltar) Ltd.* (6). There is no equivalent UK statute on bullying at work and so we do not have the benefit of case law in that jurisdiction.

50 The Act is relatively short. Section 3 provides that the Act applies to bullying and victimization in employment and that it binds the Crown. Section 4 defines bullying and s.5 defines victimization. Sections 6 and 7 contain the prohibitions against bullying and victimization respectively. Section 8 deals with the jurisdiction of the Employment Tribunal and s.9 with the remedies. The Schedule to the Act sets out the requirements of a Bullying at Work Policy for employers. For the purposes of our case, we are mainly concerned with ss. 4 and 6 of the Act. I shall set both of these provisions out in full:

"**Meaning of bullying.**

4.(1) A person ('A') subjects another person ('B') to bullying where A engages in conduct which has the purpose or effect of causing B to be alarmed, distressed, humiliated or intimidated.

(2) In subsection (1) the reference to conduct includes—

(a) persistent behaviour which is offensive, intimidating, abusive, malicious or insulting;

(b) persistent unjustified criticism;

(c) punishment imposed without justification;

(d) changes in the duties or responsibilities of B to B's detriment without reasonable justification.

(3) Bullying does not include reasonable action taken by an employer relating to the management and direction of the employee or the employee's employment.

. . .

Bullying of employees.

6.(1) An employer (A) must not, in relation to employment by A, subject an employee (B) to bullying.

(2) The circumstances in which A is to be treated as having subjected B to bullying under subsection (1) include those where—

(a) a third party bullies B in the course of B's employment; and

(b) A failed to take such steps as would have been reasonably practicable to prevent the third party from doing so.

(3) Subsection (2) does not apply unless A knows that B has been bullied in the course of B's employment on at least two other occasions by a third party; and it does not matter whether the third party is the same or a different person on each occasion.

(4) A third party is a person other than—

(a) A; or

(b) an employee of A's.

(5) An employer will not be in contravention of subsection (1) in relation to a complaint of bullying where he can show—

(a) that at the time of the act or acts complained of—

(i) he had in force a Bullying at Work Policy in accordance with the Schedule; and

(ii) he has taken all reasonable steps to implement and enforce the Bullying at Work Policy; and

(b) as soon as reasonably practicable, he takes all steps as are reasonably necessary to remedy any loss, damage or other detriment suffered by the complainant as a result of the act or acts of which he complains."

51 Reference was also made in argument to s.9(2) of the Act. This states:

"(2) When determining the amount of an award of compensation for injury to feelings under subsection (1)(b) the Tribunal shall take into account the seriousness, frequency and persistence of the employer's breach."

Ground one

52 The first ground of appeal is the following:

The Chairman erred in law in holding that the single, isolated, and unpremeditated act of pushing, together with ancillary outbursts, was "sufficiently serious" to amount to bullying on the part of the employer.

53 As explained above, the Chairman's findings of fact are accepted for the purposes of the appeal. It is those findings which need to be applied to the relevant legal provisions.

54 There are two limbs to the first ground. First, is Dr. Cassaglia's conduct, as a single one-off incident, capable of amounting to bullying

under the Act? If it can, then secondly, was it sufficiently serious to be classified as such?

Ground one—limb one

55 I will first look at what the Chairperson in *Hancock* v. *Coral Interactive (Gibraltar) Ltd.* (6) said about the relevant provisions of the Act. She said (Case No. Ind. Tri. 21/2016, at paras. 23 and 24):

> "23. Save for the Section 4(2) bullying conduct examples, Section 4(1) also does not define, limit or qualify the word '*conduct*'. I consider that the employer's conduct should be assessed subjectively and can be an isolated action or manner of behaviour or a series of actions or manner of behaviour. Although the employer's conduct may be unintentional, I also consider that the conduct must be of sufficient force and I think generally carry some element of injustice—in order to cause (or be intended to cause) the serious adverse sentiments prescribed in Section 4(1). This is confirmed by the 4 Section 4(2) bullying conduct examples, 3 of which involve conduct towards the victim which is without justification, including '*(c) punishment imposed without justification*'. I also consider that the conduct in question will often carry an element of abuse or misuse of power, and this is reflected in Section 4(1) of the Act by use of the verb '*subjects*' and by the examples of bullying provided in Section 4(2).
>
> 24. All that is required under Section 4(1) of the Act is that the bully's conduct '*has the effect of causing*' the victim to be alarmed, distressed, humiliated or intimidated and the alleged bully's intent may therefore be irrelevant when assessing the effect of the conduct complained about. But there is a line of E&W authority, with which I agree, that when assessing 'effect' it is unlikely to be the case that the purpose of the counter-party is completely irrelevant, since the context in which a statement is made or an act undertaken is likely to be material and relevant to assessing effect." [Emphasis in original.]

56 The Chairman in our case agreed with the statements of the law set out at para. 23 in *Hancock*. Before him, the point of dispute between the parties was simply whether "one single isolated incident of conduct, which amounts to bullying, is an act of bullying for the purposes of [the Act]." The Chairman set out the parties' submissions (which essentially are the submissions again being made in this court by the GHA and by Mr. Stagnetto and which I set out below) and then concluded as follows (at 16):

> "In my opinion an isolated incident of misconduct, if sufficiently serious in nature when viewed subjectively, can amount to bullying

> for the purpose of section 4(1) of the Act. Each case needs to be viewed on its own particular facts . . ."

The Chairman then confirmed his agreement with para. 23 of *Hancock* and continued:

> "I disagree with Mr Isola's assessment that all four of the examples provided for in section 4(2) provide for or carry the necessary ingredients of continuation and persistence and that therefore an isolated incident cannot amount to bullying. In my view there is a clear difference between the first two examples and the latter two examples provided for in section 4(2). In this I agree with Mr Cardona. In my view the reason Parliament intended that for the purposes of the examples given in section 4(2)(c) or (d) only one instance of that conduct could amount to bullying is the seriousness of that conduct, and its likely effect on the victim, when compared, in general terms, with one act of offensive or intimidating etc behaviour or unjustified criticism. The seriousness of the conduct, taking into account the context in which it has occurred, and the nature of the parties involved, and the act perpetrated, is what differentiates and justifies that one act be considered to be an act of bullying and, incidentally, more likely to raise the adverse sentiments of alarm, distress or humiliation (but obviously not intimidation due to section 4(2)(a)) required by section 4(1) of the Bullying Act."

57 In this appeal, Mr. Licudi, on behalf of Dr. Cassaglia, takes a slightly more nuanced position to that argued before the tribunal by the GHA and Mr. Stagnetto. His position is that a single act can amount to bullying conduct (as found by the Chairman) *but* that in a case where the conduct complained of is offensive, intimidating, abusive, malicious or insulting (the words in s.4(2)(a)) then a single act cannot amount to bullying because the conduct needs to be persistent. If conduct is to be persistent, it needs to happen more than once—although Mr. Licudi found it unnecessary for present purposes to be drawn into whether persistent meant two, three or any particular number of separate occasions. This is because the parties are agreed that in Dr. Cassaglia's case the findings of fact amount to one isolated incident, even if the incident was composed of different elements. (Mr. Cardona, in his written closing submissions to the tribunal, argued that it was "a continuous course of conduct spanning a few minutes" rather than a single act, but in this appeal he is not saying that the conduct was persistent.) I agree that it is not persistent conduct simply because it involves more than one distinct act in the same short and contained incident.

58 The starting point is to look at s.4(1) of the Act. Conduct can have the purpose or the effect of causing alarm, distress, humiliation or intimidation. In this case, the conduct of Dr. Cassaglia did not have the *purpose* to cause any of these things. The Chairman expressly found that there was no malicious

intention on his part. It is therefore a question of whether the conduct had the *effect* of causing Mr. Stagnetto any one or more of those emotions.

59 The nature of the relationship between s.4(1) and s.4(2) is key to the resolution of this first ground of appeal. All three parties have different perspectives on this. Mr. Licudi's submission is that s.4(2) does not contain an exhaustive list but that it qualifies s.4(1). Specifically, he says that if a type of conduct is caught by any of the examples in s.4(2) then the conduct has to fall squarely within that relevant example. Mr. Cruz on behalf of the GHA submitted that s.4(2) is an exhaustive list. That the word "includes" should be read as: "means and includes." Therefore, conduct *has* to fall within any one of the four examples in s.4(2). If it does not, then it does not amount to bullying under the Act. Mr. Cardona on the other hand submits on behalf of Mr. Stagnetto that all that s.4(2) does is give examples of types of bullying but that it does not qualify or limit the general definition of bullying which is contained in s.4(1). I shall deal with each of the three different submissions in turn.

60 Before looking at the provisions, Mr. Licudi took me through a number of principles of statutory interpretation which he said were relevant to the exercise. He summarized these in his written submissions as follows: the duty of the court is to arrive at the legal meaning of the enactment; the legal meaning is that which conveys the legislature's intention; the intention of the legislature is to be ascertained objectively, not subjectively; words in an enactment are to be given their natural and ordinary meaning; words are to be read in context including the context of other words in the same enactment; every word must be given a meaning; a reasonable interpretation of a statutory provision is to be preferred if there is a choice; the courts will seek to avoid an interpretation that leads to an anomalous, illogical or absurd result; and words can only be implied to the extent that it is proper and necessary to reflect the intention of Parliament. Neither Mr. Cruz nor Mr. Cardona disagreed with these principles.

61 As to the relationship between s.4(1) and s.4(2), Mr. Licudi's submissions can be summarized as follows:

(i) Section 4(1) cannot be looked at in isolation. The whole of s.4 needs to be considered together and in context.

(ii) Section 4(2) qualifies s.4(1). So, for example, if the court were dealing with a case of criticism, then it would have to look at s.4(2)(b). The claim would have to fall within that subsection and it would have to be persistent unjustified criticism. It cannot have been Parliament's intention to set out "persistent unjustified criticism" simply as an *example* of bullying conduct with a criticism element. It must have meant to make it the *only* way in which criticism can be said to be bullying under the Act. Otherwise, the words "persistent" and/or "unjustified" would be completely

unnecessary. Similarly, the example in (a) would simply have started with the words "behaviour which is offensive etc." Such a wording would have accounted for one, two or an infinite number of incidents of the type. Mr. Licudi also pointed to the fact that only examples (a) and (b) have the word "persistent." Its inclusion in the first two examples of s.4(2) cannot therefore have been accidental.

(iii) It therefore follows that the examples in s.4(2)(a)–(d) are exclusive or absolute examples of the type of behaviour described in each of the sub-paragraphs. To press home the point, Mr. Licudi used the example of "malicious" behaviour. Malicious behaviour is contained within the example in s.4(2)(a). It cannot have been Parliament's intention to say that malicious behaviour needs to be persistent but that behaviour which is not malicious (such as the behaviour in this case) need not be persistent. That would be an absurd result.

(iv) The s.4(2) examples are not the only possible examples of bullying conduct under s.4(1). There could be others. The word "include" in s.4(2) does not make s.4(2)(a)–(d) an exclusive list. Mr. Licudi suggested "setting up to fail" as an example of bullying conduct that could fall outside of the s.4(2) examples, although he accepted that depending on the facts this could be malicious behaviour and therefore fall within s.4(2)(a). However, he submitted that if the practical effect of s.4(2) is that there are no other presently identifiable examples, that does not matter. Parliament could have left the door open to other types of behaviour which would meet the criteria.

(v) The behaviour contained in the findings of fact (put simply: a push and inappropriate language in a raised voice) is behaviour which is intimidating and abusive. It is therefore behaviour that falls within the example of conduct described in s.4(2)(a). It follows that the behaviour needs to be persistent. That would mean that Dr. Cassaglia's behaviour is not caught by the sub-paragraph.

(vi) The Chairman found that Dr. Cassaglia's behaviour amounted to bullying because it was "sufficiently serious," not because it fell within s.4(2)(a). This, Mr. Licudi says, was an error on his part because there is no such test. If Parliament intended a serious single act of abusive or intimidating behaviour to amount to bullying then it could have easily and plainly said so. It is therefore neither reasonable nor necessary to imply such a term.

(vii) The claim by Mr. Stagnetto included a claim for damages to injury to feelings (as set out in the claim form at s.7.3). Section 9(2) of the Act applies when determining the amount of an award for injury to feelings. The subsection provides that the tribunal shall take into account "the seriousness, frequency and persistence of the employer's breach." This, it

is submitted, shows that persistence is a requirement that must feature in the acts complained of.

(viii) Alternatively, Mr. Licudi submitted that if the behaviour does not necessarily have to fall within all the requirements of s.4(2)(a) it is a reasonable interpretation to the meaning of bullying which has to be preferred. A reasonable interpretation of the meaning of bullying is that it involves, except in exceptional cases, repeated conduct. Mr. Licudi took me to a number of dictionary definitions of bullying and to H.M. Government of Gibraltar's Bullying at Work Policy which he says supported this definition of bullying.

62 As already explained, Mr. Cruz submitted that s.4(2) is an exhaustive list. That the word "includes" in the opening line of the section should be read as "means and includes." Therefore, conduct has to fall within any one of the four examples in s.4(2) for it to amount to bullying. His submissions on the point can be summarized as follows:

(i) A starting point is the natural meaning of the term "bullying." It is a common theme in definitions of bullying that it involves repeated behaviour.

(ii) That an analysis of whether conduct amounts to bullying has to be an objective analysis.

(iii) The behaviour attributed to Dr. Cassaglia falls within s.4(2)(a) and therefore requires persistent behaviour.

(iv) The word "includes" in s.4(2) should not bear its ordinary meaning. In the context of the Act, the word "includes" should be read as being "means and includes." In support Mr. Cruz relied on the *dicta* of the House of Lords in *Dilworth* v. *Commissioner of Stamps* (4), where at p.4 of the copy of the report produced, the following is said ([1899] A.C. at 105–106):

> "The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the Statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word 'include' is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to 'mean and include,' and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions."

(v) In his written submissions, Mr. Cruz also referred to the fact that the draft Bill, as contained in the Command Paper, had the following words in s.4(2): "including but not limited to the following." This was changed to "includes." The change implies that the drafters intended s.4(2) to be an exhaustive list.

(vi) The fact that an act is serious does not re-characterize it as something else. So, even if Dr. Cassaglia's behaviour was serious this does not make it bullying behaviour unless it was persistent.

63 Mr. Cruz also referred to the Hansard of the debate in Parliament which led to the passing of the Act. A part of the debate was in fact referred to by the Chairman in his judgment. Specifically, the Chairman referred to a contribution by the Hon. Damon Bossino, M.P., an opposition member, who was making observations as to the undesirability of the Bill seemingly providing that single acts could amount to bullying. Mr. Bossino said (Hansard, February 21st, 2014, ll. 281–299):

> "[Clause 4(1)] refers to conduct and there is another point I wish to raise with hon. Gentlemen and Ladies, and it is this: there is no further explanation as to whether the conduct is expected to be repetitive or not. Should there not be, for example, a reference to a course of conduct, which I think is the legislative language in the Protection of Harassment Act? . . .
>
> Much of the literature that I have read on the subject refers to repeated and persistent behaviour, which is what is in fact envisaged in most of the examples set out in clause 4(2), but not all of them . . .
>
> The suggested amendment I have just made in relation to the course of conduct will also go some way to address concerns, which employers will no doubt have, of being at the end of spurious claims, as I mentioned earlier, as a result of one-off actions."

64 The Chairman observed that Mr. Bossino's assertions had not been corrected either by amendment of the Bill or by another member explaining that his interpretation was in fact incorrect. Mr. Cruz however submitted that the reply by the Hon. the Chief Minister was relevant. Although it was in the nature of a "political" reply and not a technical statutory interpretation reply, the Chief Minister said (at ll. 624–630):

> "Let the public know, Mr Speaker, that the Opposition are not going to support legislation designed to prohibit persistent behaviour which is offensive, intimidating, abusive, malicious or insulting. Let the public know that they do not want to stop persistent and justified criticism. Let the public know that they do not want to stop punishment being imposed without justification. Let the public realise, Mr Speaker,

> that they do not want to stop people having changes in their duties or responsibilities to their detriment without reasonable justification."

65 Mr. Cardona's submissions mirrored those he made before the tribunal. The meaning of bullying is contained in s.4(1). Section 4(2) simply provides non-exhaustive examples of types of bullying behaviour. The reasons for this proposition can be summarized as follows:

(i) The term "conduct" in s.4(1) does not mean "course of conduct."

(ii) Section 4(2) does not qualify or limit s.4(1). The word "include" should be given its natural and ordinary meaning. In support he pointed to the fact that s.6(2) also uses the word "include" and that section clearly does not set out an exhaustive list.

(iii) If the examples in s.4(2) were exhaustive then there would be no need to include s.4(3). None of the examples in s.4(2) could properly be said to allow for reasonable action taken by the employer relating to the management or direction of an employee or his employment. Therefore, the inclusion of the s.4(3) exclusion implies that bullying conduct extends beyond the confines of the examples in s.4(2).

(iv) H.M. Government of Gibraltar's Bullying at Work policy (which pre-dates the Act) recognizes that bullying can be a single incident (albeit as an exception). At para. 3 the policy states:

> "Bullying is unlikely to be a single or isolated incident. It is usually, but not exclusively repeated and persistent behaviour which is offensive, abusive, intimidating, malicious or insulting."

(v) It cannot have been Parliament's intention to limit bullying behaviour to repeated acts.

(vi) Section 6(3) deals with bullying acts by third parties. There Parliament expressly provided that bullying needs to have taken place on at least two other occasions. If Parliament intended employee to employee bullying to require more than one instance to fall within s.4, then it would have used the same words used in s.6(3).

66 My first observation is that I can understand how difficulties have arisen in the interpretation of the relevant provisions of the Act. The parties' submissions are all sensibly made. It is however my task to interpret the provisions and decide on the proper construction of s.4.

67 The starting point is to determine whether s.4(2) is exhaustive or non-exhaustive. In my judgment, it is not meant to be exhaustive and on this I therefore agree with both Mr. Licudi and Mr. Cardona. I have to look at the word "includes" in the context of the other provisions of the section and indeed the other sections in the Act. Section 4(3) clearly provides an exception to bullying which cannot relate to the s.4(2) examples. Therefore, it must

relate to other eventualities which are not contained in s.4(2). I also have regard to the fact that the use of the word "includes" in s.6(2) is not meant to be exhaustive. I cannot import two different meanings to the same word in an Act unless this is clearly required. Here it is not. The change in the wording to the Bill as set out in the Command Paper is of little significance and cannot, in any event, override the reasoning I have set out.

68 The next point is whether a single incident can amount to bullying under the Act. The answer is that it can. The word "conduct" in s.4(1) can mean both a single instance or repeated incidents. It is clear from the definitions of bullying which I was referred to at the hearing that bullying is usually a course of conduct or repeated behaviour—but it need not necessarily be so. Furthermore, I consider that the examples in s.4(2)(c) and (d) can be single incident acts. One instance of an imposition of punishment without justification meets the criteria. There is no requirement for persistence, a word which is only used in examples (a) and (b). Likewise, the same could be said for the example in (d)—change in duties or responsibilities without reasonable justification. A change in duty can happen on a single occasion even if the consequences of the change then continue through time.

69 I do not consider that the extracts from Hansard to which I have been referred assist with this point. The contribution by the Hon. Damon Bossino, M.P. questioned whether a single act is sufficient. He does not appear to give a concrete opinion as to how s.4(1) is to be interpreted even if he does express the view that it should be limited to a course of conduct. The reply by the Hon. the Chief Minister is clearly in the nature of a "political" reply and is simply a reading out of the examples in s.4(2).

70 I have found the answer to the next question to be the more difficult one. What happens when behaviour falls within one of the examples in s.4(2)? Can it then only amount to bullying if it meets all of the criteria set out in the relevant sub-paragraph? I conclude that the answer to that second question must be "yes." If the behaviour falls within that described in one of the sub-paragraphs, it must then meet all of the criteria contained in the sub-paragraph in order to amount to bullying.

71 Perhaps the best example to illustrate the point is the example at s.4(2)(c)—punishment imposed without justification. It can be a single instance or any number of instances but it has to be without justification. So the question would be, what other punishment scenario could possibly be contemplated outside of s.4(2)(c)? The answer has to be that there is no other punishment scenario which could reasonably amount to bullying. Therefore, insofar as punishment is concerned, it is caught exclusively by the sub-paragraph. If s.4(2)(c) had said, for example, "unjustified punishment which results in a demotion," then that would leave the door open to other

forms of punishment which could also amount to bullying. The same rationale must apply to the other sub-paragraphs.

72 With regards to s.4(2)(a) in particular, it would make no sense for Parliament to specify that *persistent* offensive or intimidating behaviour amounted to bullying if their intention was that a single act of offensive or intimidating behaviour also amounted to bullying. All that Parliament needed to do was omit the word "persistent." I agree with Mr. Licudi that the insertion of the word cannot have been accidental. It is included in examples (a) and (b) but not in examples (c) and (d). A rationale for the distinction can be that examples (c) and (d) are acts which only the employer can carry out. There is therefore no requirement for persistence. In examples (a) and (b) the acts can be carried out by a fellow employee and therefore persistence is required for the employer to become responsible. Furthermore, if Parliament intended a serious one-off incident of offensive or intimidating behaviour to also amount to bullying then all that was required was for the example in s.4(2)(a) to say: "persistent or serious behaviour which is offensive etc."

73 I therefore conclude that if conduct falls within the behaviour set out in the examples at s.4(2) then all of the criteria in the relevant sub-paragraph needs to be met. There is no test of seriousness which would allow such conduct to be considered outside of the examples. So, for example, even an extremely serious isolated offensive incident does not amount to bullying. It may of course amount to something else, possibly misconduct or even to a criminal offence, but it would not be bullying under the Act.

74 The final question on this issue is whether Dr. Cassaglia's behaviour, as set out in the Chairman's findings of fact, amounts to behaviour which falls within the conduct described in s.4(2)(a)? Mr. Licudi submitted that the behaviour was not offensive, malicious or insulting. This is correct and the submission in fact accords with the Chairman's conclusions. Is it intimidating and/or abusive behaviour? I agree with Mr. Licudi that the findings could easily amount to intimidating behaviour. It can also be said to be abusive behaviour. Mr. Cardona suggested that a violent act was not caught by s.4(2)(a). I disagree. The terms "intimidating" and "abusive" are wide enough to include violent acts such as a push or shouting at someone. It must also be borne in mind that the intention behind the Act is to prevent bullying at work and not to provide protection against criminal acts. For the latter, we have the criminal laws. Indeed, a violent act could be a tort of assault for which an employer could be vicariously liable.

75 Dr. Cassaglia's behaviour as found by the Chairman was intimidating and/or abusive. It was contained in a single isolated incident and so was not persistent behaviour. As such, it does not fall within the criteria set out in s.4(2)(a) and cannot therefore amount to bullying conduct under the Act.

I would consequently hold that the first limb of ground one is made out. This, in effect, disposes of the appeal. I will nevertheless consider the second limb to ground one as well as grounds two and three.

Ground one—limb two

76 If I am wrong about the effect of s.4(2) on s.4(1) and the Chairman was right to find that Dr. Cassaglia's behaviour did not need to be persistent because it was serious, then Dr. Cassaglia says that the Chairman erred in finding that his conduct met such a test.

77 Mr. Licudi first complained that there was no real analysis by the Chairman as to this "seriousness" test. The Chairman simply said that he considered that an isolated incident, if sufficiently serious in nature when viewed subjectively, can amount to bullying for the purposes of s.4(1)—pp. 16 and 67 of the judgment. Mr. Licudi then referred to the Chairman's judgment of January 31st, 2020, which followed the remedies hearing, and which led to the award. The Chairman accepted the parties' submission that compensation should be awarded in accordance with the guidance set out in *Vento* v. *Chief Const. (West Yorks.)* (16). (The case concerned the award of compensation in a sex discrimination case in England. The Court of Appeal identified three bands of compensation for injury to feelings. A top band for the most serious cases; a middle band for serious cases which do not merit an award in the highest band; and a lower band for less serious cases.) The Chairman was urged on behalf of Mr. Stagnetto to classify Dr. Cassaglia's conduct as falling at the upper end of the middle bracket. The Chairman, however, determined that the conduct fell at the upper end of the "less serious" range. It was therefore submitted by Mr. Licudi that there was an inconsistency between the judgment and the award. For the purposes of determining the level of compensation, the Chairman found that the case fell within the "less serious" band. It could not therefore have been a serious case for the purposes of s.4(1).

78 Mr. Licudi in any event described the findings as not particularly serious. A single push but not with an intention to assault and hand gestures and a raised voice. The conduct should have been viewed objectively. It was not serious conduct. Mr. Cardona's simple reply was that this is not something that this appellate court should interfere with. It is a finding of fact by the tribunal which is not said to be plainly wrong. Therefore, this court should not attempt to substitute its own view for that of the tribunal.

79 It seems to me that the principal point is whether "conduct" in s.4(1) has to be viewed objectively or subjectively. As I read *Hancock* (6) (Case No. Ind. Tri. 21/2016, at para. 23), the Chairperson set out a subjective test (as to what the employer intended by its conduct) but then added an element of objectivity by adding the words:

> "I also consider that the conduct must be of sufficient force and I think will generally carry some element of injustice—in order to cause (or be intended to cause) the serious adverse sentiments prescribed in Section 4(1)."

80 The Chairman, whilst endorsing the relevant passage in *Hancock*, set out the test in the following way:

> "So are the above stated actions of Dr Cassaglia viewed together and subjectively sufficiently serious to amount to a one off incident of bullying."

81 What did the Chairman mean by "when viewed subjectively"? A look at the Chairman's comments when he considered whether the claim by Mrs. Olivares Smith was made out may provide the answer. There, the Chairman said:

> "The essence of the complaint here is that Dr Cassaglia used a raised, or even an aggressive voice whilst verbally pointing out, as he was entitled to do, his opinion that Mrs Smith did not have the authority to stop his request; this over a period of less than a minute. In my opinion such behaviour would have to be brought within the ambit of the example set out in section 4(2)(a) in order to be conduct that amounts to bullying. This being the case the behaviour has to be 'persistent'. Even if Mrs Smith may have considered what occurred in the Histology office and/or in the corridor to be offensive, intimidating or insulting the fact remains that at the end of the day it was a one off incident and, in my opinion, not an incident sufficiently serious when viewed subjectively as to bring it within the ambit of a one off act of bullying."

This suggests that he was applying two subjective tests. First, did Mrs. Olivares Smith feel some offence or felt intimidated or insulted? Secondly, was the impact on Mrs. Olivares Smith sufficiently serious? He cannot have applied a subjective test as to what Mrs. Olivares Smith felt and then applied a second subjective test as to what he himself thought of the conduct. An arbiter has to either apply an objective analysis, based on what a reasonable person would think, or a subjective analysis of what a perpetrator or victim thought.

82 To the extent that the Chairman is saying that an analysis of a complainant's feelings on its own is insufficient, I would respectfully agree with him. Applying a subjective element on its own to s.4(1) cannot have been what Parliament intended. If all that was required was a subjective test as to whether an employee felt alarmed *etc.*, then that could give rise to absurd results in the case of an overly sensitive employee who genuinely, but unreasonably, felt any one of the sentiments set out in s.4(1). (The proviso set out in s.4(3), that reasonable action taken by an employer relating

to the management and direction of the employee does not amount to bullying, does not cure this issue. An incident could arise between employees outside of action taken by an employer.) There has to be objectivity when looking at the conduct complained of.

83 Mr. Cruz highlighted that the Bullying at Work Policy requirements for employers, which are contained in the Schedule to the Act, provide that investigations into complaints have to be objective. Specifically, para. 2(c) of the Schedule provides that the Policy must include:

> "a clear statement of the procedure for bringing complaints and the manner in which they will be dealt with which must include a commitment that complaints of bullying will be taken seriously, investigated objectively and dealt with in confidence and must allow the complainant to be represented by a representative of his choice at all stages . . ."

I agree that this does indeed provide support for my conclusion on objectivity.

84 There are two different elements to s.4(1). First, there has to be conduct. Secondly, the conduct must have the purpose or effect of causing alarm *etc*. In my judgment, the conduct has to be viewed objectively. Is the conduct complained of behaviour which, objectively, could cause alarm, distress, humiliation or intimidation? If the answer is yes, then a subjective test needs to be applied to whether it had the purpose or effect of causing those sentiments. When looking at purpose you look at what the perpetrator intended. When looking at effect, you look at what the victim felt. Only one of either purpose or effect is required to satisfy s.4(1) although of course both will be present in many cases.

85 The s.4(3) proviso is then applied as a third element—although for obvious reasons this could only be applied to an "effect" case and not to a "purpose" case. If an employer's purpose is to cause alarm *etc*., then it can never be reasonable action.

86 I conclude that objectivity should have been applied to the findings of fact made by the Chairman. Was it conduct that could have caused alarm, distress, humiliation or intimidation when viewed objectively? In my judgment, a tribunal could quite properly find that the findings of fact in this case do amount to such conduct. I do not consider that the classification by the Chairman of the conduct as a "less serious" case for the purpose of assessing the level of compensation detracts from that. I do not propose to say any more about what impact the application by the Chairman of a subjective test on the conduct should have on the appeal as it would not in any event affect the result in light of my conclusion on the other grounds.

Ground two

87 The second ground of appeal is the following:

> *The Chairman erred in law by failing to engage with the required multi-factorial assessment of whether the conduct amounted to bullying attributable to the employer—as opposed to a one-off, unauthorized act which reasonably and fairly cannot amount to institutional bullying within the meaning of the Act.*

88 This second ground of appeal makes a simple point. It is said on behalf of Dr. Cassaglia that when there is a one-off incident between employees, which an employer could not have had prior knowledge of, liability should not be attributed to the employer. The findings of fact in this case concern an incident between two employees which was not premeditated. It was a single one-off incident which took place over a short space of time. It could not have been foreseen by an employer. How then can an employer be held liable for such an incident? The reply by both Mr. Cruz and Mr. Cardona was simply that the Act makes an employer vicariously liable for the actions of an employee. The employer therefore assumes responsibility for whatever the employee does in the course of his employment. Furthermore, the Act provides that it is a defence to a claim if an employer shows that he has a bullying at work policy; that he has taken all reasonable steps to implement the policy; and if he takes steps to remedy any loss, damage or other detriment suffered by a complainant (s.6(5)). This deals with any unfairness caused by the imposition of strict vicarious liability on an employer.

89 The main thrust of the argument made by Mr. Licudi was based on the wording of s.6(1) and s.9(2) of the Act. The first of these sections says that: "An employer (A) must not, in relation to employment by A, subject an employee (B) to bullying." Section 9(2) then provides that when determining the level of compensation the tribunal shall have regard to "the seriousness, frequency and persistence of the employer's breach." Mr. Licudi's submission was that s.6(1) required the employer itself to subject an employee to bullying. If Parliament had intended to provide for strict liability, then it would have used the words "shall be liable." Further, that this was reflected in s.9(2) which talks of the "employer's breach." There therefore has to be attribution of fault to the employer. This is also supported by the examples in s.4(2). The first two examples require persistence. If behaviour is persistent then an employer can quite sensibly be attributed the blame because it has either chosen to ignore a situation or has failed to implement a proper policy. The second two examples are examples of conduct which are attributable to the employer himself, therefore those do not require persistence. This distinction, he says, supports the argument that a single, one-off incident of the type we are concerned with cannot be attributed to an employer.

90 Mr. Cruz referred the court to *Majrowski* v. *Guy's & St. Thomas' NHS Trust* (9), a case before the House of Lords which concerned whether an employer was vicariously liable for harassment committed by an employee in the course of his employment. Lord Nicholls of Birkenhead set out the rationale for the concept of vicarious liability. He said ([2006] UKHL 34, at para. 9):

> "Whatever its historical origin, this common law principle of strict liability for another person's wrongs finds its rationale today in a combination of policy factors . . . Stated shortly, these factors are that all forms of economic activity carry a risk of harm to others, and fairness requires that those responsible for such activities should be liable to persons suffering loss from wrongs committed in the conduct of the enterprise. This is 'fair', because it means injured persons can look for recompense to a source better placed financially than individual wrongdoing employees. It means also that the financial loss arising from the wrongs can be spread more widely, by liability insurance and higher prices. In addition, and importantly, imposing strict liability on employers encourages them to maintain standards of 'good practice' by their employees. For these reasons employers are to be held liable for wrongs committed by their employees in the course of their employment."

91 Mr. Cardona highlighted examples where an employer had been held vicariously liable and which show that a wide interpretation is given to the concept of vicarious liability. In *Mohamud* v. *WM Morrison Supermarkets plc* (10), the UK Supreme Court held that an employer was liable for an assault which took place when a member of staff followed a customer outside of the workplace and assaulted him. In *Bellman* v. *Northampton Recruitment Ltd.* (3), the English Court of Appeal held that an employer was liable for an assault that was occasioned by the Managing Director on another employee at an office Christmas party.

92 Mr. Licudi's response was that vicarious liability is a secondary liability. It arises if an employee himself would be liable for a breach. In such a case, the employee has primary liability and the employer has secondary liability. In the case of *Majrowski* for example, the liability under s.3(1) of the UK Protection from Harassment Act 1997 was a liability of the person committing the act of harassment. The courts were then considering whether secondary liability should attach to the employer. This is in contrast to our situation where the Act only provides for the primary liability of employers. It is not therefore a question of strict vicarious liability for whatever an employee does but is a question of what liability the Act imports on the employer. I agree.

93 Although the common law concept of vicarious liability extends to breaches of statutory duty by an employee and not just to common law

wrongs—see Lord Nicholls' judgment in *Majrowski* (9) ([2006] UKHL 34, at para. 10)—it is clear that the Act does not provide for the liability of an employee. There is therefore no question of vicarious liability for bullying. The Act provides for employers to be liable for actions undertaken by employees or third parties but, strictly, that is a different thing. It is a primary liability imposed by statute on the employer.

94 Mr. Licudi contrasted the provisions of the Act to the Equal Opportunities Act 2006. In its s.47, that Act imposes liability on an employer for the actions of an employee. It provides:

> "47.(1) Anything done by a person in the course of his employment shall be treated for the purposes of this Act as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval."

It was submitted that if Parliament wanted to impose the same type of strict liability on an employer under the Act, it could easily have adopted this same wording.

95 In my judgment, there has to be a consideration of whether the behaviour or incident can be attributable to the employer for it to fall within s.6(1). The fact that an employer has to *subject* an employee to bullying under s.6(1) for it to be liable ties in with the examples contained in s.4(2). In examples (c) and (d) of s.4(2) it is the employer himself who is doing the acts. In examples (a) and (b), there is a requirement for persistence. As Mr. Licudi said, if there is more than one incident of abusive behaviour or unjustified criticism then it is likely that something has gone wrong with the policies that an employer has in place. In those circumstances, he has subjected his employee to bullying through the actions of the offending employee.

96 Notwithstanding the fact that at the material time Dr. Cassaglia was the most senior person within the GHA, the claim against the GHA was brought on the basis that Dr. Cassaglia was an employee and not on the basis that he personified the employer. The behaviour found by the Chairman was a one-off isolated incident which could not have been foreseen by the GHA. The GHA cannot be said to have subjected Mr. Stagnetto to bullying and was not therefore in breach of s.6 of the Act. The second ground of appeal is also made out.

Ground three

97 The third ground of appeal is the following:

> *The appellant's interests and reputation have been adversely affected by the tribunal's decision, yet he did not receive a fair hearing.*

98 Dr. Cassaglia complains that his right to a fair hearing before the tribunal was breached. He was, in Mr. Licudi's words, "intrinsically and intimately" affected by the decision. It was his conduct which was at the heart of the proceedings, as has been discussed earlier in the judgment in the context of his right to appeal. Notwithstanding, he was only involved in the proceedings as a witness. The effect of that was that he was not served or provided with the claim forms until February 7th, 2019; he was never served with the responses by the GHA; he was not served with witness statements or the disclosure exchanged by the parties; he was not notified of preliminary or directions hearings; and he was not represented at the substantive hearing. The GHA took a neutral position before the tribunal and Dr. Cassaglia therefore says that his defence to the allegations was not properly advanced. As a person whose conduct was at the heart of the proceedings, his defence ought to have been properly and fully put to the tribunal.

99 Mr. Stagnetto's position is that Dr. Cassaglia's interest in the claims before the tribunal was simply as a witness. Mr. Cardona submitted that, as a witness, his rights were fully protected.

100 Mr. Cruz made some written submissions on this ground of appeal on behalf of the GHA.

101 I shall approach this ground of appeal by first determining whether Dr. Cassaglia was entitled to a fair hearing. If he was, then I will look at whether his right to a fair hearing was in fact breached. Before doing so, I will turn to the evidence in the case.

"Unfairness evidence"

102 Dr. Cassaglia filed a witness statement dated September 8th, 2020 in which he deals with both the unfairness evidence and his materiality evidence. (He also filed a second witness statement dated February 19th, 2021 which I discuss in the next section of this judgment, and which relates only to Dr. Cassaglia's materiality evidence.) Dr. Cassaglia gave live evidence and was cross-examined by Mr. Cardona but not by Mr. Cruz. Dr. Cassaglia did say that he did not agree with the Chairman's conclusions and alleged that Mr. Stagnetto, and the other witnesses called in support of Mr. Stagnetto's case, had lied and conspired against him but, beyond that, no evidence was tendered about the events of September 20th, 2017.

103 The GHA filed evidence addressing the unfairness point. It produced witness statements by Ms. Lesley Louise dated February 2nd, 2021 and by Mr. Mark Isola, Q.C. dated February 5th, 2021. As I have already indicated, their evidence was not challenged.

104 Ms. Louise is the Head of H.M. Government of Gibraltar's Health and Care HR, which provides human resources services to the GHA. Her

witness statement deals with three principal issues: the documents that the GHA provided to Dr. Cassaglia relating to the bullying claim; the GHA's position of neutrality; and the question of whether the GHA was also looking after Dr. Cassaglia's interests.

105 Mr. Isola is a senior partner in the law firm Isolas LLP ("Isolas"). Isolas acted for the GHA in the bullying claim before the tribunal and Mr. Isola was leading counsel. He filed a witness statement to address Dr. Cassaglia's contention that he had assumed that Isolas and/or Mr. Isola were acting for him in the tribunal's proceedings as well as for the GHA.

106 Dr. Cassaglia's witness statement of September 8th, 2020 is 39 pages long. It contains a summary on pp. 2 and 3 which usefully sets out the main points being made and which I reproduce:

> "[4] I was not made a party to the tribunal proceedings. Instead, prior to the hearing, I was asked to provide evidence in support of the GHA's defence of this claim. At its request, I handed over all of my relevant and highly confidential documents and agreed to give evidence. I thought my position would be protected. Indeed, I was told it would be. I did not realise that I could or less still ought to have been made a party. In the light of the Chairman's findings and the approach adopted by the GHA, it is now clear that as a matter of elementary fairness I ought to have been made a proper party to the proceedings and had independent representation. Numerous advantages would have flowed from that status (or to put it another way, numerous serious injustices avoided), including prior access to the evidence of all other witnesses, the right to file written submissions, the right to call my own witnesses, to cross-examine other witness and to make targeted oral submissions in my defence.
>
> [5] None of these procedural advantages were afforded to me. During the tribunal proceedings, I had in effect become a respondent but was denied the opportunity to defend myself or benefit from independent legal representation in the tribunal or to assist with preparing my evidence and supporting witnesses. As will become clear below, I had some legal assistance with respect of the internal disciplinary process. I had not instructed anyone to represent me in the tribunal proceedings as I had not been made a party and understood that I would be giving evidence for the GHA and that the GHA would adopt and protect my position. I had furthermore been told that I was being adopted by the legal team (Isolas) representing the GHA, which made sense as I had thought our interests were aligned.
>
> [6] The judgment has caused me great distress and reputational damage. I have been fighting to clear my name ever since . . .

> [7] When I received the judgment, I was shocked to see that the Chairman had made the findings he did against me and in particular had not understood my position. At that stage, I asked Hassans to become involved in the tribunal matter and advise me as to my rights going forward. I explained why I was upset with the judgment given that I was under the impression that the GHA and its legal team had fully adopted my case and my interests. Yet, the Chairman records the GHA as having taken a neutral stance. Further, the Chairman had not understood at all my case to the effect that the complainants along with other laboratory staff had concocted a case against me for reasons which I will more fully set out below. Hassans then advised on my rights going forward.
>
> [8] Initially, following the judgment, my lawyers (Hassans) contacted the GHA and asked the GHA to appeal the decision. My counsel provided draft summary grounds raising a number of issues. The GHA issued a notice of appeal but apparently (unknown to us) not advancing all of the grounds provided by my lawyers. We were not provided with a copy. It later transpired that the GHA took only one point as I understand it limited to the question of whether a single act can amount to bullying. Unfortunately, in October 2019 the GHA decided to withdraw its appeal. I was then stuck. I was not a party and had not appealed the tribunal decision. Because the GHA had abandoned its appeal, my lawyers advised me to file a judicial review claim . . ."

107 I shall deal with seven distinct issues raised in the evidence and which go towards the arguments on unfairness which are being made on behalf of Dr. Cassaglia.

(i) *When did Dr. Cassaglia become aware that the bullying claims had been filed?*

108 Dr. Cassaglia's evidence was that he had not been formally informed of the bullying claims until January 2019—although he acknowledged that he had been made aware in late 2018 that the claims had been made. It was put to him in cross-examination that Ms. Louise had actually informed him about the claims in April 2018. His reply was that it had been an informal conversation with Ms. Louise and he could not be sure whether it took place in April 2018 or later that year. Mr. Cardona suggested that Dr. Cassaglia was misleading the court or being reckless as to the evidence he was giving. This, Mr. Cardona said, was because by the time his witness statement was signed he must have seen a letter produced by the GHA referring to the fact that Dr. Cassaglia had been informed about the bullying claim at some point between April and July 2018. Dr. Cassaglia disagreed. He held a genuine belief that it was in late 2018 when he was first told.

109 Mr. Cardona also referred to the fact that Dr. Cassaglia's solicitors must have become aware of the claims in April 2018, when notice of the claims was sent to all of the tribunal's Chairpersons—as part of a standard process which leads to the selection of a Chairperson for a claim. (The lawyer acting for Dr. Cassaglia in the disciplinary proceedings, Ms. Gillian Guzman, Q.C., sits as a Chairperson.)

110 There is no doubt that Dr. Cassaglia was aware of the fact that a claim had been issued at some stage in 2018. Although he appears to be wrong about the timings, I accept that he believes that this took place in late 2018. On balance, however, I find that he would have been aware of the claims in April 2018 or very shortly thereafter. In any event, whether it was April or later in the year is not strictly material. Furthermore, there is no dispute that the first formal communication to him about the tribunal claims was in January 2019.

(ii) *Did Dr. Cassaglia believe that his interests in the tribunal were aligned with those of the GHA and that he was being represented by the GHA's lawyers?*

111 At paras. 52 and 53 of his main witness statement, Dr. Cassaglia says the following:

> "[52] In early 2019 I was told by Hassans (which was assisting me with the internal investigation and related matters) that the GHA had Appointed Mr Mark Isola to represent the GHA at the Tribunal. Mr Isola was instructed directly by Minister Costa. Hassans spoke with Mr Isola and was reassured by Mr Isola that he was adopting me and my interests (see further below). I had prepared a file of documents, statements and other important and confidential material relating to the internal disciplinary proceedings.
>
> [53] At the request of the GHA, these documents were passed to Isolas who were acting for the GHA. This was to assist the GHA in its defence of the Bullying Act claim. It is my understanding (because this is what I was told) that the documents were transferred to the GHA on the basis of an agreement that the GHA/Isolas would adopt me and my interests as if I was their client. The interests of the GHA and me were, it seemed to me, aligned as the GHA wished to defend itself against a statutory bullying claim. The understanding was therefore that my interests would be fully protected; that there would be an investigation into the allegations; work done to fully understand my case on concoction/collusion and in particular the motives of the laboratory staff to lie; that witness statements would be collected and my position explained to the Chairman."

112 The GHA's position is that they never told Dr. Cassaglia that his interests were being represented by the GHA. At paras. 13 to 16 of her witness statement, Ms. Louise explains that the GHA adopted a neutral stance. She states:

> "[13] Following service of the Claim Forms in December 2017, the GHA instructed [Isolas] to represent it. Isolas were instructed by the Previous Chairman to adopt a neutral position on behalf of the GHA throughout the conduct of the Employment Tribunal Claims.
>
> [14] I was aware in early 2019 that Isolas were liaising with the solicitors for the First Respondent [Phillips], regarding the Appellant's role in providing evidence in support of the GHA's response to the Employment Tribunal Claims. At this stage in the Employment Tribunal Claims, the GHA's rebuttal of the Allegations (and not its legal argument that a single act could not constitute bullying) was reliant on the Appellant providing a witness statement.
>
> [15] During pre-trial case management correspondence with the Secretary to the Employment Tribunal, Phillips made the following submission in response to an attempt by Isolas to amend (for a second time) particulars of the GHA's reply:
>
> > 'Dr Cassaglia should be playing no role in this case let alone involvement in instructing the GHA's solicitors.'
>
> [16] It is a matter of public record that at the trial for the Employment Tribunal Claims, [the Chairman] prevented counsel for the GHA from conducting a searching cross-examination of either claimant's evidence on the basis that it would compromise the GHA's neutrality: it is also a matter of public record that this was not resisted by Phillips."

113 On the question of whether the GHA was looking after Dr. Cassaglia's interests as well as its own, Ms. Louise says the following at para. 21 of her statement:

> "It has been suggested by the Appellant that the GHA held itself out as intending to look after the Appellant's interests as well as its own. I was never privy to any conversations between Isolas and the Appellant which confirm or refute this suggestion. I did not instruct Isolas to also act for the Appellant."

114 Mr. Isola's statement explains that when the first response was filed by the GHA on January 26th, 2018 it had been envisaged that the disciplinary proceedings would have been concluded prior to the substantive hearing of the bullying claim in the tribunal. As a result, the first response was a "holding defence" based on points of law and reserving the right to file an amended response once the outcome of the disciplinary proceedings

was known. A second response was filed on December 14th, 2018 once the tribunal decided to hear the bullying claim without awaiting the outcome of the disciplinary proceedings. That second response set out a sole defence to the claim based on the point that a single incident could not constitute bullying under the Act. It also set out that the GHA was adopting a neutral position on the evidence. The s.6(5) defence that had formed part of the first response was withdrawn. (The s.6(5) defence was a defence that the GHA had a bullying policy and had taken steps to implement and enforce it.) At para. 13 of the witness statement Mr. Isola then says:

> "A meeting took place at a high level between the GHA and the Appellant and/or the Appellant's solicitors in early January 2019, which I was not party to, to determine whether the Appellant would be willing to be called as a witness of the GHA. This subsequently resulted in me being instructed to contact the Appellant's lawyers Messrs Hassans . . . To the best of my recollection, I met with the Appellant for the first time to take his witness statement on the 29th January 2019 and which he signed on 7th February 2019."

115 Mr. Isola explains that he was instructed to file a third response to re-introduce the s.6(5) defence and apply for an adjournment of the tribunal's proceedings. In the event, the Chairman rejected the re-insertion of the s.6(5) defence and refused the adjournment.

116 On the question of whether he told Dr. Cassaglia that he would be acting for him as his own client, Mr. Isola states as follows at para. 15 of his witness statement:

> "I never told the Appellant I would adopt him as my client. Notwithstanding that, the Appellant was requested by the GHA to provide witness evidence for it. Whether he perceived/thought/ assumed that by doing so the GHA had adopted his defence/interests is not a matter I can comment or speculate on, and nor was I party to all conversations the Appellant and/or his solicitors, may have had with the GHA in this respect. What I can say is that I was not instructed by the GHA, or requested by the Appellant, or his solicitors, to provide the Second Response to him or them, or for that matter the Third Response, and without which the Appellant might not have been made aware of the fact that the GHA was adopting a neutral position on his evidence."

117 Mr. Isola's evidence was not challenged. Dr. Cassaglia accepted that at no time had he been told by Mr. Isola that he was adopting him as a client. Mr. Isola does however make an important point. The GHA's second or third responses were not provided to Dr. Cassaglia. Without those, Dr. Cassaglia might not have been aware that the GHA was adopting a neutral position on the evidence.

118 Dr. Cassaglia explained that as Medical Director he had been involved in a number of claims before the Employment Tribunal. When the GHA defended a claim before the tribunal it was because it was advised by its legal team that the claim was not a strong one. He therefore assumed that if Mr. Stagnetto's and Mrs. Olivares Smith's claims were proceeding to a hearing it was because the GHA was defending them. In order to defend the claims, the further assumption he made was that the GHA was taking his side and was disputing the facts. He did not think that it was possible that the GHA would not take sides and did not understand it could happen. A flaw in this assumption was put to him by Mr. Cardona. Why would the GHA take such a position if disciplinary proceedings were being pursued against him arising from the same incident? Dr. Cassaglia's reply was that the disciplinary proceedings was a different process. He further explained that he had met with Mr. Isola on three separate occasions, including on a visit to the laboratory which took place so that Mr. Isola could view the location for himself. He had received help from Mr. Isola with his witness statement for the tribunal. He had suggested potential witnesses to him, including Mr. Nicholas Reyes. Dr. Cassaglia also provided Mr. Isola with screen shots and timings for different parts of the incident. In light of those interactions, he had assumed that his interests and those of the GHA were aligned.

119 The email exchanges between Mr. Isola and Ms. Guzman on January 21st, 23rd and 24th, 2019 in the run up to the tribunal hearing are significant. On January 21st, 2019, Ms. Guzman forwarded to Mr. Isola a number of documents and said as follows:

> "As discussed, the GHA has put Dr Cassaglia in an extremely difficult position by not having involved him in this process until now, and we consider that any subsequent disciplinary proceedings are now untenable; we confirm however he is fully committed to giving evidence and assisting with the defence of this claim the details of which no doubt you will now provide him with."

120 The reply from Mr. Isola on January 23rd, 2019 disputed the assertion that the disciplinary proceedings had become untenable as a result of the GHA seeking a witness statement from Dr. Cassaglia, but said the following:

> "Unfortunately, without your client's evidence, the GHA is unable to defend the ET claim, which is based on allegations of bullying on the part of your client, and for which the GHA would be vicariously liable under the terms of [the Act]."

A reasonable inference which can be drawn from this comment is that the GHA would be defending the claim on the facts, based on Dr. Cassaglia's version of events. (The fact that this may not be what Mr. Isola actually

meant by the email is immaterial for present purposes. I am simply looking at what Dr. Cassaglia was told and what he thought.)

121 Ms. Guzman replied on January 24th, 2019. She set out Dr. Cassaglia's position on the disciplinary proceedings exchanges and then said the following:

> "As regards the ET claims which must now be the focus of our discussion, as stated, Dr Cassaglia will cooperate fully with you. We have already given you relevant material and will forward the original Investigation Report separately. As discussed during our telephone conversation last Friday, we have been dealing with this case since inception and have information that can only but assist our client and by extension yours."

122 It is also curious to note the stance taken by Mr. Stagnetto's lawyers at a time when the GHA had not yet filed any evidence. In an email sent by Mr. Cardona to Mr. Isola on January 15th, 2019 (sent on a *without prejudice* basis at the time), Mr. Cardona said:

> "Having considered your Defence, in which your client makes far-reaching admissions, I find it very odd that no proposals for settlement have been forthcoming.
>
> The only real issue is whether the incident took place and in that regard you have simply put us to proof, which can only mean that you are not calling any witnesses to the incident.
>
> It seems unreal that my clients will not come up to proof when kicking into an open goal.
>
> Do you have instructions or are you expecting instructions to try and settle this case?"

This email shows that Mr. Stagnetto's lawyers were of the view that unless the GHA presented evidence of its own, the GHA could not defend the claim.

123 Dr. Cassaglia was questioned about the file of evidence which he said had been provided to Isolas. In his witness statement at para. 55, Dr. Cassaglia stated that he understood his papers had been provided to Isolas, Mr. Stagnetto and Mrs. Olivares Smith, and the GHA. When challenged by Mr. Cardona about this, he confirmed that he had simply assumed they had also been disclosed to Mr. Stagnetto and Mrs. Olivares Smith. He was then taken by Mr. Cardona to the documents that had been provided and it was put to Dr. Cassaglia that there was no danger of the disclosure making his disciplinary proceedings untenable. He insisted that the effect of the disclosure, when the documents are viewed together, was prejudicial.

124 On the provision of documents, Ms. Louise says that although she had informally notified Dr. Cassaglia of the bullying claims in April 2018, she did not provide him with copies of the claim forms until January 2019. When Dr. Cassaglia was asked to provide a witness statement in support of the GHA's response, he was given copies of the claim forms of both Mr. Stagnetto and Mrs. Olivares Smith and their particulars of complaint.

125 Reference was also made to an email sent by Dr. Cassaglia to Mr. Isola on March 31st, 2019. In the email, Dr. Cassaglia sent Mr. Isola documentation and said the following:

> "Please see attached. I haven't redacted the personal information and I am disclosing to you under legal privilege. If it needs to be passed on we should redact all patient identifying details."

A reply sent by Mr. Isola some twenty minutes later did not refer to the documents or question the phrase "legal privilege." Dr. Cassaglia was asked what he meant by it. He explained that he meant information that would be privy to him and his legal team and not given to anyone else. However, I observe that by March 31st, 2019, Dr. Cassaglia knew that the GHA were adopting a neutral position—see below.

126 On being further questioned as to why he felt reassured that his interests were being defended by the GHA, Dr. Cassaglia said that he would have expected the professionals to have told him that he was not being represented. He likened the situation to a patient not being told by his doctor what his options for treatment were, saying: "you can't blame a patient for not knowing which question to ask."

127 Dr. Cassaglia's evidence was that the first time he had come to know that the GHA were taking a neutral stance was on March 28th, 2019, the first day of the hearing in the tribunal. His wife, who sat through the proceedings, informed him about it during the lunchtime break. It had come as a complete surprise. (Dr. Cassaglia was not himself present. When he attended the tribunal a day before the substantive hearing was to commence, he was told by Mr. Isola that he should leave and that he should only attend to give evidence.)

128 I accept Dr. Cassaglia's evidence that up until the first day of the hearing in the tribunal he believed that the GHA were looking after his interests.

(iii) *Becoming a party to the claim*

129 Dr. Cassaglia explained that he only learnt that he could have applied to become a party in the bullying claim after the GHA withdrew their appeal. (Isolas wrote to Hassans on October 1st, 2019 informing them that their appeal against the Chairman's judgment was to be withdrawn. In that

letter they referred to the fact that Dr. Cassaglia had not availed himself of his right to apply to become a party.) Mr. Cardona asked him whether he had been told by his own lawyers, prior to the tribunal hearing, that he could apply to become a party but Dr. Cassaglia chose not to answer that question on the grounds of legal privilege.

130 Mr. Cardona suggested that adverse inferences could be drawn by Dr. Cassaglia's failure to answer the question. Mr. Licudi however referred the court to *Phipson on Evidence*, 19th ed., para. 23.22, at 677–678 (2018). This states as follows:

> "No adverse inference can be drawn from a claim for privilege. It would be inconsistent with privilege existing as a fundamental right on which the administration of justice is based for a court to draw any adverse inference from the making of a valid claim to privilege. In *Wentworth v Lloyd* [[1864] 10 H.L.C 589] the Master of the Rolls had laid it down that where a party chose to exercise his privilege to prevent his solicitor as witness from divulging confidential information he must be subject to the rule that the keeping back of evidence must be taken most strongly against the person who does so. In the House of Lords, Lord Chelmsford protested most strongly against any such proposition as being entirely at variance with principle and utterly in contradiction to the principle of professional confidence and as denying him the protection afforded him by the law for public purposes, and taking away a privilege which could thus only be asserted to his prejudice. In *Sayers v Clarke Walker* [[2002] EWCA Civ 910] the Court of Appeal more recently reaffirmed this principle, holding that it was not permissible to draw adverse inferences from a refusal to waive privilege."

It seems to me to be clearly established that no adverse inference should be drawn by the failure to answer the question and I shall not do so.

131 Nothing in the documentation and exchanges that have been referred to me suggest that Dr. Cassaglia knew, or ought to have known, that he could have applied to become a party until the relevant provisions of the Employment Tribunal (Constitution and Procedure) Rules 2016 were mentioned in Isolas' letter of October 1st, 2019. I accept his evidence that, until that point in time, he did not know that becoming a party was a possibility. (Whether or not such an application would have been successful is of course another matter.)

(iv) *Inability to raise confidential matters at the tribunal hearing*

132 One of the complaints being made by Dr. Cassaglia is that he was denied the opportunity to raise confidential matters in private during his questioning in the tribunal. Mr. Cardona suggested that all that Dr. Cassaglia

had tried to do was raise matters concerning the investigation relating to the child patient to contextualize why he had gone to the laboratory that afternoon. Dr. Cassaglia rejected that and explained that he wanted to give evidence in private about the many issues which he was concerned about regarding the pathology department and which he says led to the collusion by the witnesses. He had wanted to raise confidential patient information and other issues which could undermine public confidence in the GHA. He thought that if he raised these matters the tribunal would understand his case better. He did not do so because the Chairman refused to sit in private.

133 There is no transcript of Dr. Cassaglia's evidence before the tribunal. (The recording equipment malfunctioned on the day he gave evidence.) The Chairman's notes of Dr. Cassaglia's evidence appear to be quite extensive. However, there is no reference to Dr. Cassaglia's request to give the evidence in private. This is understandable as it must have involved an exchange between Dr. Cassaglia and the Chairman, and was not strictly evidence which the Chairman wanted to make a note of for his deliberation.

134 Dr. Cassaglia's witness statement of October 15th, 2018 does not go into the materiality evidence which he is now putting forward. Having heard his evidence, I am nevertheless satisfied that he would have gone into the detail of why he says the claimants and witnesses had a motivation to lie if he had been given an opportunity to do so.

(v) *Was Dr. Cassaglia directly affected by the award?*

135 Dr. Cassaglia was challenged by Mr. Cardona on whether he had been directly affected by the award. Dr. Cassaglia agreed that he was not named in the award and that he did not have to pay compensation or do anything following the Chairman's judgment, however, he was adamant that he had been greatly affected by it. He explained that the hearing had taken place in public and that he had been portrayed as the defendant in the news. He also said that he had been harassed in social media and had been called "the bully." There were memes circulating with his face on where he was labelled as a bully. Furthermore, he had to step down from his role as Medical Director at a meeting he held on October 10th, 2019 with the Chief Secretary, as the union was threatening to go on strike in the week before the general election if he was not removed from the post. Dr. Cassaglia's evidence was that all these consequences flowed directly from the tribunal's judgment.

136 I agree that it was the tribunal's judgment that led to Dr. Cassaglia not continuing in his post as Medical Director. This is borne out by the following timeline and facts:

(i) Dr. Cassaglia continued in his post as Medical Director from the day of the incident on September 20th, 2017 to October 10th, 2019—a period

of just over two years. In that time, an investigation board found a *prima facie* case of serious misconduct against him which led to the GHA instituting disciplinary proceedings. Nevertheless, he was not interdicted or removed from his post.

(ii) On October 23rd, 2017, a union official at the GHA published a bulletin calling on the suspension of a "senior member of the GHA Executive team" following an "alleged assault on one of our shop stewards." This was clearly a reference to Dr. Cassaglia and Mr. Stagnetto. Following a complaint by Dr. Cassaglia's solicitors to the union, the bulletin was withdrawn. An email of October 24th, 2017 between union officials states that no further bulletins should be posted and that they needed to allow "due process to be played out."

(iii) The tribunal handed down its judgment on August 23rd, 2019.

(iv) A union press release published on September 23rd, 2019 called on the GHA to accept the tribunal's findings and withdraw its appeal.

(v) On October 1st, 2019, GHA union members agreed to stage a demonstration if Dr. Cassaglia was not removed from the post of Medical Director. Item 2 of the draft minutes of a meeting of union representatives held on that day is headed: "The case of the Medical Director—Dr D Cassaglia MD public tribunal outcome." Under "Action," the minutes state:

> "It was unanimously agreed that if the GHA continued to fail to take action and remove the current MD from post and retract the appeal, that a peaceful protest demonstration would take place on Wednesday 9 October by the whole of the healthcare sector and supporting AAC Unite members."

(vi) On October 10th, 2010, Dr. Cassaglia stepped down from the post of Medical Director at a meeting with the Chief Secretary. At p.37 of his witness statement Dr. Cassaglia says:

> "I met with the Chief Secretary who I assumed was acting on behalf of the Government of Gibraltar and had arranged to meet me in response to the threat by the Unions to go on strike in the week of the general election if I was not removed from my post as MD CEO (Election date 17/10/19). I decided that for the good of the government and Gibraltar that I would temporarily step down from my MD.CEO role to return to Paediatrics pending the outcome of the internal disciplinary process. Despite promises to the contrary, the matter was immediately leaked to the press."

137 The award did not name Dr. Cassaglia or require anything from him. However, it is indisputable that he had to step down from his post as Medical Director because of the tribunal's judgment.

(vi) *The referral to the General Medical Council*

138 Dr. Cassaglia explained that he had made a self-referral to the GMC on October 25th, 2019. That he had done so as a result of the tribunal's judgment. There had been no need to do so prior to that, although he had discussed the matter with the GHA's GMC responsible officer. The responsibility on a registered member is to refer once an allegation is determined and not beforehand. Following the referral, the GMC confirmed that it was reviewing his fitness to practise. This is serious because he cannot practise as a doctor in Gibraltar unless he is registered with the GMC. It was put to Dr. Cassaglia that the tribunal's findings did not bind the GMC. He was not sure about that and said that he was reliant on legal advice on the matter. He did in any event confirm that the GHA have no concerns about his fitness to practice.

(vii) *The delays to the disciplinary proceedings and the relevance to those proceedings of the Chairman's findings*

139 As to the disciplinary proceedings, Dr. Cassaglia said that he was having difficulty understanding who was doing what as the process had been delegated to the Chief Secretary and it had not been constituted under the usual GHA procedures. It was then suggested by Mr. Cardona that Dr. Cassaglia had done everything in his power to disrupt the disciplinary proceedings. This was not accepted. According to Dr. Cassaglia, the reasons for the numerous adjournments of the disciplinary proceedings was that his legal team had concerns about the procedures which were being followed. (I have not found it necessary to rule on whether the objections to the disciplinary process and the requests for adjournments were reasonable and/or necessary.)

140 Dr. Cassaglia accepted that the disciplinary board would be making decisions about his misconduct independently of the Chairman's findings. However, Dr. Cassaglia added that he thought it was "foolish" to think that the board would not be influenced by the publicity and findings—although he had no reason to distrust the board.

"Materiality evidence"

141 In his witness statement of September 8th, 2020, Dr. Cassaglia sets out an outline of the concerns he had with the pathology department on practice standards and on what he refers to as "Quality Assurance and accountability." Dr. Cassaglia had wanted to improve patient safety, quality of care and performance across the GHA. In relation to the pathology department in particular, Dr. Cassaglia says at para. 32 of his witness statement: "There were also continued concerns about the laboratory services, reporting of results and the accuracy of results." Dr. Cassaglia explains that he encountered a lot of resistance from the pathology managers

to the changes he was trying to implement. At para. 42 he says the following:

> "I would repeatedly raise my concerns in meetings, but there would be heavy resistance from [Dr. Menez] and his followers. Often he would agree to me privately to get things in order, but then behind the scenes the changes would not be made. The atmosphere became tense and unconstructive. I believe it was these developments that led the complainants and witnesses to decide to oust me from my post by concocting evidence against me."

142 Dr. Cassaglia describes the pathology department as being run by its manager Dr. Menez as a separate organization from the GHA with its own rules. Compliant members of staff were rewarded with unauthorized time off and other benefits. Indeed, Dr. Cassaglia asserts that the three witnesses who gave evidence against him were given permanent contracts or promotion following the proceedings. Dr. Cassaglia accuses Mr. Stagnetto, Mrs. Olivares Smith and the other witnesses of lying and colluding and says that they were put up to do so to derail his attempts at improving standards in the department.

143 In his second witness statement dated February 19th, 2021, Dr. Cassaglia simply exhibits a letter of February 18th, 2021 sent by Cruzlaw LLP to Hassans relating to an internal GHA investigation report dated January 4th, 2021. The letter states:

> "The GHA accepts that the internal investigation report into the Laboratory dated the 4th January 2021, provides support for Dr Cassaglia's assertion in the appeal that at the material time there was reason to be significantly concerned about the workings of the pathology department. The GHA is currently in the process of addressing these issues."

144 Professor Burke is the Head of Clinical Governance and the GMC suitable person at the GHA. It is a post that he has held since July 2018. He made a witness statement for this appeal on September 8th, 2020 in which he identifies general areas of clinical governance concerns at the GHA. The focus of the statement is however on the concerns with the laboratory. He is very critical of how the laboratory has been managed and asserts that this has had an impact on the services provided to patients. Of particular relevance to the issues in the appeal is a comment he makes at para. 27(4) of his statement where he describes the laboratory as:

> "A 'fortress laboratory' where staff were held rigidly in line by favours (e.g. unauthorised time off) or were bullied out of the service if they failed to comply."

145 Ms. Knowles made a witness statement dated October 23rd, 2020 to which she exhibited a document setting out an outline of the evidence she could have given at the tribunal had she been called to do so. In that document, Ms. Knowles explains that she was employed as a senior biomedical scientist at the GHA laboratory in April 2009. She worked within the laboratory until August 2016 and then, following a short period away from work, was deployed to the Primary Care Centre until December 2018 when she left the GHA.

146 Ms. Knowles asserts that the laboratory was lacking in areas of quality assurance and says that senior members were reluctant to participate in practices aimed at monitoring and assessing competency. She also describes how she had problems with Dr. Menez who, she says, was a bully and was manipulative. At para. 11 of her outline statement she says that favouritism was displayed and says the following:

> "Overtime was an ideal example of this. If it suited him, overtime was available to certain members of staff but not others. On a regular basis, I was aware of people submitting hours that were questionable. Flexible working hours were also offered to certain people and not others. If you happened to be one of his favourites, you got exactly what you wanted more or less . . ."

Referring to the relationship between Dr. Cassaglia and Dr. Menez, Ms. Knowles says (at para. 15):

> "I specifically recall that from the day I started in the GHA [Dr. Menez's] relationship with Dr Cassaglia was never a happy one. As a Paediatrician, Dr Cassaglia would often request blood gases to be processed urgently on children out of hours, and would prefer to process the sample himself. [Dr. Menez] would do his best to try avoid allowing him entry to the lab, especially if he himself was covering the out of hours shift, instructing him to go elsewhere, such as the ICU to get his samples processed."

147 Mr. Reyes, a retired police inspector, made a statement for this appeal on September 4th, 2020. In it, he explains that on September 27th, 2017 he overheard conversations between members of the union which suggested that they were anticipating problems in their relationship with the Government. He exhibits a screenshot of a contemporaneous message he sent his wife telling her what he had heard. Mr. Reyes then exhibits another screen shot of text messages which he sent his wife on October 24th, 2017. In those messages he says: "Allegation of assault against Cassaglia. From what I've heard it's a set up. Union have instigated! Makes you wonder about convo I heard at angry friar a few weeks ago." At para. 9 of his statement he then says the following in relation to these comments:

> "The court will appreciate that these are events which happened nearly 3 years ago and had no impact on me so I can't specifically recall the details but I am sure that I must have overheard something which made me say the allegation of assault was union instigated and a set-up, I would not have sent the message otherwise."

In March 2019, Mr. Reyes was put in contact with Isolas and he discussed his evidence with them. He was not however asked to provide a statement.

148 As I have explained above, the purpose of Dr. Cassaglia's materiality evidence and of tendering the evidence of Professor Burke, Ms. Knowles and Mr. Reyes in this appeal was to show that there was evidence that Dr. Cassaglia could have called before the tribunal had he been given the opportunity to do so. I make it clear that I have not placed reliance on this evidence for the truth of what is said. It is safe to assume that many aspects of this evidence would be challenged by Mr. Stagnetto and/or by the persons to whom reference is made. That said, I agree that the evidence of Professor Burke and Ms. Knowles could have provided support for Dr. Cassaglia's assertion that some members of the Pathology Department had reason to lie and collude against him. On the other hand, I am not sure that the evidence of Mr. Reyes has any real evidential value. He is not able to give evidence as to what exactly he says he heard which made him formulate the opinion that the accusations against Dr. Cassaglia had been a set up.

149 Had the evidence of Professor Burke and Ms. Knowles been before the tribunal it *could* have made a difference to the outcome. It is clear from the Chairman's judgment that the issue of collusion weighed on his mind. In this regard, I also note Mr. Cardona's concession that it is possible that the evidence may have made a difference (although he qualified that by saying that in his submission it is unlikely to have actually made a difference). In any event, it is not my role to consider whether the evidence *would* have made a difference.

Was Dr. Cassaglia entitled to a fair hearing?

150 The submissions made on behalf of Dr. Cassaglia are the following. The case in the tribunal was all and simply about his behaviour. There was no allegation that anyone else was involved. Indeed, there was no consideration in the tribunal's judgment of whether the GHA had subjected Mr. Stagnetto to bullying. That may have been the result but it was not the process. As the GHA took a neutral stance on the evidence, the cross-examination of the complainants and their witnesses was hampered. Furthermore, Dr. Cassaglia was not put forward as a witness of truth. The person accused of the acts of bullying was not involved as an adversary in the process. Although the witnesses were taken to inconsistencies in their evidence, the allegation that they had colluded to lie against Dr. Cassaglia

was not put. This, it is said, had a devastating effect because the Chairman did not understand why four members of the laboratory would collude against the Medical Director.

151 The starting point is the submission that Dr. Cassaglia's rights, as safeguarded by the Gibraltar Constitution Order 2006 ("the Constitution"), have been breached. Specifically, it is said that his right to a fair hearing under s.8(8) and his right to private and family life under s.7(1) were both violated. Mr. Licudi relied on the House of Lords case of *R. (Wright)* v. *Health Secy.* (14). The case concerned care workers who were provisionally placed on lists of persons who were deemed to be unsuitable to work with vulnerable adults and children. The statutory framework did not provide for a hearing in advance of them being placed on the provisional list and the workers sought a declaration that this breached their rights under arts. 6 and 8 of the ECHR (the equivalent provisions to s.7 and s.8 of the Constitution). Mr. Licudi submitted that the case sets out three relevant principles. The first and second are that the right to hold employment and to practise one's profession are *civil rights*. (The relevance to this is that s.8(8) of the Constitution provides that proceedings determining the existence or extent of a civil right shall be given a fair hearing.) These two principles were confirmed by Baroness Hale of Richmond in her judgment. She said ([2009] UKHL 3, at para. 19):

> "The right to remain in the employment one currently holds must be a civil right, as too must be the right to engage in a wide variety of jobs in the care sector even if one does not currently have one."

The third principle is that not affording a person a fair opportunity of answering allegations before imposing possible irreparable damage is a breach of s.8(8)—*per* Baroness Hale (*ibid.*, at para. 28). She continued by adding that (*ibid.*, at para. 37): "the procedures must be fair in the light of the importance of the interests at stake."

152 As I have observed in my discussion on the evidence, I agree that it was the tribunal's judgment that led to Dr. Cassaglia not continuing in his post as Medical Director. Mr. Licudi said that the tribunal's judgment had resulted in actual irreversible damage and not just possible irreparable damage as described in *Wright*. Even if Dr. Cassaglia is successful in this appeal and in the disciplinary proceedings, he has not exercised his role of Medical Director since October 10th, 2019. (This, at a time where Gibraltar, like the rest of the world, is facing the biggest health crisis in generations.) Further, as a result of the tribunal's judgment, Dr. Cassaglia made a referral to the GMC. This could impact on his ability to practice his profession.

153 Mr. Licudi also referred to *Turek* v. *Slovakia* (15), a case before the European Court of Human Rights, for the proposition that rights to private

and family life are also engaged as part of the right to a fair process. The facts of that case were that the applicant resigned from an administrative post in the Slovak Republic after a security check revealed that he was listed as a collaborator of the former Czechoslovakian communist security services. Any person so registered was disqualified from holding certain posts in public administration. The applicant contested the fact that he was a collaborator and argued that his rights under art. 8 of the ECHR (his right to private and family life) had been violated. The court, in finding that the applicant's rights had indeed been violated on account of the difficulties he faced in challenging the registration, said the following (44 EHRR 43, at paras. 111–113 and 116):

> "111. The Court reiterates that, whilst Art.8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Art.8.
>
> 112. The Court also reiterates that the difference between the purposes pursued by the safeguards afforded by Art.6(1) and Art.8 of the Convention, respectively, may justify an examination of the same set of facts under both Articles. In the circumstances of the present case the Court finds it appropriate to examine the fairness of these proceedings under Art.8 of the Convention.
>
> 113. In particular, the Court will examine whether the procedural protection enjoyed by the applicant at the domestic level in respect of his right to respect for his private life under Art.8 of the Convention was practical and effective, and consequently compatible with that Article."
>
> "116. There has accordingly been a breach of Art.8 of the Convention on account of the lack of a procedure by which the applicant could seek effective protection of his right to respect for his private life."

154 This is relied on by Mr. Licudi to support his contention that the process followed by the tribunal failed to afford adequate protection to Dr. Cassaglia's right to private and family life. His s.7(1) rights were affected because the tribunal's judgment was public and the outcome had consequences on his employment and his ability to practise his profession. It had also affected his reputation.

155 I also note the conclusion by the English Court of Appeal in *R. (Ross)* v. *Life Assur. Unit Trust Regulatory Org. Ltd.* (13). The case concerned a judicial review by an insurance company of a decision taken by an insurance business self-regulatory body. The insurance company was not itself a member of the self-regulatory body but it claimed to have been adversely affected by the decision. Glidewell, L.J. said ([1993] Q.B. at 50):

> "I accept that very frequently a decision made which directly affects one person or body will also affect, indirectly, a number of other persons or bodies, and that the law does not require the decision-making body to give an opportunity to every person who may be affected however remotely by its decision to make representations before the decision is reached. Such a principle would be unworkable in practice. On the other hand, it is my opinion that when a decision-making body is called upon to reach a decision which arises out of the relationship between two persons or firms, only one of whom is directly under the control of the decision-making body, and it is apparent that the decision will be likely to affect the second person adversely, then as a general proposition the decision-making body does owe some duty of fairness to that second person, which, in appropriate circumstances, may well include a duty to allow him to make representations before reaching the decision. This will particularly be the case when the adverse effect is upon the livelihood or the ability to earn of the second person or body."

156 Mr. Cardona returned to his submission that Dr. Cassaglia does not have standing to bring this appeal and that the exception to the general rule provided by *Re W (A Child)* (17) does not apply to his situation. He submitted that *Re W (A Child)* is the only possible route which is open to a non-party appellant who wishes to appeal when he was not adversely affected by the actual decision of the court below. Mr. Cardona says that the important distinction between *Re W (A Child)* and this case is that in the former the serious adverse findings were raised for the first time in the judge's judgment and were not strictly necessary for the determination he had to make. In contrast, in this case the allegations were known to Dr. Cassaglia and the consideration of the allegations by the Chairman was quite obviously necessary.

157 In addition, it was argued that the findings of the tribunal are not determinative of Dr. Cassaglia's ability to practise as a doctor because the regulatory body will need to carry out its own assessment of the allegations. As such, Dr. Cassaglia's right to respect for family and private life are not engaged. Mr. Cardona relied principally on *Axel Springer AG* v. *Germany* (2) where the European Court of Human Rights said (55 EHRR 6, at para. 83):

> "In order for art.8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life. The Court has held, moreover, that art.8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence."

As Dr. Cassaglia's right to practice has not been decisively determined, it was submitted that the tribunal's findings do not engage his rights under s.7 of the Constitution. They have not attained the required level of seriousness. I do not agree. As I have already referred to, Dr. Cassaglia had to step down from his post as Medical Director as a result of the tribunal's findings. Those must be sufficiently serious consequences.

158 The more fundamental point raised on behalf of Mr. Stagnetto was that in the proceedings before the tribunal Dr. Cassaglia had rights as a witness but not as a party. The claim was against the GHA. Liability under the Act rests on the employer alone. In the circumstances, it was not open to Dr. Cassaglia to apply to be joined as a party and any notional application would have failed. In support of this submission, Mr. Cardona referred the court to guidance issued by the President of the Employment Tribunals in England on January 22nd, 2018. At para. 16.2 of Guidance Note 1, the following is stated under the heading "Adding or removing parties":

> "16. These are some of the circumstances which give rise to the addition of parties:
>
> . . .
>
> 16.2 Where individual respondents, other than the employer, are named in discrimination cases on the grounds that they have discriminated against the claimant and an award is sought against them."

Mr. Cardona highlighted that it is only when an award is sought against an employee that he would be joined as a party.

159 Mr. Licudi on the other hand referred to para. 21 of the same Presidential Guidance. This states:

> "The Tribunal may permit any person to participate in proceedings on such terms as may be specified in respect of any matter in which that person has a legitimate interest. This could involve where they will be liable for any remedy awarded, *as well as other situations where the findings made may directly affect them*." [Emphasis added.]

160 The procedure to be followed by an Employment Tribunal in Gibraltar is set out in the Employment Tribunal (Constitution and Procedure) Rules 2016 ("the Procedure Rules"). Rule 33 is entitled "Addition, substitution and removal of parties." Rule 34 is entitled "Other persons." These provide as follows:

> "33. The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there

> are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings and may remove any party."
>
> "34. The Tribunal may permit any person to participate in proceedings, on such terms as may be specified, in respect of any matter in which that person has a legitimate interest."

161 It seems to me that had an application been made by Dr. Cassaglia, the tribunal should have acceded to join him as a party. There were clearly issues between the parties and Dr. Cassaglia which needed to be determined and so the addition could have been ordered pursuant to r.33. Furthermore, r.34 would also apply because Dr. Cassaglia was a person who most certainly had a legitimate interest in the proceedings. The Presidential Guidance issued to tribunals in England is of no effect in Gibraltar. However, it is interesting to note that the guidance says that tribunals should permit a person to participate on matters in which they have a legitimate interest. The guidance explains that this involves not just when the person is liable for any remedy but includes situations where the *findings* may directly affect them. It is indisputable that the findings in this case have affected Dr. Cassaglia in a significant manner.

162 There may be cases when an employee accused of bullying will not be affected in any significant or material way by the findings or outcome of a bullying claim brought under the Act. Indeed, an employee may have no desire to involve himself in a claim. Clearly, an employee who is said to have occasioned the act of bullying does not need to participate in proceedings brought under the Act unless he wishes to do so.

163 In my judgment, Dr. Cassaglia's right to exercise his profession and his right to his employment, and consequently his right to private and family life were seriously impacted by the tribunal's decision. It should have been clear to all concerned before the hearing actually took place that an adverse outcome would have had those consequences. As such, he was entitled to a fair hearing.

164 I pause to briefly discuss a further argument raised by Mr. Licudi that Mr. Stagnetto should have made Dr. Cassaglia a party to the proceedings in the tribunal. He submitted that on a strict reading of the Act, any person may be made a respondent to the claim. He based this submission on the wording of s.8 which he contrasted with s.9. Section 8 *inter alia* states: "a complaint by an employee ('the complainant') that another person ('the respondent') has contravened this Act may be presented to the Tribunal." Section 9(1), which sets out the remedies available to the tribunal, simply uses the word "respondent." However, s.9(2), which concerns the assessment of injury to feelings, refers to "the

employer's breach." This, it is said, shows that the employer and the respondent could be two different persons or entities, otherwise the legislation would have used the same term throughout. Notwithstanding this apparent distinction, it seems to me that the intention of the Act is that the employer should at all times be the respondent to a claim. The only prohibition against bullying is contained in s.6. That prohibits employers from subjecting employees to bullying. No other class of person is made liable for any act of bullying. In my judgment, participation by someone who is not the claimant's employer has to be in accordance with r.33 and/or r.34 of the Procedure Rules.

Was Dr. Cassaglia's right to a fair hearing breached?

165 Dr. Cassaglia's role before the tribunal was limited to that of a witness called by the GHA. This approach was in fact demanded by the solicitors for Mr. Stagnetto prior to the hearing. In a letter of February 14th, 2019 to the tribunal resisting the GHA's application for an adjournment, Messrs. Phillips wrote:

> "Again, what preparation does Dr Cassaglia need to have as a witness? The Tribunal has to bear in mind that Dr Cassaglia is not even being put forward as a witness of truth as the GHA must remain neutral on the incident on 20 September 2017. *Dr Cassaglia should be playing no role in this case let alone involvement in instructing the GHA's solicitors*." [Emphasis in original.]

I have already found that such an approach was wrong.

166 Even in his role as a witness, Dr. Cassaglia was not put forward as a witness of truth. Although the GHA filed the evidence of Dr. Cassaglia, it was not preferring his version over the version given by Mr. Stagnetto, Mrs. Olivares Smith and the other witnesses. This position was put in Mr. Cardona's opening written submissions where, at para. 7, he stated:

> "It is worthy of note that Dr Cassaglia is not being put forward by the Respondent as a witness of truth although that's not to say that they are saying he is being untruthful. The Respondent's position on what took place on the 20 September 2017 is neutral."

(Mr. Cardona repeated this observation when he addressed the tribunal on the first day of the hearing.)

167 Mr. Isola in his written submission to the tribunal put it in the following terms. At para. 19 he said:

> "The Respondent has presented Dr Cassaglia as a witness to give evidence on the allegations made against him and which are alleged to constitute acts of bullying, without taking sides on the evidence. If the Employment Tribunal accepts that explanation then that is the end

of the matter. If not, the Employment Tribunal should move to [consider s.4(3) of the Act]."

168 What was the effect of Dr. Cassaglia only appearing as a witness? Mr. Licudi first referred to Dr. Cassaglia's witness statement dated February 8th, 2019 which was prepared with Messrs. Isolas' assistance for the tribunal hearing. It is a short two-page statement which, in effect, simply exhibits another witness statement by Dr. Cassaglia dated March 15th, 2018 which had been prepared for the disciplinary proceedings. This is a six-page statement which sets out some background, Dr. Cassaglia's evidence on the incident itself and explains difficulties he had with members of the laboratory. Mr. Licudi contrasted those two statements to Dr. Cassaglia's main witness statement in this appeal which runs to 39 pages. Of course, simple comparisons as to numbers of pages in different statements is not a point of substance. What matters is what should or could have been said in the statement for the tribunal hearing but was not included. In this regard, Mr. Licudi highlighted that the problems Dr. Cassaglia says he encountered with the laboratory were only briefly set out in the March 15th, 2018 statement. In his more recent statement, there are extensive references to the concerns he says he had and, arguably, these potentially provide a basis for saying that the witnesses colluded and concocted a case against him.

169 Dr. Cassaglia's concerns about the laboratory have recently been confirmed by the GHA, as recorded in the letter by Messrs. Cruzlaw of February 18th, 2021, which I have referred to in para. 143 above. That, of course, is not evidence which could have been before the tribunal. The letter followed an investigation which was carried out in late 2020. It does nevertheless support Dr. Cassaglia's contention that there were concerns which he could have highlighted to the tribunal had he been given the opportunity to do so. The case for Dr. Cassaglia is that those concerns led to tension and resistance to change by some members of the laboratory. That, in turn, he says, led to the concoction of the case against him. As has already been referred to, the concerns are also supported by the witness statements of Professor Burke and Ms. Knowles who could have given evidence before the tribunal had they been asked to do so.

170 Mr. Licudi submitted that the necessary elements of a fair process required Dr. Cassaglia's case to be positively and fully laid out before the tribunal. It was necessary to assert that what Dr. Cassaglia was saying was true. It was necessary to explain that the claimants and witnesses had a motive to make a false allegation against Dr. Cassaglia. None of that happened. He submitted that the effect of the GHA maintaining a neutral stance was that the concoction case could not be put forward in any meaningful way; the complainants and their witnesses could not be told that they were not telling the truth; and Dr. Cassaglia himself was not put

forward as a witness of truth. It was also submitted that pointing out inconsistencies in the evidence of the witnesses is different from cross-examining on allegations of concoction and collusion.

171 The transcripts of the evidence before the tribunal were referred to by the parties in support of their respective submissions. Mr. Licudi pointed to the following examples of how Mr. Isola was constrained by the neutral stance:

(i) On the first day of the hearing, the Chairman intervened in Mr. Isola's cross-examination of Mr. Stagnetto. At p.93 of the transcript of March 28th, 2019, the Chairman asked Mr. Isola: "Are you going beyond being neutral?" He followed this up with: "You have a line." When Mr. Isola put a further question and this was answered by Mr. Stagnetto, the Chairman again intervened and said: "I do not think you can take it much further."

(ii) At p.169 of this same transcript, the Chairman again intervened in the cross-examination of Mr. Stagnetto. He said: "You are beginning to take it further now it is . . . you are beginning to take . . . assuming that all of Dr Cassaglia's evidence is true which is not your position." He then said: "So, you are beginning to cross the line." Mr. Isola responded: "No, and I appreciate that Mr Chairman, I appreciate that. Not an easy role." The Chairman then said: "No, no it is not. It is not."

(iii) A further reference highlighted by Mr. Licudi is an exchange on the second day of the hearing (transcript of March 29th, 2019, at p.213) where the Chairman intervened in the cross-examination of Mrs. Olivares Smith and asked a question himself. He then remarked to Mr. Isola: "I can be a bit more direct than you."

172 On the assertion that the Chairman did not properly understand Dr. Cassaglia's case on concoction, Mr. Licudi referred to an exchange between the Chairman (JN) and Mr. Isola (MI) which took place during the cross-examination of Mr. Stagnetto (transcript of March 28th, 2019, at p.204):

> "JN: Is it just this big conspiracy took place between Megan, Mrs Smith and the witness? That is not the GHA's problem. I am not even sure that is Dr Cassaglia's version of events . . . It is certainly not the GHA's position.
>
> MI: Well, it is not very clear from all the inconsistencies and the evidence.
>
> JN: They are mainly inconsistencies but you seem to be suggesting that there was some sort of conspiracy about this all."

173 Mr. Licudi also referred the court to emails which had been sent on the afternoon of the incident by Mr. Stagnetto, Ms. Davis, Mr. Mahbubani

and Mrs. Olivares Smith. In those emails, the only person who mentioned a push was Mr. Stagnetto. Ms. Davis simply referred to Dr. Cassaglia barging into the office. Mr. Mahbubani did not mention any physical incident at all even though his email opened with: "As requested an account of what happened this afternoon." For her part, Mrs. Olivares Smith wrote:

> "I was later briefed by the rest of the staff of what happened whilst I was away from office on my lunch break. Apparently, he was extremely disrespectful and rude using f words to Lawrence, 'pushed Jackie as he made his way' into the department and that he had used Megan's and Mohit's Modulab account to get the info."

174 A second set of emails were then sent on the day after the incident. In those, all three of the witnesses (Ms. Barea, Ms. Davis and Mr. Mahbubani) described Dr. Cassaglia pushing Mr. Stagnetto into the office. These emails and apparent inconsistencies were put to the witnesses at the tribunal hearing and it is not this court's role to consider whether the Chairman was wrong to accept the witnesses' version of events. However, in the context of what could also have been put to the witnesses had Dr. Cassaglia's case on collusion been before the tribunal, Mr. Licudi pointed to minutes of a meeting held the day after the incident and before the second set of emails were sent. Ms. Davis prepared the minutes of a meeting which was attended by a large number of members of staff of the Pathology Department. The minutes open with a paragraph saying: "[Mrs. Olivares Smith] introduces the meeting with a full recap of the incident that happened with the Medical Director on Wednesday 20 September at 16:30." In the first draft, which she sent to Mrs. Olivares Smith by email, there is a tenth paragraph which says: "[Mrs. Olivares Smith] claims to those who we [*sic*] present in the act when LS was pushed by the MD, to please make a witness statement." A further version of the minutes was produced two days later. There are changes to the phraseology used throughout—which of course is perfectly normal. However, Mr. Licudi highlighted that the tenth paragraph of the first version had been deleted in its entirety.

175 There may be a perfectly reasonable explanation for the change in the minutes. Indeed, there is nothing untoward in a manager asking staff members for a statement following an incident. More importantly, I should not be drawing inferences in any event for the purposes of this appeal. What it does, however, show is that there are matters on which the witnesses could have been cross-examined regarding the question of collusion.

176 Another example referred to by Mr. Licudi was that Mrs. Olivares Smith was asked by Mr. Isola (p.148 of the transcript of March 29th, 2019) why she had written her first account four days after the incident. Her reply was that she needed time "to clear her mind and see exactly what had happened." Mr. Licudi pointed to the fact that there had been an email

setting out an account on the day of the incident (which I have referred to at para. 173 above). There she refers to being briefed by other staff members and that Dr. Cassaglia had "pushed Jackie." She then sent a second email on September 24th, 2017 to Dr. Menez. Mr. Licudi argued that in the second account there is no mention of being briefed by other members of staff or of the push to Ms. Barea. He is correct insofar as there is no mention of being told that Dr. Cassaglia had pushed Ms. Barea in her second account but Mrs. Olivares Smith does say that she was "briefly updated" in the penultimate paragraph of the email. Be that as it may, Mr. Licudi's point was that, contrary to her evidence, there was an earlier account and there was, at least, one material difference between the two versions. The email of September 20th, 2017 was disclosed by the GHA for the purposes of the appeal. It was not before the tribunal. It was submitted that it was unfair on Dr. Cassaglia that there are documents which could have been used to evidence and support his case on concoction but which were not referred to at the hearing.

177 Mrs. Olivares Smith in evidence also stated that she had not requested a second statement from Ms. Davis or Mr. Mahbubani who both gave a first account on the afternoon of the incident (p.152 of the transcript of March 29th, 2019). She said that the two staff members had gone to her office to say that they wanted to make a second statement. Mr. Licudi pointed out that this was inconsistent with the draft minutes of the meeting of September 21st, 2017—which were not before the tribunal and again, it was argued, this created unfairness.

178 Whilst Mr. Licudi accepted that Dr. Cassaglia could have applied to be joined as a party, he urged the court not to indulge in speculation as to what the outcome would have been if his rights had not been breached. He referred to *Turek* (15), and in particular to para. 117 of the court's judgment which states as follows:

> "The Court cannot speculate as to what would have been the outcome of the applicant's proceedings had they been conducted in a manner compatible with Article 8 of the Convention."

(I take the words "The Court cannot speculate" as meaning "The Court *should not* speculate." In other words, it is not a question that in that case the court could not speculate because of the particular facts. Rather, once a court finds that there has been a breach of the procedural protection afforded by the Constitutional right to respect for private life, the court should not try to assess what the conclusion of the tribunal would have been had Dr. Cassaglia been afforded a fair hearing.) It is consequently submitted that if Dr. Cassaglia was entitled to a fair hearing and was not afforded one, then that is the end of the matter—the tribunal's decision should be set aside. I shall return to this point.

179 In relation to whether Dr. Cassaglia was actually afforded a fair hearing, Mr. Cardona took the court through para. 45 of the grounds of appeal where Dr. Cassaglia's reasons for saying that he did not receive a fair hearing are contained. There are six sub-paragraphs, each setting out an alleged defect in the process.

180 *Paragraph 45(1)*. This states that Dr. Cassaglia was not made aware of the bullying claim until January 2019 when the hearing was due to start in February 2019. This gave him very little time to prepare. Mr. Cardona submitted that this was not the Chairman's fault. Further and more importantly, Mr. Cardona pointed to the following. First, Dr. Cassaglia had been informed by Ms. Louise about the bullying claim in 2018. (I have already observed that when exactly this happened in 2018 is not important.) Secondly, the hearing actually started towards the end of March 2019 so even if January 2019 was an important point in time, this still gave Dr. Cassaglia sufficient time to prepare. He also had the Investigation Board's report and transcripts of the evidence given by the witnesses to the Investigation Board.

181 *Paragraph 45(2)*. This in effect provides that the decision to proceed to trial with the bullying claim without the disciplinary proceedings having been resolved placed Dr. Cassaglia in a difficult position because he could not clear his name "in the procedurally more favourable confines of an internal investigation" and he had to hand over his defence material to the GHA. Mr. Cardona's response to this complaint was simply to refer to the chronology of the disciplinary proceedings which he says shows that it was Dr. Cassaglia who was delaying the process. Had the disciplinary hearing proceeded as envisaged, it would have been completed before the directions in the tribunal came into effect in November 2018. I do not in any event consider that this complaint is relevant to the issues I am considering in this appeal.

182 *Paragraph 45(3)*. This states: "The Appellant was not made a party to the claim, nor informed by the Tribunal of his right to be represented nor to avail himself of that right." This was described by Mr. Cardona as the crux of Dr. Cassaglia's case. However, he submitted that the court would have to find that the failure to add Dr. Cassaglia as a party was fundamentally unfair. He pointed to the fact that Dr. Cassaglia had solicitors who were engaged in the disciplinary proceedings and were in fact liaising with the lawyers for the GHA prior to the tribunal hearing. Should he have sought advice on whether he could join the tribunal's proceedings rather than now blaming the Chairman for not informing him that he could apply to join?

183 *Paragraph 45(4)*. This states: "The Appellant was not present at, nor told to be present at the entire hearing, whilst all witnesses gave their evidence." In relation to this complaint, Mr. Cardona submitted that Dr.

Cassaglia was perfectly aware of what the allegations against him were. There was no new or unknown situation which he had to deal with. In the circumstances, there was no fundamental unfairness in him not being allowed to be present throughout the proceedings.

184 *Paragraph 45(5)*. This is the complaint that Dr. Cassaglia's interests were not adopted or advanced before the tribunal. It is said that: "This left the Appellant vulnerable and facing an inequality of arms against the complainants." The mainstay of Mr. Cardona's submission on this ground of appeal was that, in actual fact, the cross-examination of the witnesses by Mr. Isola went beyond the neutral position which the GHA said they were going to be adopting.

185 All cross-examinations began with the witnesses being asked whether they understood the significance of the statement of truth they had signed in their witness statements. Mr. Cardona described the questioning that followed as "quite intense" and took the court through examples in the transcripts which show that the witnesses were being challenged about being truthful and about colluding in preparing their witness statements. The following are only some of the examples that Mr. Cardona highlighted:

(i) At p.148 of the transcript of March 29th, 2019, Mrs. Olivares Smith was asked by Mr. Isola: "Did you want to make sure that you had all the other written accounts with you before you wrote your own one?"

(ii) At p.150 she was then asked: "Did you discuss your account with Dr Menez, your statement?"

(iii) At p.186 the following exchange took place between Mr. Isola (MI) and Mrs. Olivares Smith (AOS):

"MI: And, did you speak to Jackie the next day about what she was going to send or say?

AOS: I didn't. It's a witness statement; I can't say what she's going to say.

MI: No, but did you speak to her about the statement, discuss the statement with her, or make—

AOS: It's a witness statement; I can't discuss what she's going to discuss in her witness statement.

MI: You did not discuss the contents with her?

AOS: It's a witness statement.

MI: Or Megan, given another statement?

AOS: It's a witness statement."

(iv) And then at p.188 the questioning continued with:

"MI: I just want confirmation that as far as the collection of the written accounts, the email, did you provide anyone, during the course of giving their accounts with the accounts above us, to look at or tell them what others were saying in relation to their accounts?

AOS: No.

MI: In any form?

AOS: No.

MI: Verbal or written?

AOS: No."

(v) At p.136 of the transcript of April 1st, 2019, Mr. Isola asked Ms. Davis (MD) questions regarding similarities in the email accounts between witnesses. The following exchange took place:

"MI: Well, there's other accounts, the other accounts, the only two accounts that show 'LS' . . . On the top of them are the two on the 21st written by the two same people in the same office, written within five minutes of one another.

MD: And that is correct. But to—to let you know something, when Jackie first started, I was the one to basically train her when she started working. So, we both worked, what the same? I don't know. She did tell me though that she has sent them, that's when I decided to do one.

MI: And just before we move on, Ms Davis, and you're not aware that your written account was provided to anyone else?

MD: No, I sent that to Audrey. I don't know whether I included Alex. Yes, I did. But that was sent to Audrey."

(vi) At pp. 29–37 of the transcript of April 2nd, 2019, Mr. Mahbubani (MM) was questioned by Mark Isola, Q.C. and Nicholas Isola (NI) (the latter was junior counsel for the GHA before the tribunal) about an email Mr. Mahbubani sent on September 21st, 2017 being similarly worded and structured to an email sent by Ms. Davis. The following extracts form part of the exchanges:

"MI: And you did not see or discuss any of the content of their written accounts, if anyone else . . .

MM: No.

. . .

NI: Yeah correct. The structure of each sentence, to some, may seem similar . . . would you agree that sentence one is talking about stating you are a witness and the timeframes, i.e. yesterday afternoon at around 1630. Would you agree those are very similar for both emails?

MM: Yeah, but they are talking about the same incident.

NI: That is fine. Now, if you look at the next sentence, the next sentence is about where you were standing, who you were with and Dr Cassaglia entering the department . . . Would you agree that the structure there is similar as well?

MM: It is the same incident. I am writing exactly the same. I am writing about the same incident, so it is going to be the same, it is not going to change.

. . .

NI: Okay. So both emails have five sentences and each sentence appears to have a very similar structure, do you agree?

MM: Yes."

(The exchange then continued with questions on the words used being similar in both emails.)

186 Mr. Cardona also pointed to an order of April 12th, 2019 made by the Chairman whereby he ordered a telecommunications company to provide call logs for Mrs. Olivares Smith's mobile phone. This he says had the object of exploring the possible collusion between members of the Pathology Department. (As observed by the Chairman in his judgment, the logs were obtained after the evidence had been heard and so were not used to challenge the witnesses.) The point was nevertheless made by Mr. Isola in his closing submission to the tribunal that Mrs. Olivares Smith had given evidence that she had made two calls to Dr. Menez but yet the logs showed that there had been four calls.

187 It was also submitted on behalf of Mr. Stagnetto that Dr. Cassaglia had rights as a witness and that these rights were not breached. Mr. Cardona pointed to the following. There is no evidence that Isolas limited the evidence tendered by Dr. Cassaglia in his witness statement. (Indeed, when Mr. Isola sent the draft of the short statement exhibiting the March 15th, 2018 statement, Dr. Cassaglia was asked to approve or amend the draft. He therefore had an opportunity to add to the statement if he thought there were matters which were important and had not been addressed.) Dr. Cassaglia had notice of the allegations being made against him. The allegations were put to him in cross-examination and he had an opportunity to respond to these. He was re-examined. No extraneous findings were

made by the Chairman against him. Dr. Cassaglia's evidence was considered by the Chairman, as is evident from the judgment.

188 In reply, Mr. Licudi pointed to the fact that the Chairman in his judgment continued to reflect that the GHA had taken a neutral stance. He cannot therefore have thought that in practice the cross-examination by Mr. Isola went beyond the neutral.

189 *Paragraph 45(6)*. Dr. Cassaglia says that he was impeded in fully putting his case forward by the Chairman when he was refused permission to rely on confidential patient information in private at the hearing. Mr. Cardona submitted that what Dr. Cassaglia had tried to do at the hearing was contextualize why he had gone down to the laboratory. This had nothing to do with the allegations of collusion which he is now making. His witness statement of March 15th, 2018 prepared for the disciplinary hearing does not refer to the problems with the laboratory as being the reason for the collusion but simply that he found certain members of staff in the Pathology Department obstructive and difficult to work with. It set the context for him being upset about his instructions not being followed and going down on the day in question.

190 In relation to Dr. Cassaglia's reference to the part of the Chairman's judgment at p.58 which says: "why would at least four people in the department suddenly collude to destroy Dr Cassaglia's career?", Mr. Cardona pointed to para. (b) on p.59 of the judgment where the Chairman discusses the relationship between Dr. Cassaglia and Mr. Stagnetto and the witnesses. This, he submitted, shows that the Chairman was applying his mind to whether there could have been collusion and concoction. Furthermore, there is an entire section at pp. 8–10 of the judgment headed "underlying current." Mr. Cardona submitted that the Chairman understood and considered the argument on concoction but that he had simply rejected it.

Discussion

191 I accept Dr. Cassaglia's evidence that he had concerns about the workings of the Pathology Department and was trying to implement changes which were not being well received by its managers. However, for present purposes it does not matter whether those concerns were justified or not. The point is that Dr. Cassaglia had those concerns and there was, arguably, a basis for saying that the witnesses to the bullying claim may have concocted the allegations against him. It is a matter which could have been raised in an adversarial process. I also accept that he could have called evidence in support of this assertion.

192 The cross-examination of the claimants and witnesses by Mr. Isola addressed the inconsistencies in their statements and explored whether the

witnesses had colluded. They were not, however, accused of having made the allegations up nor was it suggested that they had done so in an attempt to thwart the reforms that Dr. Cassaglia sought to implement.

193 The GHA presented Dr. Cassaglia as a witness but expressly stated that they were not taking sides on the evidence. That in itself is quite an odd proposition. A party calls and relies on a single witness but does not assert that his evidence is the truth. Of course, in practice the Chairman did go on to consider whether or not Dr. Cassaglia's version of events was to be preferred. (I would also add that the Chairman's judgment shows that he carefully considered the inconsistencies in the evidence given to the tribunal by the claimants and their witnesses.)

194 The GHA cannot be criticized for taking the neutral stance. They were pursuing disciplinary proceedings against Dr. Cassaglia following the investigation board's recommendation. Those proceedings had not reached an outcome. They could not therefore take sides. However, a person in Dr. Cassaglia's circumstances should have been afforded a fair hearing before the tribunal. To be afforded a fair hearing, he should have had full disclosure of the pleadings, witness statements and documents in the case, he should have been afforded the right to be represented and examine the witnesses at the hearing, and he should have been able to call his own witnesses in support. It seems to me that had that happened, and had Dr. Cassaglia's case been fully advanced before the tribunal, the conclusion reached by the Chairman on the facts may well have been different. (This court is not being asked to determine whether the outcome should or would have been different.)

195 As regards Mr. Licudi's reliance on *Turek* (15) and his submission that once the court finds that Dr. Cassaglia did not receive due process that is the end of the matter and the tribunal's findings should be set aside, I would observe the following. The *Turek* principle would apply where a person has the right to a fair hearing but this was not afforded to him. However, this principle must be qualified. In a situation where, for example, a person declines or refuses to take part in proceedings, he cannot then say, when a tribunal reaches an adverse decision, that he was not afforded the right to a fair hearing. But what of the situation in this case? Dr. Cassaglia could have applied to become a party, or to participate in the proceedings as a person who could be affected by the outcome of the claim, but he did not do so. Had he done so, and had the Chairman granted the application, he could not thereafter have said that he was not afforded a fair hearing. The process was equipped to afford Dr. Cassaglia a fair trial.

196 That said, I have found that Dr. Cassaglia did not know that he could make an application to join or participate and that, in any event, he genuinely thought that his interests were being protected by the GHA. Is that sufficient to pray in aid that he did not receive a fair trial?

197 On the one hand, we have the following factors. The GHA asked Dr. Cassaglia to provide a witness statement to assist in the defence of the claims. (This followed a meeting which Mr. Isola states took place "at a high level between the GHA and the Appellant and/or the Appellant's solicitors in early January 2019" but which Mr. Isola did not himself take part in. There is no evidence as to what was actually discussed at that meeting.) Following on from that, a reasonable inference which can be drawn from the exchange of emails between Ms. Guzman and Mr. Isola of January 21st–24th, 2019 is that the GHA would be defending the claim on the facts, based on Dr. Cassaglia's version of events. Dr. Cassaglia was not however provided with the GHA's second or third responses. Had he been provided with these, he would have been aware that the GHA were adopting a neutral position on his evidence.

198 These considerations have to be balanced against the following: First, the unchallenged evidence of Ms. Louise and Mr. Isola that: (a) Isolas were never instructed to act for Dr. Cassaglia; and (b) Mr. Isola did not tell Dr. Cassaglia that he was adopting him as a client. Secondly, the GHA did not involve Dr. Cassaglia in the defence of the claims until January 2019, a matter of weeks before the hearing was due to commence. This should have alerted Dr. Cassaglia to the fact that he may have been required to take his own steps to protect his interests before the tribunal. (He had known about the claims for some time before that.) Thirdly, Dr. Cassaglia knew that the GHA were (and still are) pursuing disciplinary proceedings against him. It is doing so on the basis that the investigation board found that there was a *prima facie* case that Dr. Cassaglia had pushed and shouted at Mr. Stagnetto. Why then would the GHA take sides on the allegations in the tribunal and present Dr. Cassaglia's version as the truth?

199 In my judgment, having asked Dr. Cassaglia to provide a witness statement, some criticism can be levelled at the GHA for not making it clear to him that they were taking a neutral position on the evidence. However, whatever the faults of the GHA may have been, why should these be visited on the process and the tribunal? At no point did the Chairman say that Dr. Cassaglia should not be represented. No application to join or participate in the proceedings was made. The unfairness may, arguably, have been created by the GHA but it was not the fault of the tribunal. (We know of course that Mr. Stagnetto objected to Dr. Cassaglia taking any part in the proceedings other than as a witness, but the decision would ultimately have been for the tribunal.) Furthermore, it does not seem to me to be fair to criticize the Chairman for not having, of his own motion, invited Dr. Cassaglia to apply to join the proceedings. Dr. Cassaglia was being put forward as a witness by the GHA—and to that extent he was aware of the proceedings and was a participant. The Chairman was entitled to assume that Dr. Cassaglia was attending as a witness willingly and having considered his options.

200 It is also important to note that during the course of the first day of the hearing, Dr. Cassaglia was informed that the GHA were taking a neutral stance on the evidence. He did not take any action at that stage. At para. 70 of his witness statement, Dr. Cassaglia says the following:

> "I spoke to my personal legal representative (for the internal proceedings) on Sunday 31 March 2019 and she was surprised to hear about the neutral stance and that I was not actually sitting next to [Mr. Isola] as the witnesses were giving evidence. Nonetheless, by this stage the proceedings were underway. I was busy at work and there was little I could do at that late stage. No one said that I should be made a party or be represented."

Whilst I note Dr. Cassaglia's explanation, should he not have sought legal advice on the first day of the trial as soon as he heard about the neutral stance? Should he have sought answers from the GHA? Should he have tried to make an application to join and/or adjourn the proceedings at that point? He only took action once the Chairman handed down his judgment.

201 Finally, I observe the following. At para. 12 of his main witness statement, Dr. Cassaglia says that he discussed his proposed defence with Isolas and suggested witnesses to them. (We know for example that he put Isolas in touch with Mr. Reyes.) He then complains that in the end he was the sole witness called for the GHA. He also says that his statement was only two pages long (appending his earlier six-page statement) and that it "did not deal in any way with my primary case namely that the complainants were acting in concert with others effectively to oust me." This begs the question, why did he not try to amend the draft statement and include these matters himself? Furthermore, at para. 53, Dr. Cassaglia refers to having an understanding that "work [would be] done to fully understand my case on concoction/collusion and in particular the motives of the laboratory staff to lie." Should he not have been involved in that work himself? If he was not, should that not have alerted him to the fact that all was not how he perceived it to be?

202 Having carefully considered all of the above factors, I conclude that this ground of appeal is not made out. Dr. Cassaglia had sufficient notice of the claims and in all the circumstances should have considered applying either to join the proceedings as a party or to participate as a person with a legitimate interest in the outcome. In my judgment, his failure to do so means that he cannot now say that his right to a fair trial was violated.

Summary of conclusions

203 On June 26th, 2020, I reconstituted the judicial review originally brought by Dr. Cassaglia into an appeal under the Employment Tribunal (Appeals) Rules 2005. In order to do so, I determined that Dr. Cassaglia

had a sufficient interest in the proceedings before the tribunal. No appeal was brought against that determination and this court is therefore *functus officio* as regards jurisdiction. In any event, having heard full argument on the matter and the evidence in the case, I am satisfied that Dr. Cassaglia has been directly affected by the tribunal's judgment and/or its award, and he is consequently entitled to bring this appeal.

204 This appeal is an appeal on points of law alone. Whilst Dr. Cassaglia does not accept the Chairman's findings of fact, the findings are not being challenged in this appeal. It is not this court's task to say whether it would have reached a different decision on the evidence to the decision arrived at by the tribunal.

205 Bullying conduct under s.4(1) of the Employment (Bullying at Work) Act 2014 can include both a single act or repeated incidents. Section 4(2) does not contain an exhaustive list of examples of bullying conduct. However, if conduct falls within one of the examples in s.4(2), then the conduct only amounts to bullying if it meets all of the criteria set out in the relevant sub-paragraph.

206 Dr. Cassaglia's behaviour, as found by the Chairman, was intimidating and/or abusive conduct and it therefore falls within the example of bullying behaviour set out at s.4(2)(a). Although there were different elements to the behaviour, these elements formed part of a single and isolated incident. It was not "persistent behaviour." The criteria in s.4(2)(a) requires that intimidating and abusive behaviour be persistent in order to amount to bullying under the Act. Consequently, the Chairman should not have found that Dr. Cassaglia bullied Mr. Stagnetto. (Whether or not the behaviour could, outside of the legalities of this case, be regarded as bullying conduct is irrelevant. The statutory criteria is not met.)

207 In order for an employer to be liable for an act of bullying, the conduct complained of must be either effected by, or attributed to, the employer. (Conduct is attributable if, for example, it is persistent.) In this case, Dr. Cassaglia's actions formed part of a single, isolated and unforeseeable incident. It should not have been attributed to the GHA as the employer.

208 Finally, as a person directly affected by the outcome of the claim brought by Mr. Stagnetto, Dr. Cassaglia was entitled to a fair hearing before the tribunal. He could have either applied to be joined as a party or participated in the proceedings as a person with a legitimate interest in the outcome. Had he participated other than just as a witness and/or had he been represented by counsel, the outcome, in terms of the findings of fact made by the Chairman, may well have been different. However, although some criticism can be levelled at the GHA for not making it clear to Dr. Cassaglia that they were adopting a neutral position on the evidence, and

that they were not strictly representing his interests, he had sufficient notice of the claim and should have considered applying to join or participate in the proceedings himself. He did not do so. The third ground of appeal is therefore not made out.

209 The appeal is allowed on grounds one and two.

Appeal allowed.
