[2021 Gib LR 641]

GIBRALTAR HEALTH AUTHORITY v. CILLIERS

SUPREME COURT (Restano, J.): November 12th, 2021

2021/GSC/31

Employment—Employment Tribunal—appeals—dismissed employee brought claim against Gibraltar Health Authority for unfair dismissal—tribunal dismissed employee's application to strike out Gibraltar Health Authority's response to claim—Gibraltar Health Authority not permitted to appeal against comments made by tribunal chairperson based on misinterpretation of statement as to grounds for dismissal

The respondent was dismissed from her employment.

The respondent was employed by the appellant ("the GHA") as a consultant ophthalmologist. When she applied for the position with the GHA, the respondent did not disclose that she was the subject of a confidential internal investigation at an English hospital in relation to an alleged breach of data protection guidelines.

The respondent commenced employment in January 2017. In May 2017, she was summarily dismissed. A letter of dismissal explained that her dismissal was based on gross misconduct arising from her failure to disclose the fact that she had been found guilty of professional misconduct when she completed the application form for the position at the GHA.

The respondent alleged that the charge of gross misconduct was merely an excuse for the decision to dismiss her which had been taken before the GHA became aware of the internal investigation at the English hospital. The respondent commenced proceedings in the Employment Tribunal alleging that she had been unfairly dismissed because she made protected disclosures to the GHA concerning shortcomings with clinical governance. She applied to strike out the GHA's response. Two of the grounds relied on, namely that the GHA had conducted the proceedings in a scandalous, vexatious and unreasonable manner and that it had failed properly to comply with an order for disclosure, were dismissed by the Chairperson and were not the subject of this appeal. The remaining ground alleged that the response was scandalous or vexatious or had no reasonable prospect of success based on the fact that the only reason for the respondent's dismissal given by the GHA in the response was her failure to make material disclosures in her application form, whereas it was alleged that when the decision to dismiss was taken,

in April 2017, the GHA was not aware of the alleged material non-disclosure but only that there was an "ongoing issue."

The Chairperson dismissed the strike-out application. He stated in his reasoning that it was clear from the evidence that when the decision was taken to dismiss the respondent, the GHA did not have any material or reliable information as to what the "ongoing process" concerned. He stated that the dismissal decision could not have been made for the reasons expressed at the dismissal meeting or in the dismissal letter, which he considered Mr. Isola, who appeared for the GHA, to have conceded when he stated that the reason for dismissal evolved after the date of the decision to dismiss. The Chairperson stated that he had been prepared to find that this ground for striking out had been established but that his mind was changed by Mr. Isola's statement or concession to the effect that whilst the GHA's decision to dismiss was made in April 2017, the reason for the decision evolved in the subsequent days or weeks. The Chairperson considered such a shift to be an admission that the paragraphs of the response which stated that the reason for dismissal was the respondent's non-disclosure had become an irrelevance and that the GHA wished to rebut the respondent's assertions by relying on other grounds for dismissal.

The GHA sought to appeal. It submitted that the Chairperson made the following errors of law: (i) he was wrong to hold that the threshold for striking out a response was lower than the threshold for striking out a claim; (ii) he applied the wrong legal test on the response having no reasonable prospect of success where the claim was dependent on conflicting evidence and/or the central facts were in dispute; (iii) this was not an appropriate case for the use of the tribunal's strike out powers; (iv) the Chairperson was wrong to base his decision on a supposed statement, concession or admission by Mr. Isola that the GHA's reliance on non-disclosure as a ground of dismissal had fallen away and to state that, had it not been for that, the response would have been struck out; (v) the Chairperson relied on an account of the evidence that was demonstrably incorrect including misstating key dates that had been agreed between the parties; and (vi) the decision was vitiated by apparent but not actual bias on the part of the Chairperson because the Chairperson had closed his mind to the GHA's prospects of success which was evident from the errors he made. The GHA submitted that the Chairperson's comments meant that it was effectively debarred from relying on non-disclosure as a ground of dismissal and that it should be entitled to appeal against this part of the decision even though it was, on the face of the decision, the winner.

Held, dismissing the appeal:

(1) It was now clear that when Mr. Isola referred to matters evolving after April 5th, 2017, he was not referring to the fact that the GHA was only relying on grounds of dismissal other than non-disclosure, but rather that the GHA's concerns about the "ongoing process" were confirmed after April 5th, 2017 when further information was forthcoming. Further, when Mr. Isola referred to other grounds of dissatisfaction with the respondent he was

not saying that these grounds replaced non-disclosure as the main reason for dismissal, only that they formed part of the decision making process in some way. The Chairperson misinterpreted Mr. Isola's submissions (paras. 34–35).

(2) Although there were some cases where an appeal could be brought by a "winner," the present case was not one of them. The decision did not consist of more than a single determination, namely the dismissal of the strike-out application, nor was there a fundamental legal issue in play. The GHA would not be permitted to appeal against the comments made by the Chairperson about the GHA not pursuing non-disclosure as a ground of dismissal and indicating that he would have struck out that part of the response had they done so. They were not determinations which bound the parties. Further, the views expressed were clearly based on a misunderstanding. In any event, this matter would be irrelevant when the case proceeded to a final hearing at which it would be open to the GHA to persuade the Chairperson, to the extent necessary, that his comments were wrong (para. 42; para. 47).

(3) At the final hearing, the tribunal would not be reviewing or reconsidering its decision, which power the tribunal did not appear to have. The only decision that the tribunal made was to dismiss the strike-out application. When the matter proceeded to a final hearing, the tribunal would reach its decision based on the evidence and final submissions and would not be bound by the Chairperson's comments. The GHA would not be fettered in the way in which it could defend the claim (para. 43).

(4) The GHA's submission that the Chairperson applied the wrong threshold test for a strike out of a response did not take matters any further. Although the Chairperson's reasoning in this respect was not entirely clear, it was an observation which had no bearing on the decision. The application to strike out was dismissed and this point was entirely academic (para. 44).

(5) The GHA also relied on certain mistakes made by the Chairperson when he analysed the facts of the case. However any errors which might have arisen did not represent binding findings of fact by the tribunal. A proper determination on all these issues could only take place once all the evidence and final submissions had been heard by the tribunal (para. 45).

(6) The court rejected the submission that r.3 of the Rules should be construed so as to allow the court to entertain this appeal because the rights of an appellant should mirror those of a respondent. Rule 3(2) referred only to appeals against decisions or parts of decisions in the sense of a result or outcome and nothing more. The court was not aware of any rule of statutory construction which supported the submission that r.3 must be construed so as to provide appellants with the same rights that respondents enjoyed under r.6 and which allowed for a respondent to an appeal to contend that a decision be affirmed on other or additional grounds to those relied on by the tribunal (para. 46).

(7) Finally, the various errors relied on by the GHA did not raise any question of apparent bias on the part of the tribunal. A fair minded and informed observer would understand that even though the Chairperson made certain mistakes, judges could make mistakes of this sort in their assessment of the evidence or on legal issues when determining interim applications. A fair minded and informed observer would also understand and accept that the Chairperson could be persuaded to change his mind at the final hearing especially as he gave the GHA the benefit of the doubt and did not strike out the response (paras. 48–50).

Cases cited:
(1) *Cie Noga d'Importation et d'Exportation SA* v. *Australia & New Zealand Banking Group*, [2002] EWCA Civ 1142; [2003] 1 W.L.R. 307, considered.
(2) *Cruz* v. *Gibraltar Community Projects Ltd.*, 2010–12 Gib LR 340, considered.
(3) *Ezsias* v. *North Glamorgan NHS Trust*, [2007] EWCA Civ 300; [2007] 4 All E.R. 940; [2007] ICR 1126; [2007] IRLR 603, considered.
(4) *Hamilton* v. *GMB*, [2007] IRLR 391, considered.
(5) *JRL*, *Re*, *ex. p. CJL*, [1986] HCA 39; (1986), 161 CLR 342; 60 ALJR 528; 66 ALR 239; 10 Fam LR 917, considered.
(6) *Lake* v. *Lake*, [1955] P. 336; [1955] 2 All E.R. 538, considered.
(7) *Moss* v. *Information Commr.*, [2020] UKUT 242 (AAC), considered.
(8) *Porter* v. *Magill*, [2001] UKHL 67; [2002] 2 A.C. 357; [2002] 2 W.L.R. 37; [2002] 1 All E.R. 67; [2002] LGR 51; [2002] HLR 16; [2002] HRLR 16; [2001] NPC 184, applied.
(9) *Segor* v. *Goodrich Actuation Systems Ltd.*, [2012] UKEAT 0145/11/1002, referred to.
(10) *Southwark LBC* v. *Jimenez*, [2003] EWCA Civ 502; [2003] ICR 1176; [2003] IRLR 477, considered.
(11) *Work & Pensions Secy.* v. *Morina*, [2007] EWCA Civ 749; [2007] 1 W.L.R. 3033, considered.

Legislation construed:
Employment Tribunal (Constitution and Procedure) Rules 2016, r.2(1): The relevant terms of this provision are set out at para. 21.

K. Navas (instructed by Kenneth Navas Barristers and Solicitors) for the appellant;
F. Vasquez, *Q.C.* and *I. Lawson-Cruttenden* (instructed by Triay Lawyers) for the respondent.

1 **RESTANO, J.:**

Introduction

Dr. Cilliers was employed by the Gibraltar Health Authority ("the GHA") as a consultant ophthalmologist and on May 15th, 2017, some four months

after she started working at St. Bernard's Hospital, she was dismissed. Dr. Cilliers commenced a claim in the Employment Tribunal alleging that she was unfairly dismissed because she made protected disclosures, commonly referred to as "whistleblowing," which the GHA is defending. This appeal is brought by the GHA against an interim decision made by the Chairperson of the tribunal dismissing Dr. Cilliers' application to strike out the GHA's response form ("the response"). Even though the GHA was successful in obtaining a dismissal of the application to strike out its response, it contends that prejudicial findings were made by the Chairperson in his decision which undermines its ability to properly defend the claim.

Background and the decision of the tribunal

2 Prior to taking up her appointment in Gibraltar, Dr. Cilliers was employed as a consultant ophthalmologist at South Warwickshire NHS Foundation Trust Hospital ("South Warwickshire Hospital") from January 2011 to June 2016. Whilst employed there, Dr. Cilliers breached South Warwickshire Hospital's corporate governance guidelines relating to data protection which she says was inadvertent and happened because she wanted to improve patient care. This led to a confidential investigation being carried out into this incident the result of which was that Dr. Cilliers recognized and apologized for her error and received additional training on data protection issues. It was around this time that Dr. Cilliers applied for the position in Gibraltar which she did by completing a form entitled "application for consultant appointment" dated March 28th, 2016. Dr. Cilliers did not disclose the investigation which had taken place in South Warwickshire Hospital in her application form and maintains that she was not required to do so.

3 Dr. Cilliers was successful in obtaining the position she applied for but some four months later, on May 15th, 2017, she attended a meeting with Dr. Cassaglia who was the GHA's Medical Director at the time and Christian Sanchez, the GHA's Human Resources Manager when she was summarily dismissed. The following day, Dr. Cilliers received a letter of dismissal dated May 15th, 2017 from Dr. Cassaglia explaining that the dismissal was based on gross misconduct based on her failure to disclose the fact that she had been found guilty of professional misconduct when she completed the application form when applying for her job. Dr. Cilliers appealed the dismissal and this led to a hearing taking place before an appeal board on July 26th, 2017. The appeal board's decision, which was set out in a letter dated August 2nd, 2017, recommended that the GHA withdraw her dismissal on the grounds of gross misconduct but that her application be made voidable and that the contract be rescinded.

4 On August 10th, 2017, Dr. Cilliers commenced proceedings in the Employment Tribunal for unfair dismissal in which she alleges that the true

reason for her dismissal was the fact that she had made a series of protected disclosures to the GHA regarding shortcomings with the clinical governance at the Eye Unit at St. Bernard's Hospital. Dr. Cilliers applied to strike out the GHA's response to the claim on three grounds under r.36 of the Employment Tribunal (Constitution and Procedure) Rules 2016 as set out in a letter dated June 4th, 2020. Two of the grounds relied on, namely that the GHA had conducted the proceedings in a scandalous, vexatious and unreasonable manner and that it had failed to properly comply with an order for disclosure, were dismissed by the Chairperson and are not the subject of this appeal. The remaining ground which is relevant for the purposes of this appeal is based on the allegation that the response is scandalous or vexatious or has no reasonable prospect of success. This is based on the fact that the only reason given by the GHA for the dismissal of Dr. Cilliers in the response was her failure to make material disclosures when she applied for the post of consultant ophthalmologist but that when the decision to dismiss was taken, the GHA was not aware of the alleged material non-disclosure. It is alleged that the GHA only knew that there was an "ongoing issue" at this point and that it then alighted on this as a convenient excuse to justify the decision. Further, Dr. Cilliers relied on the fact that the GMC had confirmed in an email that there was nothing untoward and dishonest about the way she had completed the application form.

5 Joseph Nuñez sitting as Chairperson of the Employment Tribunal heard the application on July 13th and 14th, 2020 and, following the hearing, he was allowed to consider the settlement agreement entered into between Dr. Cilliers and South Warwickshire Hospital (which had not been disclosed to the GHA) to determine its relevance to the proceedings. He concluded that this was not disclosable. He then handed down his decision dismissing the strike-out application on September 14th, 2020 ("the decision"). A transcript of that hearing was made available to the court as were the skeleton arguments filed for that application.

6 When dealing with the power to strike out in the decision, the Chairperson refers to r.36 of the Employment Tribunal (Constitution and Procedure) Rules 2016 and to the fact that Mr. Vasquez, Q.C., who appeared for Dr. Cilliers at that hearing as well as in this appeal, conceded that even if the response were struck out that would not be the end of the matter as the GHA would still be able to challenge Dr. Cilliers' claim that she had made protected disclosures. In that regard, the Chairperson stated: "I concur with such a view and perhaps go further." After stating that r.36 had to be read in conjunction with r.3 (the overriding objective) and summarizing the general principles set out in *Harvey on Industrial Relations & Employment Law*, he stated as follows:

"I pause here to make what to my mind is an important observation. Neither the cases referred to in Harvey or [sic] indeed the passages in Harvey appear to deal with anything other than applications to strike out claims. This is not the situation we have in this case; the application is to strike out the Response filed. What is more, in this case, even if the application to strike out succeeds, it does not mean that is the end of the case as the Claimant will still have the burden of proving that she made protected disclosures, as defined by section 45A of the Act, which enables her to rely on the provisions of section 65D of the Act, and the Respondent will still have the opportunity of persuading this Tribunal that the Claimant did not make a protected disclosure. Why is this so important? Simply because this Tribunal will still be in the position of having to hear the evidence behind one of the central factual disputes in this case, i.e. whether the Claimant made protected disclosures within the provisions of sections 45A and 65D of the Act. Bearing in mind the above in mind, it seems to me that in cases such as the present on the threshold which the applicant of the strike out application needs to surmount whilst still high is possible [sic] not as high as in those where the application is for the striking out of a claim."

7 Moving forward to the part of the decision which deals with the substance of the strike-out application itself, whilst this was originally aimed at the whole of the GHA's response the position was refined in the course of the hearing by Mr. Vasquez who confirmed that the application was limited to paras. 7–11 of the response which the Chairperson set out at pp. 22–23 of the decision and which state as follows:

"7. The Respondent's reason for dismissing the Claimant on the Termination Date related to her failure to make material disclosures in the Application Form which put her integrity and honesty in serious doubt. The Claimant declared/certified in the Application Form when responding to the employment screening of the Respondent that (i) all the information in the Application Form was complete and accurate; (ii) that any false statement/deliberate omission in the information sheet supplied might disqualify her for employment; (iii) that she had not been found guilty of professional misconduct. The Claimant expressly stipulated in the Application Form that she did not want the Respondent to contact her then employers, the South Warwickshire NHS Foundation Trust, for a reference prior to the interview.

8. In the course of the Respondent's pre-validation checks with the GMC for the Claimant on 26th March 2017, the Respondent discovered when reviewing the Claimant's GMC connect file, that she had been deferred in 2016 by her Responsible Officer on 20th

> January 2016 as she was the 'subject of ongoing process' at the South Warwickshire Hospital NHS Foundation Trust.
>
> 9. The 'ongoing' process whilst with the South Warwickshire NHS Foundation Trust involved several breaches of information governance processes when she was carrying out audit research objectives with the aim of streamlining the follow-up systems in the high volume Medical Retina Services, and which were the subject of an internal investigation for professional misconduct. When the Claimant signed the declaration/certificate contained in the Application Form she failed to disclose the misconduct.
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> 10. Under the GMC Guidelines, her prior misconduct would have constituted a breach of Rule 42 and/or 43 thereof, and which was ongoing at the time she signed the Application Form. Compliance with information governance is part of a medical practitioner's professional code and a breach of this would constitute professional misconduct under the GMC Professional Code of Conduct the relevant provisions . . .
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> 11. The Medical Director of the Respondent met with the Claimant on 12th May 2017 following the request referred to in paragraph 6(e) above, and adjourned the meeting to 15th May 2017 to allow a colleague to attend the meeting with the Claimant, and raised the non-disclosure of this ongoing process with her prior employer by the Claimant in the Application Form submitted to the Respondent, including her deferred revalidation, in relation to professional misconduct for breaching information governance processes when carrying out audit research objectives. It was determined that such material non-disclosure in the Application Form fell materially below required professional standards to the extent that it put her integrity and honesty into serious doubt, and constituted gross misconduct entitling the Respondent to terminate her employment for good and sufficient cause with immediate effect on the 15th May 2017."

8 As can be seen, this part of the response states that the reason for Dr. Cilliers' dismissal was that she had failed to disclose that she had been the subject of a process at the South Warwickshire Hospital concerning breaches of information governance. The GHA contended that this omission put Dr. Cilliers' integrity and honesty in serious doubt. Mr. Vasquez submitted, however, that these paragraphs had to be struck out because when the decision to dismiss had been taken on April 5th, 2017 by the Minister for Health and Dr. Cassaglia, all the GHA knew was that Dr. Cilliers had been the subject of some "ongoing process" at South Warwickshire Hospital. Further information had only been forthcoming afterwards and this included an email from Dr. Pollock on behalf of the GMC who had confirmed to the GHA that there was nothing wrong with the way that Dr.

Cilliers had completed her application form. In Mr. Vasquez's submission, this meant that when the decision to dismiss had been taken, the GHA did not have material on which to found the dismissal and that when the response was filed in the tribunal, the GHA knew that there was nothing in it as confirmed by Dr. Pollock. In the course of the hearing before the Chairperson, Mr. Vasquez pointed out that no other ground of dismissal had been pleaded by the GHA in its response and that there was no application to the GHA to amend its pleading, adding: "Perhaps they should consider it because if they were going to try and plead something else they can't."

9 Mr. Isola, Q.C. who appeared for the GHA before the tribunal submitted in response that when the decision was taken to dismiss Dr. Cilliers on April 5th, 2017 there were various issues of dissatisfaction with her including the failure to complete the GHA application form properly. His submission as recorded in the transcript was as follows:

> "My view on the evidence is that decision, the approval of the discussion, the approval was given there were a number of reasons, that were there for termination, but the approval was given for termination, but not necessarily the reason that was going to be attributed to the dismissal . . ."

10 Further, when the Chairperson was checking that his note was accurate inquired as follows (as recorded in the transcript): "What I've put here is the approval for termination was given on the 5th April, but the decision as to the grounds for dismissal was not made upon that day. Is that correct?" Mr. Isola then answered "Yes." Mr. Isola's further submission was that the reasons for the dismissal could change and evolve after the date of the termination and that the grounds on which the dismissal was based were not fixed on the day the decision to terminate was taken.

11 After reminding himself about his previous opinion that the threshold which an applicant has to surmount is not as high in cases where the application is to strike out a response rather than a claim, the Chairperson goes on to set out his reasoning for refusing the dismissal application which starts at the final paragraph of p.33, where he states that it is perfectly clear from the evidence that when the decision to dismiss was taken on April 5th, 2017, the GHA did not have "any material or reliable information as to what the 'ongoing process' concerned, or that as a result of that 'ongoing process' the Claimant [Dr. Cilliers] had been disciplined etc, which evidence does not appear to be disputed either." Further, he states that the dismissal could not have been made for the reasons expressed at the meeting of May 15th, 2017 and the letter of the same date—

> "which Mr Isola appears to have conceded when he stated that the reason for the dismissal evolved after the 5th April 2017. Thus, the

Respondent [the GHA] appears to have shifted its position away from the contention that the primary reason for the dismissal was the Claimant's failure to properly fill in a form, which it accept's [*sic*] is deficient at least."

12 He then further stated as follows:

"On the basis of the above, and before further reflection, I was quite prepared to find that this ground for striking out had been established and I was also prepared to strike out the Response in the exercise of my discretion.

What has changed my mind was Mr Isola's statement/concession (albeit late in the day) to the effect that whilst the Respondent's decision to dismiss was made on 5th April 2017, what was not fixed/decided on that day was the reason for the decision, which evolved in the days/weeks subsequent to that date. On the 5th April 2017, there were various issues of dissatisfaction with the Claimant of which only one was the issue of the incomplete GHA application form. In other words, the Respondent whilst still denying that the reason for the dismissal was the Claimant's whistle blowing now wishes to rebut the Claimant's assertion by averting [sic] that the reason for the dismissal was something other than the failure to properly complete a GHA application form. Such a shift appears to me to be in effect an admission that paragraph's [*sic*] 7 to 11 of the Response have become an irrelevance.

. . .

Originally, the Respondent sought to rebut the Claimant's assertions by asserting that the failure to complete the GHA application form properly was the principal cause for her dismissal but that position has now changed and the Respondent wishes to rebut the Claimant's assertions by relying on other grounds for her dismissal (eg complaints made by staff and patients against the Claimant). This being the case, and whilst I have much sympathy for the Claimant's submissions with regard to the striking out appliacation, [sic] I do not see how I can possibly exercise my discretion to prevent the Respondent from calling evidence to prove that the reason for the decision taken to dismiss on 5th April 2017, was one other than whistle blowing. I cannot therefore order the striking out of paragraph's [sic] 7, 9 and 10 of the Response, though I do point out that to an extent it seems to me that the case has progressed to a position where said paragraph's [sic] have become an irrelevance in any case."

13 The two final paragraphs of the decision state as follows:

> "DECISION
>
> The Claimant's application to strike out paragraph's [sic] 7, 9 and 10 of the Response is dismissed.
>
> Bearing in mind the Respondent's new stance of moving away from relying on an inappropriately completely form as the reason for the dismissal, it would appear to me, and whilst not making an order to such effect, at least at this stage, that the Respondent's list of witnesses to be called to give evidence will be cut down to two, that is, Dr Cassaglia, a good portion of the contents of his witness statement will no longer be relevant, and Ms Louise, to whom the same comment applies. All of this will save time and expense so I trust that the Respondent will review its position as to the witnesses to be called and for what purpose in the light of the need to comply with the overriding objective."

14 On November 19th, 2020, and some two months after the decision was handed down, a CMC took place before the Chairperson by which time the GHA had filed its grounds of appeal. The Chairperson commented on these grounds of appeal and these comments are recorded in an unofficial transcript of that hearing which was also made available to the court. This suggests that the Chairperson had taken offence at the contents of para. 5(b) of the GHA's notice of appeal which states that the tribunal erred in law by making a perverse decision that no reasonable tribunal could have reached in that:

> "The decision turns on a supposed 'statement', 'concession' or 'admission' made by counsel for the Appellant during the hearing, when the recording of the hearing shows that no such statement, concession or admission was made . . ."

The Chairperson said that he did not know what appeared in the transcript of the proceedings but read out his note of what Mr. Isola had said at the hearing which he said that he had taken down verbatim and which he clearly considered confirmed his understanding of the GHA's position. This refers to Mr. Isola's submission that whilst the decision to dismiss was approved on April 5th, 2017, the reasons for the dismissal were not fixed on that day and that these changed and evolved. He also referred to the reference to there being various issues of dissatisfaction with Dr. Cilliers including the question of the application form (which he appears to have mistakenly referred to as the disclosure form).

Grounds of appeal and submissions

15 Against this background, the GHA contends that the Chairperson erred in law as follows:

(1) That he was wrong to hold that the threshold for striking out a response is lower than the threshold for striking out a claim.

(2) That he applied the wrong legal test on the response having no reasonable prospect of success where the claim is dependent on conflicting evidence and/or the central facts are in dispute, namely, that Dr. Cilliers was dismissed for making a protected disclosure.

(3) That this was not an appropriate case for the use of the tribunal's strike out powers.

(4) That the Chairperson was wrong to base his decision on a supposed "statement," "concession" or "admission" made by Mr. Isola, Q.C. who acted for the GHA in the tribunal hearing and to state that had it not been for that, the response would have been struck out. It was submitted that, as stated above, this amounted to a perverse decision that no reasonable tribunal could have made and that the recording of the hearing shows that no such statement, concession or admission was made. It was further submitted that the perversity of the Chairperson's decision could also be inferred from his consideration of the settlement agreement entered into between the South Warwickshire Hospital and Dr. Cilliers which could only be relevant to the issue of material non-disclosure.

(5) That the Chairperson relied on an account of the evidence that is demonstrably incorrect including misstating key dates that had been agreed between the parties.

(6) That the decision was vitiated by apparent, but not actual, bias on the part of the Chairman.

16 Although there are various strands to the appeal, at its core is the contention that whilst the Chairperson dismissed the strike-out application, he did so on the mistaken basis that the GHA's reliance on non-disclosure as a ground of dismissal had fallen away and then went on to say that were it not for this, he would have struck out the response as having no reasonable prospect of success. In this regard, Mr. Navas, who appeared for the GHA at the appeal hearing, drew attention to the Chairperson's comments in the final two pages of the decision that paras. 7–11 of the response had become an "irrelevance" and that much of the evidence contained in the witness statements of Dr. Cassaglia and Ms. Louise "will no longer be relevant." He also referred to the Chairperson's comments that the reason for the decision was now something other than Dr. Cilliers' failure to properly complete the application form. He said that the true effect of the decision was that paras. 7, 9 and 10 of the response could no longer be pursued by the GHA because as the Chairperson was wrong to conclude that this part of the defence was no longer being pursued based on a supposed concession made by Mr. Isola, his comments about this part of the defence having no reasonable prospect of success were engaged. Mr.

Navas said that this severely prejudiced the GHA as it was unable to pursue or it was highly unlikely to succeed with its reliance on non-disclosure as the main reason for dismissal and was only able to proceed with other grounds of dismissal relied on.

17 Mr. Navas submitted that the Chairperson was wrong to conclude that Mr. Isola had made such a concession when it was clear that this was not the case as was clear from the transcript of the hearing and the GHA's own evidence. Further, he said that had such a concession of that magnitude been made, the Chairperson should have double-checked the position and made the appropriate inquiries of Mr. Isola to ensure that the abandonment of this part of the GHA's case was clear, unambiguous and unequivocal rather than jumping to an incorrect conclusion. In this connection, he relied on *Segor* v. *Goodrich Actuation Systems Ltd.* (9) as authority for the proposition that the Employment Tribunal should be careful before taking on board concessions. Further, Mr. Navas said that the Chairperson's comments about paras. 7, 9 and 10 were wrong because, even though the details of the non-disclosure were not available to the GHA on April 5th, 2017 when the decision to dismiss was taken, the GHA were aware as from March 26th, 2017 that Dr. Cilliers was the subject of an "ongoing process" at South Warwickshire Hospital.

18 Thus, Mr. Navas submitted that the decision was perverse as it was based on an alleged concession by Mr. Isola which was never made and that given the factual dispute between the parties, no reasonable tribunal directing itself properly could have in effect struck out any part of the response. Mr. Navas also said that the Chairperson inappropriately tried to justify the decision at the CMC held on November 19th, 2020.

19 Mr. Navas said that the GHA had not applied to amend the response because it was awaiting the outcome of this appeal which would ensure that costs were reduced. In his submission, if the appeal was successful, the application to amend would only require the addition of the other reasons relied on in support of the dismissal because the failure to disclose as the principal reason for the dismissal would remain. If the appeal was not successful, this would ensure that costs would not be wasted pursuing the non-disclosure as a ground of dismissal. In any event, he considered that in the light of the decision, the GHA's prospects of amending its response were not good. Mr. Navas referred to paras. 32 onwards of Dr. Cassaglia's witness statement dated April 29th, 2020, which set out the GHA's position, and also to the GHA's defence dated September 2nd, 2021 filed in response to a separate contractual claim brought by Dr. Cilliers in the Supreme Court which sets out clearly at para. 8 how the GHA's position evolved between April 5th, 2017 and May 15th, 2017.

20 Mr. Navas further submitted that the Chairperson's observations at p.13 of the decision on the applicable threshold for striking out a response

were plainly wrong in law and had no legal basis as the threshold for striking out a response form and a claim was the same. Further, he said that the power to strike out should only be exercised rarely, especially when central facts were in dispute.

21 Dealing with the fact that the GHA had succeeded in resisting the strike-out application which the Chairperson had dismissed, Mr. Navas referred to the Employment Tribunal (Constitution and Procedure) Rules 2016 ("the Rules") which govern this appeal which he submitted did not bar an appeal such as this one even though they did not expressly refer to "winner's appeals." Rule 3 provides for appeals against the whole or part of a decision. Rule 2(1) of the Rules defines "judgment" as a decision made at any stage in the proceedings which finally determines a claim or part of a claim as regardless liability, remedy or costs or—

> "any issue which may potentially dispose of a claim, or part of a claim, irrespective of whether the issue actually results in the disposal (for example, an issue whether a claim should be struck out or a jurisdictional issue)."

He further referred to r.6 of the Rules which allow for a respondent who wishes to cross-appeal to contend that the decision appealed against should be affirmed on grounds other than or additional to those relied on by the tribunal. He said that it followed that if a respondent to an appeal could ask for part of a decision to be affirmed on grounds other than those relied on by the tribunal it would be perverse for an appellant not to be able to do so.

22 Mr. Navas submitted that this was no mere "winner's appeal" as the GHA found itself in virtually the same position as if the response had been struck out as it could no longer contend that the reason for the dismissal was the failure to make material disclosures in the application form which put her integrity and honesty in serious doubt. Further, he said that winners' appeals could be entertained where there was a fundamental legal issue at stake which he said was the case here and he cited *Moss* v. *Information Commr.* (7) in support of that proposition. Mr. Navas also relied on *Work & Pensions Secy.* v. *Morina* (11) as authority for the proposition that something decided by a court that would properly be the subject of an appeal may found an appeal even if it is expressed in its judgment (reasons) rather than its order (decision).

23 Finally, Mr. Navas submitted that the decision was vitiated by apparent, although not actual, bias. Mr. Navas relied on the formulation of the test in *Porter* v. *Magill* (8), namely ([2002] 2 A.C. 357, at para. 103):

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

24 Mr. Navas also relied on Gibson, L.J.'s statement at para. 25 of his judgment in *Southwark LBC* v. *Jimenez* (10) ([2003] IRLR 477, at para. 25) that "the premature expression of a concluded view or the manifesting of a closed mind by the tribunal may amount to the appearance of bias." Further, he referred to Kay, L.J.'s judgment in *Ezsias* v. *North Glamorgan NHS Trust* (3), where he stated that ([2007] ICR 1126, at para. 23):

> "In my judgment the present case falls clearly on the other side of the line. What the chair said in the document of 20 July 2005 was not said at the time to be a provisional or preliminary view. On the contrary, it was clearly stated in concluded terms. What she later said to the Employment Appeal Tribunal by way of explanation was, in the view of Elias J, enough to acquit her of actual pre-determination but it did not and could not displace the perception which any fair minded and informed observer would have formed, namely that there was a real possibility that she had a concluded view or a closed mind as regards Mr Ezsias's prospect of success. Elias J put it in this way, at para 52:
>
> > 'Any fair-minded and informed observer would, in my view, have considered that to put it at its lowest there was very little prospect that [the appellant] would be able to shift her from her view. I do not think that her comments at the second hearing would sufficiently have dispelled that impression.'"

25 Mr. Navas said that apparent bias could be inferred from the Chairperson's willingness to base his whole decision on a concession which was not made and which was out of line with the GHA's position with little or no regard to the unchallenged witness evidence from the most senior GHA officers or the submissions made on behalf of the GHA. He said that this bias could also be inferred from the fact the Chairperson's finding that the threshold test for the strike out of a response was lower than for the strike out of a claim and from his reliance on demonstrably incorrect evidence. For example, Mr. Navas relied on the fact that the Chairperson had stated at p.6 of the decision that Dr. Cassaglia did not refer to emails between Professor Burke, Dr. Ashton and Dr. Cassaglia regarding Dr. Cassaglia and Professor Burke wanting to have more information about the "ongoing process" when this was in fact referred to in para. 45 of Dr. Cassaglia's witness statement. Another example provided by Mr. Navas in this regard is the Chairperson's incorrect reference to the "ongoing process" having been completed on March 26th, 2016 at p.8 of the decision (*i.e.* before the application form was completed on March 28th, 2016) when Dr. Cassaglia states at para. 56 of his witness statement that he was informed that this was completed on March 28th, 2016 and Dr. Cilliers herself stated at para. 11 of her witness statement that she applied for the position when the investigation was ongoing. Further, he referred to the

Chairperson's remarks contained in the transcript that Professor Burke was aware of the "ongoing process" on January 28th, 2016 when the GHA contends that he only became aware of this on March 26th, 2017. Mr. Navas also said that the Chairperson improperly conducted a mini-trial especially on the question of when Professor Burke became aware of the "ongoing process."

26 In response, Mr. Vasquez, Q.C. submitted that the GHA had been entirely successful in resisting the strike-out application made by Dr. Cilliers and that it was therefore not able to bring this appeal. He referred to *Lake* v. *Lake* (6) as the well-known authority for the proposition that winners' appeals were restricted. He further submitted that whilst more recent cases such as *Cie d'Importation et d'Exportation SA* v. *Australia & New Zealand Banking Group* (1), *Moss* (7) and *Morina* (11) showed that the courts were less mechanical in determining what can properly form the subject of an appeal, there was nothing in those authorities which assisted the GHA and there was no question of it being able to pursue an appeal in relation to the decision. Mr. Vasquez submitted that the Chairperson's comments which the GHA was challenging did not comprise definitive findings of fact and were nothing more than passing comments made by him which were not binding on the parties. In his submission, the court's appellate jurisdiction was only triggered in relation to concrete decisions of the tribunal and not for the correction of the tribunal's reasoning.

27 Mr. Vasquez said that the comments made by the Chairman at paras. 7, 9 and 10 of the response should be taken as referring to the difficulties which he anticipated the GHA was going to have in maintaining those elements of the response. Further, he said that it was not uncommon for judges to make such comments when disposing of interim applications but that ultimately these comments were not binding on the parties and did not detract from the GHA's ability to run its defence in full at the substantive hearing.

28 Further, he said that the Chairperson's statements were understandable as the GHA's case was in his submission not sustainable at either end. The reliance on non-disclosure as the ground of dismissal could not be correct at the time the decision to dismiss was taken on April 5th, 2017 because at that point the GHA was only aware that Dr. Cilliers was subject to an "ongoing investigation" and it only received further details about this from the South Warwickshire Hospital on April 21st, 2017 then included in the letter of dismissal on May 15th, 2017. Thus when the decision to dismiss was taken on April 5th, the GHA could not have known the details of that process as pleaded in paras. 9 and 10 of the response. He said that the GHA's position was also unsustainable at the time the response was filed because on June 2nd, 2017 and before the response was filed, Dr. Pollock of the GMC had confirmed to the GHA in an email that he saw nothing

untoward in the way Dr. Cilliers had made her job application and that any breaches of information governance processes at South Warwickshire Hospital did not constitute professional misconduct.

29 Mr. Vasquez said that the GHA's position was even more untenable because many of these emails which undermined the GHA's case had only been uncovered by Dr. Cilliers after having made data subject access requests in the UK and had not been disclosed by the GHA either at the appeal hearing which took place on July 26th, 2017 following Dr. Cilliers' dismissal or in the disclosure statement filed in the Employment Tribunal proceedings. Against this background, Mr. Vasquez submitted that the Chairperson had every justification to express a certain amount of scepticism relating to the viability of the GHA's case as pleaded in the tribunal especially when no draft amended response had been provided.

30 Mr. Vasquez said that *Segor* (9), which was relied on by Mr. Navas, concerned the dismissal of a case on the basis of a concession which clearly had no application to the present appeal where the strike-out application had been dismissed and the Chairperson had in fact provided the GHA with a lifeline. Further, he said that the usual rule precluding winners' appeals should apply. As for the mistakes made by the Chairperson, he said that these were entirely academic as he ultimately refused to exercise his power to strike out the response and that they did not give rise to an appeal. Accordingly, Mr. Vasquez submitted that no issue of *res judicata* or issue estoppel arose, that the GHA was free to pursue its defence in any way that it saw fit and was not debarred from relying on the non-disclosure as a ground of dismissal. Similarly, he submitted that any errors made by the Chairperson on the facts were not binding on the tribunal and could be corrected in the course of the final hearing as they were not findings of fact.

31 Finally, Mr. Vasquez rejected the allegation of apparent bias and described this as a pernicious attempt by the GHA to remove the Chairperson at a time when it was well known that the tribunal had difficulties recruiting chairpersons and that this could have the effect of derailing the proceedings. He said that the Chairperson had bent over backwards to be fair, that all he had said was that the GHA had an uphill struggle with its defence as pleaded but, ultimately, that he had dismissed Dr. Cilliers' strike-out application. Mr. Vasquez relied on the statement made by Elias, J. (as he then was) in his judgment in *Hamilton* v. *GMB* (4) ([2007] IRLR 391, at para. 29) that judges should not readily accede to accusations of apparent bias because that may lead the parties seeking to effect a disqualification so as to have the case tried by a judge considered to be more amenable to their case. Mr. Vasquez also relied on a decision of the High Court of Australia, namely *Re JRL; ex p. CJL* (5) (161 CLR 342, at para. 5) which states as follows:

"There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise that with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be 'firmly established' . . ."

Analysis

32 In order for the GHA to succeed with this appeal it must establish that the Chairperson erred in law pursuant to s.13 of the Employment Act. In *Cruz* v. *Community Projects* (2), Dudley, C.J. explained what was required to establish an error of law as follows (2010–12 Gib LR 340, at para. 20):

"20 By virtue of s.13 of the Employment Act 1932, an appeal lies from the Industrial Tribunal to the Supreme Court on questions of law. Of course, when hearing an appeal from the Tribunal it is not for this court to substitute its view for that of the Tribunal, in that on questions of fact the decision of the Tribunal is final. This court can only interfere if satisfied that the Tribunal misdirected itself as to the law, or if there is no evidence to support a particular finding of fact or the decision is perverse in the sense that no Tribunal reasonably directing itself could have reached the conclusion it did."

33 The Chairperson dismissed the strike-out application but he proceeded on the basis that non-disclosure was no longer being relied on as a ground for dismissal and went on to say that if this had not been the case that he was quite prepared to strike out the response. The reasoning which led to the Chairperson reaching this view can be found in the final paragraph of p.33 of the decision where the Chairperson states that when the decision to dismiss was taken on April 5th, 2017, the GHA did not have any material or reliable information as to what the "ongoing process" concerned or that Dr. Cilliers had been disciplined and that she could not therefore have been dismissed for the reasons set out in the letter of May 15th, 2017 (and which are set out in paras. 7–10 of the response) which were not known at that point. In his view, the reasons given for the dismissal cannot be reconciled with the fact that when the decision to dismiss was taken, these details were not known by the GHA. The Chairperson then referred to what he took to be a concession made by Mr. Isola that non-disclosure was no longer being relied on as a primary ground of dismissal. Further, he referred to a shift

on the part of the GHA from relying on Dr. Cilliers' failure to properly fill as the primary reason for dismissal to relying on other reasons for the dismissal.

34 When Mr. Isola referred to matters evolving after April 5th, 2017, he was not referring to the fact that the GHA was only relying on grounds of dismissal other than non-disclosure. What he was getting at was that the GHA's concerns about the "ongoing process" were confirmed after April 5th, 2017 when further information about this was forthcoming. Further, when he referred to other grounds of dissatisfaction with Dr. Cilliers he was not saying that these grounds replaced non-disclosure as the main reason for the dismissal, only that they formed part of the decision making process in some way. This is now clear from the GHA's pleaded case in the defence filed in the contractual claim which was made available to the court. This states at paras. 7 and 8 that whilst the principal ground for dismissal was Dr. Cilliers' failure to disclose, there were other reasons for dissatisfaction with Dr. Cilliers which contributed to the decision to terminate her employment which related to her conduct and capability. Further, it states that the principal reason to be attributed to the decision was not fixed on April 5th, 2017 when the decision to dismiss was taken but that when the GHA received further information about the internal investigation which had taken place at South Warwickshire Hospital, it took the view that it was entitled to establish that the principal reason attributable to the dismissal was Dr. Cilliers' non-disclosure even though there were several reasons of dissatisfaction with Dr. Cilliers which contributed to her dismissal. This also deals at para. 73 with Dr. Cilliers' contention that there was no breach of GMC rules and states that the breaches of information governance processes which took place at South Warwickshire Hospital constituted professional misconduct even if they did not meet the threshold for referral to the GMC and that it was entitled to determine that Dr. Cilliers' conduct and lack of probity amount to gross misconduct.

35 It is of course a shame that this issue was not canvassed in greater detail at the time or that a draft amended response was not provided setting out the GHA's pleaded case with greater precision. It is true that the witness statement of Daniel Cassaglia dated April 29th, 2020 states that the principal ground for Dr. Cilliers' dismissal was non-disclosure of the "ongoing process" at the South Warwickshire Hospital despite significant underlying issues concerning her capability and conduct (see paras. 46 and 73). Further, Dr. Cassaglia explains that after further details about Dr. Cilliers' non-disclosure were forthcoming, he decided that she should be summarily dismissed on the basis that she had signed a declaration on her application form and had not disclosed the formal disciplinary process she was subjected to by South Warwickshire Hospital (para. 57). The strike-out application, however, was aimed at the GHA's response which does not plead this aspect of the GHA's defence adequately in the sense that it gives the impression that the information it obtained about the "ongoing

process" after April 5th, 2017 was known when the decision to dismiss was taken and does not properly explain how things developed. Further, it does not plead the other causes of complaint about Dr. Cilliers or their relevance. The GHA's skeleton argument dated June 30th, 2020 filed in response to the strike-out application did not elucidate matters either in this regard. Rather than being a case where the Chairperson accepted a concession too readily, the problem was that the Chairperson misinterpreted Mr. Isola's submissions in this regard.

36 It is difficult to understand why, if the Chairperson was labouring under the misapprehension that non-disclosure was no longer being pursued by the GHA as a ground of dismissal, he then refused to strike out paras. 7–10 of the response and simply dismissed the application. One might have expected that in these circumstances he would have struck out this part of the pleading and given directions to ensure that the GHA's case was updated and pleaded with precision. It may be that the Chairperson thought that such directions were not necessary and that he should just allow the GHA to develop its case as it saw fit.

37 The GHA contends that the Chairperson's comments mean that it is effectively debarred from relying on non-disclosure as a ground of dismissal and that it should therefore be entitled to appeal against this part of the decision even though it is, on the face of the decision, the winner. *Lake* v. *Lake* (6) is the well-known authority for the proposition that appeals cannot generally be pursued by successful litigants who may be dissatisfied with the reasoning which lies behind a decision but not the result. This case concerned a husband's petition for divorce against his wife on the grounds of adultery and cruelty. The wife denied the charges and said that if she had committed adultery, this had been condoned. In his reasoned judgment, the judge held that the wife had committed adultery but that this had been condoned by the husband but there was no mention of this in the final order drawn up which simply dismissed the husband's claim and stated that the claim had not been proved. The wife's application for permission to appeal the finding of adultery was dismissed and the Court of Appeal explained that the wife was not entitled to appeal against anything other than an appealable issue in the formal judgment or order drawn up disposing of the proceedings. Nothing turns on the fact that this is an appeal against "a decision of the Tribunal" (the language used in the Rules) as this is synonymous with a "judgment or order." What matters is the result or outcome of the lower court or tribunal. In *Lake* v. *Lake*, the Court of Appeal held that the formal judgment or order was to be distinguished from the reasons given by the judge which may reject as well as accept submissions made by the successful party. Further, it did not follow that if a successful party was dissatisfied with a matter decided against him there was an appealable issue (*per* Hodson, L.J., [1955] 2 All E.R. at 543).

38 *Lake* v. *Lake* was reviewed by the Court of Appeal in *Cie Noga* (1) which rejected a mechanical approach based on whether a decision was contained in a formal order or not and held that the formal order was not necessarily conclusive as to what could and could not be the subject of an appeal. Waller, L.J. states that *Lake* v. *Lake* properly understood means that a decision when properly analysed and if it were to be recorded in a formal order would be one that the would-be appellant would not be seeking to challenge or vary, then there is no jurisdiction to entertain an appeal ([2003] 1 W.L.R. 307, at para. 27). Further he stated (*ibid.*):

> "A loser in relation to a 'judgment' or 'order' or 'determination' has to be appealing if the court is to have any jurisdiction at all. Thus if the decision of the court on the issue it has to try (or the judgment or order of the court in relation to the issue it has to try) is one which a party does not wish to challenge in the result, it is not open to that party to challenge a finding of fact simply because it is not one he or she does not like."

39 Waller, L.J. went on to say (*ibid.*, at para. 28) that in cases where findings of fact might be relevant to some other proceedings, it might be appropriate to make a declaration so as to enable a party to challenge those findings and not find himself prejudiced by them but that it was beyond the scope of the judgment to consider precisely what circumstances might allow for the granting of a declaration where findings of fact might affect other proceedings.

40 *Lake* v. *Lake* was also considered in *Morina* (11) where the Secretary of State won his case on the merits before the Social Security Commissioner concerning the overpayment of small amount of income support to two individuals. The Secretary of State however lost his argument that the Social Security Commissioner had no jurisdiction to determine the appeal. Even though the Secretary of State had won the appeal on the merits, the question which was of much greater importance to him was the determination on jurisdiction which he sought to appeal. Kay, L.J. referred ([2007] 1 W.L.R. 3033, at para. 6) to the court's "traditional reluctance to permit an appeal at the behest of a litigant who succeeded below and who seeks to take issue with the reasoning of the decision rather than with its outcome." The court held that it was not precluded from hearing the appeal on the jurisdictional point even though the Secretary of State was the winner because this issue was no mere "finding" or part of the "reasoning" upon which the Commissioner's decision on the merits was based, but was "a fundamental legal issue of jurisdiction" or "lasting legal significance." Kay, L.J. said as follows (*ibid.*, at para. 10):

> "In the present context, I do not consider that analysis to be correct. It is significant that the wording of section 15 of the Social Security Act does not replicate that of section 16 of the Supreme Court Act. It

concerns 'any decision' rather than 'any judgment or order'. To that extent, *Lake's case* is not applicable as a matter of construction. Nevertheless, the policy aspect of *Lake's case* as articulated by Hodson LJ has to be borne in mind. Does it apply so as to shut out an appeal by the successful party before the commissioner? In my judgment, it does not. I find force in Mr Kovats's submission that the 'decision' referred to by the commissioner in para 1 was in each case and in reality two decisions—first, that he had jurisdiction to hear the appeal and, secondly, that the appeal should be dismissed on the merits. Whilst it is difficult to imagine circumstances in which the Secretary of State, having succeeded on the merits, should be permitted to appeal in relation to some aspect of the reasoning of the commissioner on the merits, I do not think that that necessarily precludes an appeal by him on the jurisdiction point which he lost. Moreover, as Miss Lieven submits, the Secretary of State is seeking to change 'the decision' described in para 2. He is seeking to establish that the appeals of the claimants should have been rejected for want of jurisdiction rather than dismissed on the merits. It is mainly for these reasons that I do not consider that we are precluded by law from hearing these appeals. Having said that, however, I am not to be taken to be enabling a whole range of 'winners' appeals'. It is significant that, in the present case, the subject matter of the proposed appeals to this court is a ruling by the commissioner on a fundamental legal issue of jurisdiction and not a finding such as the finding of adultery in *Lake's case*. The latter was of interest only to the parties and, as between them, was of no lasting legal significance in view of the finding of condonation. Thus, even where ingenuity can result in the decision of a commissioner being represented as, in reality, two decisions, I would expect this court to refuse the successful party below permission to appeal against an immaterial finding of no general significance."

41 Thus, the court viewed the outcome before the Commissioner as consisting of two decisions. Further, it made it clear that even then, the appeal was only possible because it concerned a fundamental legal issue of jurisdiction and not an immaterial finding of no general significance and the court was at pains to point out that its decision was not to be taken as enabling a whole range of winners' appeals. This decision was followed by the Upper Tribunal (Administrative Appeals Chamber) in *Moss* (7).

42 Applying these principles to the present appeal, the decision does not consist of more than a single determination, namely, the dismissal of the strike-out application, nor is there a fundamental legal issue in play such as the question of jurisdiction. The Chairperson's comments about the GHA not pursuing non-disclosure as a ground of dismissal and indicating that he would have struck out that part of the response had they done so are not

determinations which bind the parties. Further, the views expressed are clearly based on a misunderstanding. In any event, this will all be irrelevant when the matter proceeds to a final hearing by which time it will be open to the GHA to persuade the Chairperson, to the extent that it is necessary, that he was wrong about the comments which he made.

43 Further, this is not a question of the tribunal reviewing or reconsidering its decision which power the tribunal does not appear to enjoy under the Rules (unlike the position in England). The only decision which the tribunal made was to dismiss the strike-out application and when the matter proceeds to a final hearing, the tribunal will reach its decision based on the evidence and final submissions and will not be bound by these comments. Contrary to Mr. Navas' concerns, the GHA is not fettered in the way in which it can defend the claim, which Mr. Vasquez clearly accepted.

44 I do not consider that the GHA's argument that the Chairperson applied the wrong threshold test for a strike out of a response takes matters any further for it in this regard. Although the Chairperson's reasoning in this regard at p.13 of the decision is not entirely clear to me and, with respect to the Chairperson, appears to be questionable, this was an observation which was made off his own bat and which has no bearing on the decision. The application to strike out was dismissed and this is therefore an entirely academic point. In these circumstances, I do not consider that anything further needs to be said about this.

45 In support of its appeal, the GHA also relied on certain mistakes made by the Chairperson when he analysed the facts of the case. One of these errors is contained at p.6 of the decision where the Chairperson said that Dr. Cassaglia had made no reference to emails sent on April 4th, 2017 or to the letter he sent asking about the "ongoing process" which is clearly at odds with para. 45 of Dr. Cassaglia's witness statement. Another error can be found at p.8 of the decision where the Chairperson states that Dr. Cassaglia had been informed that the "ongoing process" had been completed on March 26th, 2016 (and thus before Dr. Cilliers completed the GHA application form on March 28th, 2016) when at para. 56 of his witness statement, Dr. Cassaglia states that the process was completed by March 28th, 2016. Dr. Cilliers herself refers to this process concluding on June 30th, 2016 with the signing of a confidential settlement agreement with South Warwickshire Hospital at para. 13 of her witness statement. In my view, any errors which may have arisen in relation to these comments do not represent binding findings of fact by the tribunal. The comments made by the Chairperson that Professor Burke knew about the "ongoing process" on January 28th, 2016 when this was disputed (p.75 of the transcript) are of even less significance as they arose in exchanges which took place in the course of the hearing. A proper determination on all these issues can only take place once all the evidence and final submissions have been heard by

the tribunal by which point these observations will all be water under the bridge.

46 Finally, I turn to Mr. Navas' submission that r.3 of the Rules should be construed so as to allow the court to entertain this appeal because the rights of an appellant should mirror those of a respondent. In my view, r.3(2) only refers to appeals against decisions or parts of decisions in the sense of a result or outcome and nothing more. I am not aware of any rule of statutory construction which supports Mr. Navas' submission that r.3 must be construed so as to provide appellants with the same rights that respondents enjoy under r.6 and which allows for a respondent to an appeal to contend that a decision be affirmed on other or additional grounds to those relied on by the tribunal. Further, I reject Mr. Navas' submission that it would be perverse to deny an appellant the recourse available to a respondent when different considerations apply to an appellant's right to launch an appeal and to a respondent's ability to upset the reasoning of a decision which is already before an appellate tribunal.

47 For all these reasons, whilst there are some cases where an appeal can be brought by a "winner," this is not one of them. The GHA should not be permitted to appeal against the comments made by the Chairperson that he would have struck out the response had it not been for the supposed concession made by Mr. Isola.

48 The final ground of appeal relied on by the GHA is that the decision is vitiated by apparent bias because the Chairperson had a concluded view or closed mind as regards the GHA's prospects of success. It is common ground that a judicial decision may be vitiated by apparent as well as actual bias and that the test for such apparent bias, as stated by the House of Lords in *Porter* v. *Magill* (8), is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. This requires that all the circumstances which have a bearing on the suggestion that the judge was biased are first pulled together. One must then ask oneself whether these circumstances would lead a fair-minded and informed observer to conclude that there is a real possibility that the decision-maker in question was biased. It is important to bear in mind that these circumstances must be appraised objectively and therefore with an appropriate measure of detachment.

49 Each case will ultimately turn on its own facts. By way of example, in *Jimenez* (10) an employment tribunal chairman who expressed a preliminary view in trenchant terms before all the evidence had been heard was held not to have displayed apparent bias. *Ezsias* (3) fell on the other side of the line. That case concerned a claim for unfair dismissal where, following a pre-hearing review, the chairman of the employment tribunal stated that the employee's claim had no reasonable prospect of success and was "bound to fail" and struck out the claim despite the parties' advancing

diametrically opposed cases. As well as successfully appealing the strike out ordered, it was held that the employment tribunal's decision was vitiated by apparent bias as the view expressed by the judge was not provisional or preliminary and a fair-minded and informed observer would form the perception that there was a real possibility that the tribunal had prejudged the issues and reached a concluded view or had a closed mind.

50 Mr. Navas said that the Chairperson closed his mind to the GHA's prospects of success and that this was evident from the errors he made which showed his predisposition to find against the GHA. The most significant complaint about the Chairperson conducting a mini-trial relates to the Chairman establishing the date when Professor Burke became aware of the "ongoing process." Whilst there is no doubt that a tribunal should not embark on a mini-trial when considering a strike-out application, as far as I can see the purpose of the Chairperson's inquiry in this regard was to get to the bottom of whether the relevant part of the GHA's case as pleaded was, when taken at its highest, unsustainable. This approach is not in itself objectionable even though the conclusion that the Chairperson drew may well not have been correct. In my view, a fair minded and informed observer would understand that even though the Chairperson made this and various other mistakes, judges can make mistakes of this sort in their assessment of the evidence or on legal issues when determining interim applications. A fair minded and informed observer would also understand and accept that the Chairperson can be persuaded to change his mind at the final hearing especially when, unlike the judge in *Ezsias* who struck out the claim, he gave the GHA the benefit of the doubt and did not strike out the response as he could have. In my judgment, the various errors relied on by the GHA do not raise, either individually or collectively, any question of apparent bias.

51 For all these reasons, the appeal is dismissed.

Appeal dismissed.