[2022 Gib LR 79]

GIBRALTAR HEALTH AUTHORITY v. CILLIERS

COURT OF APPEAL (Kay, P., Elias and Rimer, JJ.A.): April 27th, 2022

2022/GCA/05

Employment—dismissal—unfair dismissal—claimant commenced proceedings in Employment Tribunal and also action for damages for breach of employment contract, breach of duty of care, libel, malicious falsehood and slander—as employment contract provided for termination only with cause, contract claim not struck out as not within Johnson exclusion area—other claims, including tort claim for personal injury, struck out—claim for damages for personal injury in breach of contract claim not struck out

The respondent was dismissed from her employment.

The respondent was employed by the appellant ("the GHA") as a consultant ophthalmologist. Her contract of employment was for three years with the possibility of renewal. Either party could terminate the contract on six months' notice. The appointment was stated to be subject to certain Regulations and Orders, including that appointments to public offices could be terminated for prescribed reasons only and subject to prescribed procedure.

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. She claimed she was not required to disclose that information, that the investigation did not lead to any disciplinary action, and that she had been required to undertake further data protection training.

The respondent commenced employment in January 2017. In March 2017, Professor Burke, the GHA's head of governance, contacted Dr. Cassaglia, the GHA's medical director, to inform him that the respondent's revalidation had been deferred in January 2016. In May 2017, the respondent was summoned to a meeting with Dr. Cassaglia and the GHA's Human Resources manager to clarify some issues arising from her revalidation status with the General Medical Council. The respondent was summarily dismissed at the meeting. A letter of dismissal followed the next day explaining that the dismissal was based on gross misconduct arising from her failure to disclose the fact that she had been found guilty of professional misconduct when she applied for the position at the GHA.

The respondent alleged that the charge of gross misconduct was merely an excuse for an arbitrary decision taken to dismiss her summarily, which had been taken before the GHA became aware of the internal investigation at the English hospital. She also alleged that her conduct at the English hospital was not considered by the GMC to amount to misconduct.

The respondent commenced proceedings in the Employment Tribunal for unfair dismissal. The claimant also brought a series of common law claims in the Supreme Court for damages based on breach of her employment contract, including damages for personal injury (in the form of clinical depression and general anxiety disorder); breach of the term of trust and confidence implied in the employment contract; breach of a duty of care; libel; malicious falsehood; and slander.

The GHA applied to strike out all of these claims but in the course of argument conceded that the respondent should be allowed to advance the breach of contract claim. In the Supreme Court, Restano, J. granted the strike out application with respect to all the claims apart from the breach of contract claim (that judgment is reported at 2021 Gib LR 396). The principal ground on which they were struck out was that they fell within the *Johnson* exclusion principle (*i.e.* where the substance of a claimant's case was that the manner of his dismissal had been unfair or oppressive, then at least in the standard employment contract terminable on notice, the only remedy lay in pursuing a statutory claim for unfair dismissal. The court should not develop, and allow a claimant to rely upon, alternative common law actions the effect of which would be to undermine the carefully crafted rules which Parliament had framed for fixing liability and compensation for unfair dismissal).

The effect of the Supreme Court's judgment was that the respondent's particulars of claim required significant shortening. The respondent produced a draft of the shortened particulars of claim which retained in the section dealing with breach of contract a claim for damages for personal injury. The judge's order approved the amended pleadings which included damages for personal injury.

The GHA appealed, submitting that the order did not reflect the terms of the judgment. Having properly struck out the tort claim for personal injury, it was illegitimate and contrary to the rationale of that decision for the judge to allow damages for personal injury to be reintroduced by the back door in the action for breach of contract. The order should therefore be amended to bring it in line with the judgment by striking out those parts of the pleading relating to personal injury damages. Damages for personal injury could not be claimed as an element in the breach of contract claim. It was arguable that the respondent could legitimately seek to establish financial loss arising from any unlawful dismissal in breach of contract but that was the full extent of her claim.

The respondent submitted that a court should only strike out a claim at an interlocutory stage if it was certain that the claim was bound to fail. It was not normally appropriate to strike out in an uncertain and developing area of jurisprudence. Once it was conceded that *Johnson* did not (or

arguably did not) preclude a contractual action where dismissal could only lawfully be for cause, there was nothing in the *Johnson* jurisprudence which would deny the claimant the right to recover all damage flowing from the breach of contract claim which she was entitled to make.

Some months after the appeal had been served, the respondent lodged an out of time application for leave to cross-appeal in which she alleged that the judge had been wrong to strike out any of her claims. She also applied for an extension of time. This was opposed by the GHA.

Held, dismissing the appeal:

(1) The appeal would be dismissed. It was not possible to say that the claim for personal injury was so obviously excluded by the *Johnson* exclusion zone that it was certain to fail and should be struck out at this stage. On the contrary, if the employee had a legitimate cause of action in contract, so that it could not be said that Parliament must have intended to deprive the employee of his or her contractual rights when it passed the unfair dismissal legislation, there was no reason why it should be assumed that Parliament must have intended nonetheless to limit the nature of the damages which could be recovered in that action. Such a claimant would have to give credit for any money recovered in any unfair dismissal award for the financial loss resulting from loss of employment following the dismissal, and *vice versa*. There could not be double recovery (paras. 73–81).

(2) An extension of time would not be granted to permit the respondent to seek leave to argue the cross-appeal. An application to extend time was an application for relief from sanctions. The court applied a three-stage test: first, to identify and assess the seriousness and significance of the failure to comply with the time limit; secondly, to consider why the default occurred; and thirdly to evaluate all the circumstances of the case. First, this was a serious and significant breach and the respondent had realistically not sought to argue otherwise. Obviously, the more serious or significant the breach, the less likely it was that relief would be granted. Secondly, it was submitted that the reason for the delay was in part because the parties were taken up with other matters in the litigation but that did not provide a justification for lodging the cross-appeal so late. Nor was the fact that the respondent became aware only late in the day of a case that was central to the cross-appeal. That case had been decided many years ago and the failure to appreciate its potential significance could not constitute a good reason for the delay. Lengthy delay and the lack of good reason for it pointed firmly towards refusing to extend time. Thirdly, the court did not accept the respondent's submission that allowing the extension of time would have no real impact on the current timetable. It would very significantly widen the scope of the case. It should be highly exceptional to have regard to the merits in a strike out application, save where they were very strong or very weak. Even a cursory consideration of this cross-appeal demonstrated that it had very little prospect of success. It would be wholly inappropriate for the court to exercise its jurisdiction to extend time.

The respondent was therefore not entitled to run the cross-appeal in these proceedings (paras. 89–101).

Cases cited:

(1) *Addis* v. *Gramophone Co. Ltd.*, [1909] A.C. 488, considered.
(2) *Alwitry* v. *States Employment Bd.*, [2019]JRC014; Jersey Royal Ct., February 6th, 2019, unreported, referred to.
(3) *Barrett* v. *Enfield London Borough Council*, [2001] 2 A.C. 550; [1999] 3 W.L.R. 79; [1999] 3 All E.R. 193; [1999] Fam. Law 622; [1999] 2 F.C.R. 434; [1999] 2 FLR 426, considered.
(4) *Bliss* v. *South East Thames Regional Health Auth.*, [1985] IRLR 308; [1987] I.C.R. 700, considered.
(5) *Cox* v. *Philips Indus. Ltd.*, [1976] I.C.R. 138, considered.
(6) *D'Silva* v. *University College Union*, [2009] EWCA Civ 1258; [2010] 3 F.C.R. 222; [2010] Fam. Law 1163, referred to.
(7) *Denton* v. *T.H. White Ltd*., [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926; [2015] 1 All E.R. 880; [2014] C.P. Rep. 40, applied.
(8) *Eastwood* v. *Magnox Electric plc*, [2004] UKHL 35; [2005] 1 A.C. 503; [2004] 3 W.L.R. 322; [2004] 3 All E.R. 991; [2004] I.C.R. 1064; [2004] I.R.L.R. 733, referred to.
(9) *Edwards* v. *Chesterfield Royal Hosp. NHS Foundation Trust*, [2011] UKSC 58; [2012] 2 A.C. 22; [2012] 2 W.L.R. 55; [2012] 2 All E.R. 278; [2012] I.C.R. 201; [2012] IRLR 129; [2012] Med. L.R. 93; (2012), 124 BMLR 51, considered.
(10) *French* v. *Barclays Bank plc*, [1998] IRLR 646, referred to.
(11) *Gogay* v. *Hertfordshire County Council*, [2000] EWCA Civ 228; [2000] Fam. Law 883; [2000] IRLR 703; [2001] FLR 280; [2001] 1 F.C.R. 455; (2001), 3 LGR 14, considered.
(12) *Johnson* v. *Unisys Ltd*., [2001] UKHL 13; [2003] 1 A.C. 518; [2001] 2 W.L.R. 1076; [2001] 2 All E.R. 801; [2001] I.C.R. 480; [2001] IRLR 279, applied.
(13) *McClelland* v. *Northern Ireland General Health Servs. Bd.*, [1957] 2 All E.R.129, referred to.
(14) *Malik* v. *BCCI; Mahmud* v. *BCCI*, [1998] 1 A.C. 20; [1997] 3 W.L.R. 95; [1997] 3 All E.R. 1; [1997] IRLR 462; [1997] I.C.R. 606, considered.
(15) *Mitchell* v. *News Group Newspapers Ltd.*, [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795; [2014] 2 All E.R. 430; [2014] EMLR 13; [2014] BLR 89; [2013] 6 Costs L.R. 1008, referred to.
(16) *Monk* v. *Cann Hall Primary School*, [2013] EWCA Civ 826; [2013] IRLR 732, considered.
(17) *O'Laoire* v. *Jackel Ltd. (No. 2)*, [1991] IRLR 170; [1991] I.C.R. 729, referred to,
(18) *R. (Hysaj)* v. *Home Secy.*, [2014] EWCA Civ 1633; [2015] 1 W.L.R. 2472; [2015] 2 Costs L.R. 191; [2015] C.P. Rep. 17, referred to.
(19) *Rookes* v. *Barnard*, [1964] A.C. 1129, referred to.
(20) *Wardour Trading Ltd.*, *In re*, 2019 Gib LR 48, referred to.

(21) *Watts* v. *Morrow*, [1991] 1 W.L.R. 1421; [1991] 4 All E.R. 937, considered.

Legislation construed:
Court of Appeal Rules 2004, r.59(3): The relevant terms of this subrule are set out at para. 83.

P. Mead and *J. Santos* with *K. Navas* (instructed by Kenneth Navas Barristers and Solicitors) for the appellant;
F. Vasquez, Q.C. (instructed by Triay Lawyers) for the respondent.

1 **ELIAS, J.A.:**

Introduction

This is an unusual appeal. It arises out of a series of claims made by Dr. Cilliers, a consultant ophthalmologist, in connection with her dismissal by the Gibraltar Health Authority ("GHA") in May 2017. In addition to pursuing a statutory claim for unfair dismissal before the employment tribunal, Dr. Cilliers has brought a series of common law claims for damages for breach of contract, including damages for personal injury (which took the form of psychiatric harm); breach of the duty of care resulting in such harm; libel; malicious falsehood; and slander. The GHA initially applied to strike out all of these claims but in the course of argument before the judge, Restano, J., Mr. Mead, counsel for the GHA, conceded that Dr. Cilliers should be allowed to advance her breach of contract claim. The GHA also had a related summary judgment application with respect to aspects of the defamation and malicious falsehood claims.

2 The judge acceded to the strike out application with respect to all the claims save for the breach of contract claim. The principal ground on which they were struck out was that they fell within the scope of what is known as the "*Johnson* exclusion zone" (reported at 2021 Gib LR 396). I discuss this in detail below. There were additional reasons why the libel and malicious falsehood claims failed however. The effect of the judgment was that the (very extensive) particulars of claim required significant pruning to reflect that judgment.

3 Counsel for Dr. Cilliers provided a draft of the shortened particulars of claim. It retained in the section dealing with breach of contract a claim for damages for personal injury. There was an issue between the parties as to whether the contract claim could, consistent with striking out the tort claim for damages for personal injury, include those damages as part of the claim. This was discussed with the judge at a hearing at which the judge was finalizing the terms of the order to be made consequent upon his judgment. As I read the transcript of that hearing, the judge indicated that since he had held (following the concession) that the contract claim should stand, and there had been no specific application to strike out the personal injuries

damages, he would leave them in. The first paragraph of the order approved what was termed the "Amended Pleadings" which included the damages for personal injury. The judge then added, without objection from the parties, a second paragraph to the order as follows: "All damages being claimed by the Claimant are pursuant to her contractual claim for wrongful dismissal."

4 During the course of his submissions before us, Mr. Vasquez, Q.C., counsel for Dr. Cilliers, submitted that the judge had not been requested to strike out the personal injury damages from the contract claim; it was not an issue which was formally before him. It was, therefore, strictly illegitimate for Mr. Mead to pursue his appeal at all. There was no ruling on the point which Mr. Mead could properly pursue.

5 I think Mr. Vasquez is probably right that the judge did not think that he was being asked to strike out the personal injury element of the contract claim, not least because in his typically thorough judgment the judge did not address the point at all. Moreover, I read the second paragraph of the order as being consistent with that view. The judge was there, in my opinion, seeking to explain why the personal injury claim for damages was included; it was part of the pleaded case on contract. Finally, as I have said, some passages in the transcript of the hearing are consistent with that view.

6 However, we have been shown a transcript of the part of the hearing when Mr. Mead conceded the contract point, and it is clear that his concession was only ever intended to relate to the claim for financial loss flowing from any unlawful dismissal; he was unambiguously contending that the personal injuries element could not, consistently with a proper appreciation of the *Johnson* exclusion zone, stand as a legitimate part of that claim. By inference, it is clear that he was still seeking to strike out the personal injuries element of the contract claim.

7 With hindsight, it is perhaps unfortunate that the exact scope of the concession was not reduced to paper. I have no doubt that the judge simply overlooked this issue in his judgment, being then under the impression that it was not an issue before him. However, in my view it remained an issue which the judge was required to address. One solution would be to refer the matter back to the judge, but neither party wished the court to take that step given that they were primed and ready to argue the point. In the circumstances the court considers that it has jurisdiction to determine the matter itself, albeit without the benefit of Restano, J.'s observations on the point.

8 The form of the appeal is not against any aspect of the judgment as such, but rather against the terms of the order. Mr. Mead submits that the order does not properly reflect the terms of the judgment. Having quite properly struck out the tort claim for personal injury, it was illegitimate and contrary to the rationale of that decision for the judge to allow damages for

personal injury to be, as it were, reintroduced in the back door pursued in the action for breach of contract. The order should therefore be amended to bring it in line with the judgment by striking out those parts of the pleading relating to personal injury damages.

9 It is common ground that if the order does not reflect the judgment, the court has power to correct it. Moreover, the order itself cannot seek to modify or alter the judgment: As Ward, L.J. stated in *D'Silva* v. *University College Union* (6) ([2009] EWCA Civ 1258, at para. 16): "Orders reflect the judgment. The reasons for the orders are to be contained in the judgment, not in the order."

10 For reasons I have given, I do not think it is right to say that the order does not reflect the judgment. Rather, I think that the proper analysis is that the judgment does not deal with a material issue before the judge. Mr. Mead cannot in my view say that the judge did exclude the personal injury element of the contract claim in his judgment; he can only claim—as he does—that the judge ought to have done so. That is really his case; he says it is an inevitable consequence once the tort claim was struck out. That is disputed by Mr. Vasquez and it is the issue the court now has to determine.

11 I should add that Mr. Mead also argued that the second paragraph of the order constituted an impermissible attempt by the judge to provide a reason, not found in the judgment, for the decision to leave the personal injury claim in the contract pleadings. I do not accept that; it was simply an explanation of the reason why he took the view that the pleadings as amended were consistent with his judgment. In any event, the precise status of this paragraph is irrelevant now that the court is considering the merits of the issue in this appeal.

12 Some months after the appeal had been served, Dr. Cilliers lodged an out of time application for leave to cross-appeal in which she alleged that the judge had been wrong to strike out any of her claims. She also applied for an extension of time to lodge the cross-appeal. The GHA, represented on this aspect of the case by Mr. Santos, submits that in the circumstances the court should not grant the necessary extension of time and should in any event refuse Dr. Cilliers leave to argue the cross-appeal on the grounds that it is wholly without merit. I shall deal with these submissions after considering the substantive appeal.

The appeal

13 The legal principles are clear and undisputed. First, the power to strike out should only be exercised in a very clear case. In *Barrett* v. *Enfield London Borough Council* (3), Lord Browne-Wilkinson said this ([2001] 2 A.C. at 557):

> "In my speech in the *Bedfordshire* case [1995] 2 AC 633, 740–741 with which the other members of the House agreed, I pointed out that unless it was possible to give a *certain* answer to the question whether the plaintiff's claim would succeed, the case was inappropriate for striking out. I further said that in an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out." [Emphasis in original.]

Second, the judge must assume for the purposes of the strike out applications that the facts and matters asserted by the claimant may be established at trial.

14 The relevant facts, as asserted by Dr. Cilliers, are as follows. Dr. Cilliers had been employed as a consultant ophthalmologist at the South Warwickshire NHS Foundation Trust Hospital. She says that she innocently broke the hospital's corporate governance guidelines relating to data protection. This led to a confidential investigation which was still ongoing when, on March 28th, 2016, she applied for a job with the GHA in Gibraltar. She made no mention in the application form of the investigation. She says she was not required to do so. However, because of the ongoing investigation, there was a note on the General Medical Council's record that her revalidation, that is the process whereby the GMC ensures that practising doctors are fit to practice, had been deferred. Dr. Cilliers says that the investigation did not lead to any disciplinary action; she apologized and was required to take further data protection training. Unfortunately, for reasons which were not her fault, the GMC had not been notified that the investigation had concluded without any serious adverse consequences.

15 Dr. Cilliers was offered employment as a Consultant Ophthalmologist at St. Bernard's Hospital by a letter dated July 13th, 2016. The contract was to take effect from January 9th, 2017. This letter forms the basis of her contractual claim. The contract was for an initial period of three years. Either party could terminate the contract on six months' notice. Clause 4 provided that the contract would be subject, *inter alia*, to Colonial Regulations and General Orders.

16 When she came to the hospital, Professor Burke, the GHA's head of governance, was appointed to be her Responsible Officer. As such, he was responsible for dealing with her GMC revalidation. That process ought to have been undertaken in February 2017 but was deferred because Professor Burke was on holiday. When in March 2017 he started the revalidation process, he discovered that Dr. Cilliers' revalidation had been deferred in January 2016. He asked Dr. Cassaglia, the GHA's medical director, whether he knew about this. Dr. Cassaglia did not and it was agreed that he would speak to Dr. Cilliers and that Professor Burke would make further inquiries.

17 On May 10th, Dr. Cilliers was summoned to a meeting with Dr. Cassaglia and Christian Sanchez, the GHA's head of human resources. Dr. Cilliers was told that the purpose was to clarify some of the issues surrounding her revalidation status with the GMC and the reference from her former employer. In the event the meeting was rescheduled for May 15th, so that Dr. Cilliers could attend with her union representative. She says that it was an extremely short meeting, no more than five minutes, and that Dr. Cassaglia conducted himself in a "strident, overbearing and bullying manner" throughout. She alleges that Dr. Cassaglia began the meeting by saying that she was summarily dismissed. She was in a state of shock and when she pressed him for a reason he gave four different reasons: that she had been found guilty by the GMC of gross misconduct, which she vehemently denied; that she must have been guilty because of her apology for breach of the data protection guidelines; that in any event she had acted dishonestly by concealing the fact that she was subject to investigation; and that she was being made redundant. She said that after the meeting she was escorted out of the hospital without the opportunity to collect her belongings or to make arrangements for her patients with her colleagues, or deal with patients who were waiting to see her.

18 She received a letter of dismissal dated May 15th, the following day. It said that her failure to disclose information about the investigation in her application form "falls well below the required professional standards to the extent that it puts your integrity and honesty into serious doubt. This conduct on your part constitutes gross misconduct . . ."

19 She alleges that the true reason was not misconduct and that the charge of gross misconduct was trumped up to lend a veneer of respectability to the decision to dismiss, which was for other reasons. She says that the GMC had confirmed that the "information processing lapse" did not amount to misconduct.

20 She appealed and there was a hearing before an appeal board on July 26th, 2017. Its decision, set out in a letter of August 2nd, 2017, was that the GHA should withdraw the dismissal on the grounds of gross misconduct but should treat her application as voidable and then rescind the contract. This recommendation was not followed, however. Dr. Cilliers says that the procedures were flawed in numerous ways.

21 On August 10th, 2017, Dr. Cilliers commenced proceedings for unfair dismissal alleging that the true reason for her dismissal was that she was a "whistle-blower" and had made a series of protected disclosures connected with the Eye Unit at St. Bernard's hospital.

22 She commenced her civil claims in May 2020. The first part of the claim relates to the alleged breach of contract. She relies upon certain provisions in the General Orders. Section 11.1.1 at ch. 4 states that the contract can be terminated for certain reasons only; and s.7, ch. 2 sets out

detailed disciplinary procedures designed to ensure fairness and consistency. The Orders also provide for an appeal. Dr. Cilliers submits that the GHA summarily dismissed her for no reason stipulated in the contract and without complying with the procedures they had undertaken to apply by s.7 of the General Orders. In addition the appeal was legally flawed in various ways. She submits that the GHA can only dismiss on six months' notice for good reason permitted by the contract. Mr. Vasquez also indicated to Restano, J. that she wished to advance a concurrent tort claim although it had not been fully pleaded in her particulars of claim.

23 The judge then described the basis of the libel, malicious falsehood and slander claims. It is not necessary to set out the basis of those claims in relation to the appeal. Suffice it to say that the allegations of libel and malicious falsehood arose out of what was said to be a defamatory letter of dismissal, allegedly published to certain identified people; and the slander allegation was based on two conversations allegedly defamatory of the claimant.

The nature of the contractual claim and the damages sought

24 Although the parties have referred to the contractual claim as being one for "wrongful dismissal," it is perhaps more accurately described as a contractual claim for "unlawful dismissal." The classic claim for wrongful dismissal involves an allegation that the employer has dismissed without notice or with inadequate notice. Here the allegation is that under the terms of the contract the contract was to run, initially at least, for three years and the GHA could only lawfully dismiss during that period for certain specified reasons following a detailed and carefully prescribed set of procedures. The contention is that there were breaches of the procedural requirements and that the dismissal was for no reason permitted by the contract. It was not a question of the contract being terminated prematurely without appropriate notice; it could not lawfully be terminated at all within the three year period absent good cause.

25 The particulars of claim identify the effect of these breaches on her health as follows:

> "Further, the shock suffered by the Claimant as a direct result of the brutal, peremptory and humiliating way in which the Defendant effected the unlawful dismissal in breach of its contractual obligations to the Claimant, resulted in the onset of clinical depression and general anxiety disorder from which the Claimant continues to suffer. The Claimant continues to be incapacitated and is incapable of working to anything approaching the capacity of work she was able to sustain prior to the dismissal."

She relied upon an expert medical report to support these allegations.

26 The particulars of loss and damage include general damages for suffering and loss of amenity as well as the financial loss resulting from the effect of the illness on her ability to obtain employment. There are other heads of damage which Mr. Mead accepts are typically raised in personal injury claims of this nature. (I would observe that the only exception to that is a claim for exemplary damages pursuant to the well-known case of *Rookes* v. *Barnard* (19). This was pleaded before the tort claim was struck out. As Lord Steyn pointed out in *Johnson* v. *Unisys Ltd.* (12) ([2003] 1 A.C. 518, at para. 15), such damages have never been awarded for breach of contract.)

The strike out application

27 The principal argument in support of the application for the strike out of these claims was based upon the *Johnson* exclusion principle, so described because it was established by the decision of the House of Lords in *Johnson* v. *Unisys Ltd.* (12). This provides that where the substance of a claimant's case is that the manner of his dismissal has been unfair or oppressive, then at least in the standard employment contract terminable on notice, the only remedy lies in pursuing a statutory claim for unfair dismissal. The court should not develop, and allow a claimant to rely upon, alternative common law actions whose effect would be to undermine the carefully crafted rules which Parliament has framed for fixing liability and compensation for unfair dismissal.

The scope of the *Johnson* exclusion principle

28 In order to resolve the issue in dispute, it is necessary to consider in some detail the origin and development of the *Johnson* exclusion principle and its interrelationship with the common law.

29 The starting point is the decision of the House of Lords in the seminal case of *Addis* v. *Gramophone Co. Ltd.* (1). Mr. Addis was employed by the defendant company in their business in India. He earned a salary and commission. His contract was terminable on six months' notice. In October 1905 he was given notice but was not permitted to work it out; a successor was appointed in his place and took over the work immediately. He could not therefore earn any commission during the notice period. He sued for breach of contract and the trial was heard by Darling, J. sitting with a jury. The jury awarded him £600 for his wrongful dismissal and it was accepted that it could only have been referable, at least in part, to damages arising from the abrupt and oppressive manner in which he was dismissed.

30 A majority of the House of Lords (Lord Loreburn, L.C., Lord James of Hereford, Lord Atkinson, Lord Gorell and Lord Shaw of Dunfermline; Lord Collins dissenting) held that the award of £600 could not be lawful, at least to the extent that it was referable to the manner of dismissal. Lord

Loreburn held that it would be both novel and inappropriate to award damages for the manner of dismissal ([1909] A.C. at 490–491):

> "To my mind it signifies nothing in the present case whether the claim is to be treated as for wrongful dismissal or not. In any case there was a breach of contract in not allowing the plaintiff to discharge his duties as manager, and the damages are exactly the same in either view. They are, in my opinion, the salary to which the plaintiff was entitled for the six months between October, 1905, and April, 1906, together with the commission which the jury think he would have earned had he been allowed to manage the business himself. I cannot agree that the manner of dismissal affects these damages. Such considerations have never been allowed to influence damages in this kind of case . . .
>
> If there be a dismissal without notice the employer must pay an indemnity; but that indemnity cannot include compensation either for the injured feelings of the servant, or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment. The cases relating to a refusal by a banker to honour cheques when he has funds in hand have, in my opinion, no bearing. That class of case has always been regarded as exceptional. And the rule as to damages in wrongful dismissal, or in breach of contract to allow a man to continue in a stipulated service, has always been, I believe, what I have stated. It is too inveterate to be now altered, even if it were desirable to alter it."

31 Lord Shaw of Dunfermline observed that the manner of dismissal may well harm the reputation of a dismissed employee, and indeed it had done in this case. He described the circumstances of the dismissal and observed (*ibid.*, at 504): "Undeniably all this was a sharp and oppressive proceeding, importing in the commercial community of Calcutta possible obloquy and permanent loss."

32 Nevertheless, it was not legitimate to pay aggravated damages to reflect this. Lord Shaw accepted that if the circumstances of the dismissal were capable of sustaining a claim for libel or slander, they could be pursued; actionable torts would have been committed. But damage to reputation short of this would not be actionable, and the facts here fell into that category. It was one of that (*ibid.*, at 504)—

> ". . . class of cases in which the injury accompanying the dismissal arises from causes less tangible, but still very real, circumstances involving harshness, oppression, and an accompaniment of obloquy. In these cases, unhappily, the limitations of the legal instrument do appear; these cases would not afford separate grounds of action because they are not cognizable by law."

33 *Addis* is a troublesome case and even its ratio has been a matter of debate. In *Johnson* (12) ([2003] 1 A.C. 518, at paras. 15–16) Lord Steyn suggested that a careful reading of the speeches did not warrant the conclusion that the majority of the court had accepted that even financial loss stemming from the stigma attached to the manner of dismissal was irrecoverable. But that is a minority view and was not accepted by the other members of the House in *Johnson*. *Addis* has never been directly overruled although it has been the subject of considerable criticism. However, it remains good law in England. In both *Bliss* v. *South East Thames Regional Health Auth.* (4) and *O'Laoire* v. *Jackel Ltd. (No. 2)* (17) the Court of Appeal held that the principle was binding until overruled by the House of Lords, and in *Johnson* the House chose not to overrule it.

***Addis*: no cause of action**

34 The basis of the *Addis* decision is that the damages flowing from loss of reputation, even if financial in nature, cannot be recovered because there is no cause of action available. The action for wrongful dismissal, being a breach of the notice provision, does not provide the cause of action to recover damage of that kind. In *Johnson*, Lord Hoffmann referred to the following explanation as to why this should be the case ([2003] 1 A.C. 518, at para. 39):

> "The effect of such a provision at common law was stated with great clarity by McLachlin J of the Supreme Court of Canada in *Wallace v United Grain Growers Ltd* (1997) 152 DLR (4th) 1, 39:
>
> > 'The action for wrongful dismissal is based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship (or pay in lieu thereof) in the absence of just cause for dismissal . . . A "wrongful dismissal" action is not concerned with the wrongness or rightness of the dismissal itself. Far from making dismissal a wrong, the law entitles both employer and employee to terminate the employment relationship without cause. A wrong arises only if the employer breaches the contract by failing to give the dismissed employee reasonable notice of termination. The remedy for this breach of contract is an award of damages based on the period of notice which should have been given.'"

35 As Lord Hoffmann pointed out, however, if the claimant can point to a cause of action which in some way regulates the manner in which the employer may dismiss, this could create the relevant cause of action (*ibid.*, at para. 44):

> "As McLachlin J said in the passage I have quoted, the only loss caused by a wrongful dismissal flows from a failure to give proper notice or make payment in lieu. Therefore, if wrongful dismissal is

the only cause of action, nothing can be recovered for mental distress or damage to reputation. On the other hand, if such damage is loss flowing from a breach of another implied term of the contract, *Addis's* case does not stand in the way."

***Addis*: damage irrecoverable in contract**

36 Even if there is a cause of action entitling the employee to complain of the manner of dismissal, it does not follow that an employee would be able to obtain compensation for injured feelings or damage to reputation not causing financial loss. In general, damages of this nature are not recoverable for breach of contract for the reason given by Bingham, L.J. in *Watts* v. *Morrow* (21) ([1991] 4 All E.R. at 959–960):

"A contract breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy.

But the rule is not absolute: where the very object of a contract is to provide pleasure, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead."

37 In *Cox* v. *Philips Indus. Ltd.* (5), Lawson, J. sought to bring the employment contract in that case within the exceptional category. He awarded general damages where it was within the contemplation of the parties that the employee would suffer mental stress for the breach of contract which arose. The Court of Appeal rejected this approach in *Bliss* v. *South East Thames Regional Health Auth.* (4), a case where an employee was held to have been unlawfully suspended in breach of the duty of trust and confidence. It overturned an award of general damages in the sum of £2,000 for frustration and mental distress. Dillon, L.J., with whose judgment Heilbron, J. and Cumming-Bruce, L.J. agreed, did not believe that this was a permissible sum to award in law ([1987] I.C.R. at 717–718):

"The general rule laid down by the House of Lords in *Addis v Gramophone Co. Ltd.* [1909] AC 48 is that where damages fall to be assessed for breach of contract rather than in tort it is not permissible to award general damages for frustration, mental distress, injured feelings or annoyance occasioned by the breach. Modern thinking tends to be that the amount of damages recoverable for a wrong should be the same whether the cause of action is laid in contract or in tort. But in the *Addis* case Lord Loreburn regarded the rule that damages for injured feelings cannot be recovered in contract for wrongful dismissal as too inveterate to be altered, and Lord James of

> Hereford supported his concurrence in the speech of Lord Loreburn by reference to his own experience at the Bar.
>
> There are exceptions now recognised where the contract which has been broken was itself a contract to provide peace of mind or freedom from distress: see *Jarvis v Swan Tours* [1973] QB 233 and *Heywood v Wellers* [1976] QB 446. Those decisions do not however cover the present case.
>
> In *Cox v Philips Industries* [1976] ICR 138 Lawson J. took the view that damages for distress, vexation and frustration, including consequent ill-health, could be recovered for breach of a contract of employment if it could be said to have been in the contemplation of the parties that the breach would cause such distress etc. For my part, I do not think that that general approach is open to this court unless and until the House of Lords has reconsidered its decision in the *Addis* case."

38 A similar attempt to bring the employment contract into the exceptional category where damages could be awarded for distress and annoyance was made by the claimant in *French* v. *Barclays Bank plc* (10). Again it was unsuccessful.

39 In his skeleton argument Mr. Vasquez submitted that Dr. Cilliers would be entitled to recover general damages because the purpose of the contract was to provide her with security and peace of mind. In my view that is not a sustainable argument in the light of these authorities.

40 However, whilst no compensation is payable for injury to feelings, it is now firmly established that if the employee is treated in a way which gives rise to a recognized psychiatric illness, this will in principle, and subject to important considerations of causation, foreseeability and remoteness in each case, entitle an employee to seek damages in the same way as for physical injuries: see *Gogay* v. *Hertfordshire County Council* (11). That is of course Dr. Cilliers' case. In *Gogay*, a claimant successfully alleged that she had been suspended from her employment in breach of the duty of trust and confidence and claimed both special and general damages for the psychiatric illness which resulted. Hale, L.J., with whose judgment May and Peter Gibson, L.JJ. agreed, after referring to *Addis* and *Bliss* said this ([2000] IRLR 703, at para. 64):

> "There is all the difference in the world between hurt, upset and injury to feelings, for which in general the law does not provide compensation whether in contract or (with certain well defined exceptions) in tort, and a recognised psychiatric illness."

Developing an independent cause of action

41 As Lord Hoffmann observed in *Johnson* (12), damages flowing from the manner of dismissal could be awarded if there were a specific contractual term regulating the manner of dismissal. The obvious term to rely upon in the employment context is the duty of trust and confidence. This is an implied term incorporated into all contracts of employment to the effect that the employer will not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The existence of this term has long been recognized in employment law and was accepted as good law by the House of Lords in *Mahmud* v. *BCCI* (14).

42 In *Mahmud* former senior employees of BCCI alleged that their employer had conducted the business fraudulently and corruptly. They alleged that as a consequence they had suffered damage to their reputation which had stigmatized them and prevented them obtaining employment in the financial services industry. The liquidator of the bank applied to strike out these claims as demonstrating no cause of action. The House of Lords unanimously rejected the application and held that in principle damages for the financial loss flowing from the adverse impact of the breach of contract on the claimants' employment prospects was recoverable. Although this case was not concerned with the dismissal of employees as such, Lord Nicholls assumed that in principle the implied term could apply equally in that context ([1998] 1 A.C. at 39):

> "In my view these observations cannot be read as precluding the recovery of damages where the manner of dismissal involved a breach of the trust and confidence term and this caused financial loss. *Addis v Gramophone Co. Ltd.* was decided in the days before this implied term was adumbrated. Now that this term exists and is normally implied in every contract of employment, damages for its breach should be assessed in accordance with ordinary contractual principles. This is as much true if the breach occurs before or in connection with dismissal as at any other time."

Johnson

43 In *Johnson* (12) the claimant sought to use the trust and confidence term to circumvent *Addis* (1) and claim damages for psychiatric injury. Mr. Johnson was dismissed and was paid for his contractual notice period. He successfully made a claim for unfair dismissal and was awarded compensation by an employment tribunal. He then took proceedings for common law damages in contract and tort, alleging that the way in which he had been dismissed had caused him to have a mental breakdown and that the company knew from past experience that he was under stress and psychologically vulnerable. He contended that the duty of trust and

confidence had been infringed by procedural failings by the employer and that the psychiatric illness was a foreseeable consequence of the breach.

44 The question was whether this implied term could be invoked to regulate the manner of dismissal and provide the claimant with the relevant cause of action. *Mahmud* did not establish that he could because Lord Nicholls' observations in that case about the application of that term to the act of dismissal was *obiter*, as Lord Nicholls himself recognized in his speech in *Johnson*.

45 Lord Hoffmann considered that there were problems with seeking to apply the trust and confidence term to regulate the power of dismissal, citing two reasons in particular. First, there was an express term providing that dismissal could lawfully be exercised on notice. So the trust and confidence term could not, for example, be used to contend that the dismissal must be for a justifiable reason; that would convert the power to dismiss on notice into a power to dismiss only for cause. Furthermore, whilst an obligation to maintain trust and confidence was an appropriate description for a term designed to regulate the ongoing relationship between the parties, it was not apt to apply that particular term to regulate conduct at the point of termination when the relationship was effectively at an end.

46 However, Lord Hoffmann accepted that it would in principle be possible to imply some lesser term to the effect that the dismissal must be carried out fairly and in good faith. Such a term would not conflict with the express term, and could render it unlawful to dismiss in an unnecessarily oppressive or insensitive way.

47 However, whilst Lord Hoffmann accepted that a term to that effect could be developed at common law, he did not think it would necessarily be wise to take that step. There were problems with a term of this nature. There would be difficulties distinguishing damage flowing from the fact of dismissal with damage flowing from the manner of dismissal. Moreover, the employer's liability could in some cases be wholly disproportionate to his degree of fault. Not only might that be undesirable but it might have the wider consequence of inhibiting employers from engaging psychologically fragile personnel.

48 Lord Hoffmann took the view that these conflicting considerations meant that the question whether a term should be implied regulating dismissal was "finely balanced." However, there was in his view a decisive factor against implying the term in this context, namely the fact that to do so would undermine the statutory provisions on unfair dismissal. After discussing at some length the background to that legislation and summarizing its key features, he set out his reasons as follows ([2003] 1 A.C. 518, at paras. 54–59):

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

55. In my opinion, all the matters of which Mr Johnson complains in these proceedings were within the jurisdiction of the industrial tribunal. His most substantial complaint is of financial loss flowing from his psychiatric injury which he says was a consequence of the unfair manner of his dismissal. Such loss is a consequence of the dismissal which may form the subject matter of a compensatory award . . .

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

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

> 'there is not one hint in the authorities that the . . . tens of thousands of people that appear before the tribunals can have, as it were, a possible second bite in common law and I ask myself, if this is the situation, why on earth do we have this special

> statutory framework? What is the point of it if it can be circumvented in this way? . . . it would mean that effectively the statutory limit on compensation for unfair dismissal would disappear.'
>
> 58. I can see no answer to these questions. For the judiciary to construct a general common law remedy for unfair circumstances attending dismissal would be to go contrary to the evident intention of Parliament that there should be such a remedy but that it should be limited in application and extent.
>
> 59. The same reason is in my opinion fatal to the claim based upon a duty of care. It is of course true that a duty of care can exist independently of the contractual relationship. But the grounds upon which I think it would be wrong to impose an implied contractual duty would make it equally wrong to achieve the same result by the imposition of a duty of care."

49 Lord Nicholls agreed with Lord Hoffmann's speech. He considered that the intervention of Parliament in passing the unfair dismissal legislation provided "an insuperable obstacle" to a "common law right embracing the manner in which an employee is dismissed . . ." Lord Millett agreed with Lord Hoffmann and gave a short speech of his own. He suggested that absent any legislation on the matter, the common law may well have developed a term to the effect that the employer must treat the employee fairly, even in the manner of dismissal. However, given the existence of the statutory right to claim for unfair dismissal, any such development would be "both unnecessary and undesirable." If, for example, "it gave a remedy in excess of the statutory limits or to excluded categories of employees, it would be inconsistent with the declared policy of Parliament" (*ibid.*, at para. 80).

50 Lord Bingham agreed with the speeches of both Lords Hoffmann and Millett, and Lord Steyn dissented but agreed in the result on the grounds that the damage was plainly too remote.

51 What exactly is the scope of the *Johnson* exclusion zone? There are three particular features to be noted about *Johnson*. First, the effect of the decision is to preclude the court from developing a cause of action at common law which, but for the existence of the statutory scheme, might have been available to the employee. *Addis* remains good law albeit that the principal rationale for the decision has changed.

52 Second, *Johnson* concerned a dismissal, and the exclusion zone can only exist where there is a dismissal. Absent a dismissal (actual or constructive) the statutory scheme does not come into play. Hence the implied term of trust and confidence could be relied upon in *Mahmud* (14)

with respect to financial loss resulting from loss of reputation where the alleged breach was independent of the dismissal.

53 Third, *Johnson* was concerned with the typical employment contract, namely one which can lawfully be terminated by giving the appropriate contractual notice. Does it affect the right of an employee to bring a claim for breach of an express term of the contract which relates either to the reasons for dismissal or the manner of dismissal? That is this case, and the answer to this question is fundamental to its resolution.

54 The first two features were relevant to the arguments advanced in the conjoined cases of *Eastwood* v. *Magnox Electric plc; McCabe* v. *Cornwall County Council* (8), a decision of the House of Lords. In each case the claimants sought damages for stress-related injuries arising from allegedly unfair conduct. Their Lordships held that they could not do so where those injuries resulted from unfair conduct which was connected to the dismissal or the manner of dismissal. However, they could do so in so far as they were alleging that the injury flowed from unfair conduct which occurred prior to the dismissal itself. If this could be proved, it would fall outwith the *Johnson* exclusion zone.

55 The lead judgment of Lord Nicholls made it clear that *Johnson* denies the availability of the common law action itself; it does not just limit the remedy ([2005] 1 A.C. 503, at para. 13):

> "13. In fixing these limits on the amount of compensatory awards Parliament has expressed its view on how the interests of employers and employees, and the social and economic interests of the country as a whole, are best balanced in cases of unfair dismissal. It is not for the courts to extend further a common law implied term when this would depart significantly from the balance set by the legislature. To treat the statutory code as prescribing a floor and not a ceiling would do just that. A common law action for breach of an implied term not to be dismissed unfairly would be inconsistent with the purpose Parliament sought to achieve by imposing limits on the amount of compensatory awards payable in respect of unfair dismissal."

56 In this case, Restano, J. did not accept that either Dr. Cilliers' personal injuries claim in tort or the defamation claims could be said to have arisen independently of the dismissal itself.

57 The question whether the *Johnson* exclusion zone could apply to express terms of the contract was considered by the Supreme Court in *Edwards* v. *Chesterfield Royal Hospital Foundation Trust* (9). There were two conjoined appeals but it suffices to focus on the *Edwards* case itself. A consultant surgeon was found guilty of gross misconduct. He alleged that he had been found guilty by a disciplinary panel which was not constituted in accordance with the express terms of his contract. He

asserted that had the proper panel been in place, the gross misconduct finding would not have been made. He alleged that as a consequence of the gross misconduct finding, he would be unable to obtain another full-time medical post. Accordingly, he submitted that damages should be assessed by reference to that fact. The employer argued that damages were limited to the three-month notice period.

58 A seven-member Supreme Court by a bare majority held that damages were not recoverable for breach of the express terms of the contract regulating the disciplinary procedures leading to dismissal. Lord Dyson, with whose judgment Lord Walker and Lord Mance agreed, gave the principal judgment. Lord Phillips agreed with the majority in the result, but for a slightly different reason.

59 Lord Dyson analysed the legislation which has led to the adoption by employers of disciplinary procedures. He said that it was clear from these various statutes that the provisions about disciplinary procedure were intended to operate within the scope of unfair dismissal law; that was the driving force behind their adoption. He then continued as follows ([2012] I.C.R. 201, at paras. 38–40):

> "38. It follows that, if provisions about disciplinary procedure are incorporated as express terms into an employment contract, they are not ordinary contractual terms agreed by parties to a contract in the usual way. At para 38 of his judgment in *Mr Edwards's case* [2010] ICR 1181, Moore-Bick LJ said: 'Whether the parties intend the provisions relating to disciplinary procedures to sound in damages depends on the true construction of the contract.' As a general proposition, this is obviously true. But in the present context, it ignores the statutory link between the provisions about disciplinary procedures and the law of unfair dismissal.
>
> 39. The question remains whether, if provisions about disciplinary procedure are incorporated into a contract of employment, they are intended to be actionable at common law giving rise to claims for damages in the ordinary courts. Parliament intended such provisions to apply to contracts of employment, inter alia, in order to protect employees from unfair dismissal and to enhance their right not to be unfairly dismissed. It has specified the consequences of a failure to comply with such provisions in unfair dismissal proceedings. It could not have intended that the inclusion of these provisions in a contract would also give rise to a common law claim for damages for all the reasons given by the House of Lords in *Johnson v Unisys Ltd* for not extending the implied term of trust and confidence to a claim for damages for unfair manner of dismissal. It is necessarily to be inferred from this statutory background that, unless they otherwise expressly agree, the parties to an employment contract do not intend that a

failure to comply with contractually binding disciplinary procedures will give rise to a common law claim for damages. In these circumstances, I agree entirely with para. 66 of Lord Hoffmann's speech.

40. The unfair dismissal legislation precludes a claim for damages for breach of contract in relation to the manner of a dismissal, whether the claim is formulated as a claim for breach of an implied term or as a claim for breach of an express term which regulates disciplinary procedures leading to a dismissal. Parliament has made certain policy choices as to the circumstances in which and the conditions subject to which an employee may be compensated for unfair dismissal. A dismissal may be unfair because it is substantively unfair to dismiss the employee in the circumstances of the case and/or because the manner in which the dismissal was effected was unfair. The manner may be unfair because it was done in a humiliating manner or because the procedure adopted was unfair, inter alia, because the agreed disciplinary procedure which led to the dismissal was not followed. It may be unfair because defamatory findings were made which damage the employee's reputation and which, following a dismissal, make it difficult for the employee to find further employment. Any such complaint was intended by Parliament to be adjudicated on by the specialist employment tribunal subject to the various constraints to which I have referred. Parliament did not intend that an employee could choose to pursue his complaint of unfair dismissal in the ordinary courts, free from the limitations carefully crafted by Parliament for the exercise of this statutory jurisdiction."

60 The minority judges, Baroness Hale and Lords Kerr and Wilson, had argued that contractual claims of this kind would have been capable of enforcement by employees even before the unfair dismissal provisions were first introduced in the Industrial Relations Act 1971. They considered that Parliament would not have intended in that statute or any of its successors to take away contractual rights. Lord Dyson disagreed (*ibid.*, at para. 43):

"The answer to this argument is that the right to claim damages in respect of the manner of a dismissal did not exist before the 1971 Act: see paras 20 and 21 above. I accept that there has been debate as to what *Addis v Gramophone Co Ltd* [1909] AC 488 decided. It is not necessary to enter into this debate. It is, however, clear that the Donovan Report which inspired the 1971 Act stated that the law was as summarised in the headnote to the law report to *Addis* and Lord Nicholls expressed the same view in *Eastwood's case* [2005] 1 AC 503, para 2. In any event, at the very least it was not clear whether an employee could claim damages for the unfair manner in which he was dismissed. No example was cited to us of any case decided before the

> 1971 Act in which an employee was awarded damages for breach of contract for the unfair manner in which he had been dismissed. In these circumstances, I cannot accept that an application of the reasoning in *Johnson* [2003] 1 AC 518 should be rejected because it involves saying that the 1971 Act took away an employee's existing rights and that this could not have been intended by Parliament."

61 The effect of this analysis is that unless the parties specifically provide otherwise, the disciplinary procedures will typically not be capable of founding a cause of action for breach thereby enabling an employee to recover damages at large at common law. They may, however, provide the basis for other remedies. This case, therefore, departs from *Johnson* (12) in so far as it is focusing on the nature of the relief sought rather than the existence of the cause of action as such.

62 Lord Mance gave a concurring judgment in which he said this (*ibid.*, para. 94):

> "Employers and employees when contracting, in particular when introducing prescribed disciplinary procedures, must be taken to have in mind the statutory scheme relating to unfair dismissal, and to contemplate that scheme as providing the relevant remedies in the event of unfair dismissal. It does not seem to me artificial to ascribe such an intention to them, any more than it did to Lord Hoffmann in *Johnson* [2001] ICR 480, paras 63 and 66. They cannot have intended that procedures put in place to avoid the need to invoke the statutory scheme should in fact circumvent and make irrelevant the careful limitations of that scheme."

63 This case was not concerned with the position of an employee such as Dr. Cilliers who could only be dismissed for cause. Lord Mance observed that this was so and said that such cases gave rise to different issues.

64 Baroness Hale alone discussed the position of such an employee in her dissenting judgment (*ibid.*, at para. 113):

> "But let us suppose a contract of employment where the employer is only entitled to dismiss the employee for good cause. Rightly or wrongly, most university teachers employed under the contracts of employment which were current in the 1960s believed that they could only be dismissed for cause. If judges, instead of being office holders, were employed under contracts of employment, they could only be dismissed for cause. Under such a contract, if the employer dismisses the employee without good cause, the employee is entitled to be compensated for the consequences of the loss of the job. Obviously, the calculation of damages will have to take account of contingencies such as the possibility of good cause arising in the future. This is the application of the ordinary principles of the law of contract."

65 Later in her judgment she said this (*ibid.*, at para. 121):

> "In fact, the territory which Parliament had occupied was the lack of a remedy for loss of a job to which the employee had no contractual right beyond the contractual notice period. Parliament occupied that territory by requiring employers to act fairly when they dismissed their employees. But there was and is nothing in the legislation to take away the existing contractual rights of employees. There was and is nothing to suggest that Parliament intended to limit the entitlement of those few employees who did and do have a contractual right to the job, the right not to be dismissed without cause. It is for that reason that I am afraid that I cannot agree that the key distinction is between the consequences of dismissal and the consequences of other breaches. The key distinction must be between cases which must rely on the implied term to complain about the dismissal and cases which can rely on an express term."

66 In *Alwitry* v. *States Employment Bd.* (2) the Royal Court in Jersey followed this approach and held that where there was a contract which permitted dismissal only for cause, the issue was not the fairness of the dismissal but rather its validity. The court held that underpinning the *Johnson* exclusion principle were cases where the dismissal could be without cause on notice. Accordingly, there was no basis in *Johnson* for denying the claimant the right to claim damages for the full loss flowing from the breach of contract. (There was an appeal to the Court of Appeal in Jersey but not on this point.)

The judge's determination

67 Having set out the jurisprudence above, I can relatively briefly deal with the judge's reasoning and the arguments on the appeal.

68 The basis on which the judge refused to strike out the contract claim was that, like *Alwitry*, *Johnson* (12) did not apply to a case where the contract expressly fettered the right to dismiss. As I have said, counsel in fact conceded in the course of argument below that the contractual claim could be pursued. He accepted that the position was not so clear that he could properly seek to strike out the basic claim. The judge did not consider or give reasons as to whether the damages for personal injuries could properly be pursued as part of the breach of contract claim for reasons already discussed.

69 As to the tort claim for personal injury, the judge held that it would be inconsistent with *Johnson* to permit it to be advanced. The judge rejected the contention that "a meaningful distinction can be drawn in this case between the dismissal itself and the reasons given for it" (2021 Gib LR 396, at para. 40). The claim was in his view clearly based on the dismissal and the manner in which it was carried out. The judge did not accept that

this conclusion was affected by the fact that the contractual claim could be pursued. He held in terms (*ibid.*, at para. 41): "the personal injury claims for non-pecuniary losses fall squarely within the Johnson exclusion area, whether a concurrent claim in contract can be pursued or not."

70 The defamation claims are not pertinent to the appeal itself, but in substance the main ground on which they were struck out was also because they fell into the *Johnson* exclusion zone. The judge held that the libel claims based on the letter of dismissal were inextricably linked with the dismissal itself, and moreover there was in the judge's view no real distinction between the damage resulting from the dismissal and the reputational damage alleged (*ibid.*, at para. 43). The conversations giving rise to the slander allegations could also not be said to be independent of the dismissal. The judge also identified a further ground why he would in any event have struck out the libel and malicious falsehood claims even if he had not found that they fell within the *Johnson* exclusion zone.

Arguments

71 The case turns on whether damages for personal injury can be claimed as an element in the breach of contract claim. Mr. Mead submits that it cannot because the damage (if established) obviously flows from the manner of dismissal, as the judge found in terms when considering the tort claim. It makes no sense to dismiss the personal injury claim with one hand but effectively let it back in with the other. He says that whilst it is at least arguable that Dr. Cilliers can legitimately seek to establish financial loss arising from any unlawful dismissal in breach of contract, that is the full extent of her claim. She cannot claim any additional heads of damage arising from any personal injury she may have suffered, even if that could otherwise be proved to be a consequence of the breach of contract. On this analysis, the logic of applying *Johnson* (12) in these circumstances is not to deny the existence of the contractual right itself but rather to define the nature of the damage which is recoverable for breach of that right.

72 Mr. Vasquez in his response emphasizes the words of Lord Browne-Wilkinson in *Barrett* (3) to the effect that it is only if a court is certain that a claim is bound to fail that it should strike it out at an interlocutory stage. He also places weight on the additional observation that it is not normally appropriate to strike out in an uncertain and developing area of jurisprudence. He says that once it is conceded that *Johnson* does not (or arguably does not) preclude a contractual action where dismissal can only lawfully be for cause, there is nothing in the *Johnson* jurisprudence which would deny the claimant the right to recover all damage flowing from the breach of contract claim which she is entitled to make.

Discussion

73 I do not think it is possible to say that the claim for personal injury is so obviously excluded by the *Johnson* exclusion zone that it is certain to fail and should be struck out at this stage. On the contrary, if the employee has a legitimate cause of action in contract, so that it cannot be said that Parliament must have intended to deprive the employee of his or her contractual rights when it passed the unfair dismissal legislation, I can see no reason why it should be assumed that Parliament must have intended nonetheless to limit the nature of the damages which can be recovered in that action. Of course, the claimant would have to give credit for any money recovered in any unfair dismissal award for the financial loss resulting from loss of employment following the dismissal, and *vice versa*. There cannot be double recovery.

74 In my judgment, this conclusion is reinforced by the following considerations. First, *Johnson* was concerned with an argument that in the light of common law developments, the court ought effectively to overrule *Addis* (1), or at least limit its effect, by recognizing an implied term in the contract which, however framed, will in substance require the employer to act fairly in the manner in which he carries out any dismissal. It is because such a term would undermine the statutory scheme for unfair dismissal that the court refused to create it, whether by extending the existing term of trust and confidence to the act of dismissal itself or otherwise. *Johnson* was not concerned to deny the right to claim any particular head of damages where the cause of action can properly be pursued.

75 It is true that *Edwards* (9) was a case where an express contractual right regulating the manner of dismissal was held not to give rise to a claim for damages. But that was because of the nature of the contractual right in issue, namely disciplinary procedures whose origin was inextricably linked with the unfair dismissal legislation. The majority in *Edwards* considered that Parliament could not have intended to allow damages to be recovered for breach of such an express term, not least because this would undermine the legislation. The point was put succinctly by Lord Mance in his judgment in a passage I have quoted above at para. 62 but will repeat: "[Parliament] cannot have intended that procedures put in place to avoid the need to invoke the statutory scheme should in fact circumvent and make irrelevant the careful limitations of that scheme."

76 Equally, whilst Lord Dyson accepted that in principle Parliament would not, by adopting a scheme for unfair dismissal, have intended to remove a cause of action already in play, he in effect held that it was artificial to apply that principle to procedures of the kind found in the *Edwards* case. The legislation promoted the disciplinary procedures of the kind then under consideration; it was fanciful to say that to deny a damages

claim for the breach of them involved in any real sense the removal or denial of a right.

77 In my view neither of these points applies here. I do not think it can confidently be said that the procedural requirements in this case were adopted with unfair dismissal considerations in mind. Their purpose is not only to ensure that a dismissal is fair; they also assist the employer to determine whether the reason for dismissal is consistent with the contractual obligation to dismiss only for cause. Of course, compliance or otherwise with the procedures would be relevant in any unfair dismissal claim, but that cannot be said to be their only, and possibly not even their primary, purpose. In a case of this kind, avoiding an invalid dismissal might well be financially more significant than avoiding an unfair dismissal.

78 Moreover, although contracts which permit dismissal only for cause are relatively rare, they did exist even before the Industrial Relations Act first introduced unfair dismissal legislation in 1971. An example is found in *McClelland* v. *Northern Ireland General Health Servs. Bd.* (13). It surely cannot be said that Parliament intended to take away or modify the full scope and effect of any contractual rights conferred upon employees by contracts of this nature.

79 The final point is this: *Johnson* denies a common law cause of action regulating the manner of dismissal in the case of employment where the employer can dismiss on notice. *Edwards* denies a common law claim for damages for breach of particular express contractual procedures where their origin is inextricably linked with the development of the unfair dismissal legislation. Neither goes so far as to say that, where a contractual claim for damages can be made, it is legitimate to impose a restriction on the kind of damages which can be recovered. In my view that would be going a step too far. Nothing in *Johnson* compels that conclusion. Indeed, in *Edwards* Lord Dyson accepted that even in the case of the disciplinary procedures in play in that case, damages for breach could be recovered if the parties said in terms that this was their intention ([2012] 2 A.C. 22, at para. 39). In effect, there is only a presumption that damages are irrecoverable in such cases. I do not see why, if there were such an express term, all damages flowing from the breach, including psychiatric harm, could not be recovered. In my judgment there would then be no principled basis for refusing to allow a claim for all legally recoverable loss. In my view that is equally the position here.

80 Dr. Cilliers may well have problems with questions of foreseeability and remoteness, but that will depend upon the evidence emerging at trial. It is not a reason for striking out the case at this stage, and indeed the case was not argued on that basis.

81 For these reasons, I would dismiss the appeal.

Cross-appeal

82 I turn to the application for leave to argue the cross-appeal and the related application for an extension of time to allow the application to be pursued. That must be considered first.

83 Under r.59(1) of the Gibraltar Court of Appeal Rules 2004, a notice of cross-appeal must be lodged within seven days of service of the grounds of appeal. Rule 59(3) imposes an express sanction for a failure to file a notice of cross-appeal within time. It states that where the notice is out of time, the respondent "shall not be allowed, except by leave of the court" to proceed with a cross-appeal. So an application to extend time is an application for relief from sanctions. That is not disputed.

84 In the present case, the appellant lodged and served on the respondent the grounds of appeal on August 24th, 2021. The notice of cross-appeal had to be filed therefore, under r.59(1), by August 31st, 2021. In fact, the respondent did not file the notice until February 3rd, 2022, over five months late.

85 It is true that on August 25th the parties agreed the terms of an order under which the appellant was given leave to amend the grounds of appeal within 21 days of the production by the Supreme Court of certain transcripts of the trial. (This did not include the transcripts of the hand-down hearing when the order was finalized.) The agreed order also provided that the timetable under the Court of Appeal Rules be extended so as to permit the record of appeal to be filed 42 days after the amended appeal had been lodged. In fact, the record of appeal was served on the respondent on October 5th. In the event, the notice of appeal had not been amended. Mr. Vasquez submitted to the court that it had never been made clear that the appellant was not going to amend its grounds of appeal. That may be so, but I have no doubt that, as Mr. Santos argued, it would have been plain that no amendment would be made once the record of appeal had been served, and if there were any doubt, I would have expected Mr. Vasquez to seek to have the position confirmed. Quite apart from that, the cross-appeal is directed to the matters struck out by the judge whilst the appeal is directed to what he did not strike out. Details of the precise nature of the appeal have no real relevance to the cross-appeal.

86 Rule 59 does not provide that time for lodging the cross-appeal can be delayed to take account of the matters relied upon by respondent in this case. But even if the court were minded to take a relatively benign approach to the failure to file and serve the notice of cross-appeal until after the record of appeal had been served, there was still a very substantial delay from early October until early February. In his skeleton argument, Mr. Vasquez did not seek to argue otherwise.

87 However, he introduced an entirely new point in his oral submissions. Essentially, the argument was that it had been agreed that the transcripts of the hearing at the hand down should be obtained because it was suggested—correctly as it happened—that these might be material to the arguments on appeal. The appellant was dilatory about getting those transcripts. The submission was that in some way this either prevented time from running for the service of the cross-appeal, with the result that the cross-appeal had been served within time; or alternatively, that this was a material consideration when exercising the discretion whether to extend time or not.

88 In my judgment this argument, ingenious as it was, is totally without merit. The agreed order of August 25th said nothing about these transcripts. They were wholly irrelevant to the cross-appeal in any event, as demonstrated by the fact that it was lodged before these transcripts were obtained and made available to the respondent. Moreover, when the respondent filed its notice of cross-appeal it did not at any stage suggest that it was prejudiced in any way by the fact that it did not have these transcripts. It is fanciful to suggest that they were needed in order for the respondent to be in a position to finalize the cross-appeal. I therefore reject these submissions. The cross-appeal was filed very late and the respondent must seek relief from sanctions.

89 It is now firmly established that when considering whether to grant relief from sanctions the Court must apply the three-stage test set out by Lord Dyson, M.R. in *Denton* v. *T.H. White Ltd.* (7). This was the approach adopted by this court in the case of *In re Wardour Trading* (20), also a case where the notice of cross-appeal was served late.

90 Lord Dyson described the three-stage test in *Denton* as follows ([2014] 1 W.L.R. 3926, at para. 24, as quoted in 2019 Gib LR 48, at para. 9):

> "'. . . A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate 'all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)].'
>
> Factors (a) and (b) are explained in *Denton* (*ibid.*, at para. 33) and are '(a) the requirement that litigation should be conducted efficiently and at proportionate cost; and (b) the interests of justice in the particular case.'"

Factor 1: the seriousness and significance of the breach

91 On any view, this is a serious and significant breach and Mr. Vasquez has realistically not sought to argue otherwise. Obviously the more serious or significant the breach, the less likely it is that relief will be granted.

Factor 2: why the default occurred

92 Mr. Vasquez has sought to explain the reason for delay. He submitted that in part it was because the parties were taken up with other matters in this litigation. There were steps that had to be taken following the order of Restano, J. following the strike out proceedings. The respondent had to serve amended particulars of claim reflecting Restano, J.'s order on July 21st, 2021 and respond to the defence which was subsequently amended. There was also a plethora of hearings in the case. But none of this provides any justification for putting in a notice of cross-appeal so late. It should have been lodged before these hearings took place. As the Court of Appeal noted in *Mitchell* v. *News Group Newspapers* (15) ([2014] 1 W.L.R. 795, at para. 41) pressure of work is not a good reason for failing to meet a deadline. Mr. Vasquez also said that it was only late in the day that he became aware of the case of *Monk* v. *Cann Hall Primary School* (16), which is central to his cross-appeal, although quite when he became aware of it has not been divulged. Once he was appraised of it, he saw its potential to a cross-appeal, particularly with respect to the defamation claim. But *Monk* was decided many years ago. The failure to appreciate its potential significance cannot in my view constitute a good reason for the delay. In any event, as Mr. Santos has pointed out, the very argument now being advanced in the cross-appeal based on *Monk*, namely the fact that the circumstances of the dismissal included the Respondent being marched off the premises in a humiliating manner, was identified as a potential slander by conduct claim in the hearing before Restano, J.

93 All this falls well short of a good reason for lodging the cross-appeal so late and Mr. Vasquez did not seek to argue otherwise with any real conviction.

94 These considerations point strongly against extending time. As Moore-Bick, L.J. pointed out in *R. (Hysaj)* v. *Home Secy.* (18) ([2015] 1 W.L.R. 2472, at para. 59), lengthy delay and the lack of a good reason for it "point firmly towards refusing to extend time." These factors are not of course conclusive, however. There may be cases where even weak explanations for a significant delay will justify extending time if the justice of the case overall requires it. That depends on the third factor.

Factor 3: all the circumstances of the case

95 An important consideration in determining whether to grant relief is what effect allowing the extension of time will have on the case. I do not

accept Mr. Vasquez's submission that it will have no real impact on the current timetable. There is a five-day preliminary hearing on liability already fixed for June. This was done in December, when a timetable was also fixed; there was no indication at that time that a cross-appeal would or may be forthcoming. As Mr. Vasquez himself has recognized, if the respondent is relieved from the sanction and given leave to argue the cross-appeal, this will very significantly widen the scope of the case. In a (successful) application to vary the timetable in view of the cross-appeal, Mr. Vasquez said this:

> "The Parties are mindful that if the Cross-Appeal is successful, the result may be to reinstate the Particulars of Claim herein to essentially the form in which they were originally pleaded . . . It follows that, in that eventuality, the Preliminary Hearing . . . will be rendered otiose in the sense that it will address only a part of the claims in these proceedings. Accordingly, little or nothing will be achieved by a hearing limited to that discrete issue, and the costs of the preparation of that hearing will have been incurred unnecessarily."

96 Mr. Vasquez was at that time submitting that the date in June for the preliminary hearing on liability should not be kept. In fact it has been, notwithstanding that the timetable could not be kept because of this hearing. As Mr. Santos points out, even if time is extended but leave to pursue the cross-appeal is not given then, depending on when the court's decision is handed down, there may be precious little time properly to prepare for the June hearing. The time available between the court's decision and the hearing date may be too short. He says that even if a decision is given in mid-April it will be very difficult indeed to ensure full disclosure and exchange of witness statements, hold a pre-trial review and prepare properly for the trial in June. That seems to me to be a fair and realistic observation. He also points out that the appellant has produced a defence (and subsequently an amended defence) and that these documents will have to be reconsidered if leave to argue the cross-appeal is given. I would accept, however, that if this were the only adverse consequence, it could probably be dealt with by an appropriate order as to costs.

97 It should be highly exceptional, as Moore-Bick, L.J. pointed out in *Hysaj* (18) ([2015] 1 W.L.R. 2472, at para. 46), to have regard to the merits in a strike out application, save where they are either very strong or very weak. In my judgment, even a cursory consideration of this cross-appeal demonstrates that it has very little prospect of success.

98 As I have said, the thrust of the cross-appeal is based on a brief observation of Underhill, L.J. in the case of *Monk* v. *Cann Hall Primary School* (16). In his judgment in that case Underhill, L.J. considered that it was arguable that if someone was humiliatingly marched off the premises immediately following the dismissal, that might amount to conduct which

could be treated as being independent of the act of dismissal itself. If that were so, the *Johnson* exclusion zone would not apply. Dr. Cilliers alleges that she was marched off the premises in a similar way as the employee in *Monk*. It is suggested that the judge erred by not taking into account the fact that conduct of that kind might constitute defamatory conduct, a form of slander by conduct, and it is at least arguable that it would fall outside the exclusion zone. No defamation action was ever framed in those terms, however. It is true that Mr. Vasquez indicated to the judge below in argument that, if necessary, he would amend the pleadings to incorporate it, but he did not in fact provide any pleading on the point for the judge to consider. In the context of a defamation case this is particularly important given the significance which is afforded to precise pleadings in such cases. When Mr. Vasquez raised the possibility of pleading this new ground, the judge observed that both counsel for the appellant, Mr. Mead and Mr. Santos, had complained that he had had six months to prepare the point. They had also asserted that it was wholly unsatisfactory that the matter should be dealt with on the hoof, with only the vaguest suggestion of how the claim might be framed.

99 In my view the matter was never properly before the judge and I accept the submission of Mr. Santos that in effect Mr. Vasquez is seeking to introduce a new point on appeal which was not in substance argued below. The amendments Mr. Vasquez seeks with respect to this matter have no bearing on the provisions which the judge struck out. I do not think they can be raised now by way of a cross-appeal.

100 Mr. Santos made a number of other submissions about the lack of evidence to sustain the argument now advanced, and alleged that there were various defects in the pleadings. It is not necessary to engage with those additional matters.

101 In view of all these considerations, I would hold that it would be wholly inappropriate for the court to exercise its jurisdiction to extend time. The respondent is therefore not entitled to run the cross-appeal in these proceedings.

Disposal

102 I would dismiss the appeal and refuse to extend time to permit the respondent to seek leave to argue the cross-appeal.

103 **RIMER, J.A.:** I agree.

104 **KAY, P.:** I also agree.

Appeal dismissed.