Neutral Citation Number: [2020] EWHC 2980 (QB)

Case No: QB-2019-003966

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2020

**Before**:

**HUGH SOUTHEY QC (Sitting as a Deputy Judge of the High Court)**

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**Between:**

**AB** **Claimant**

**- and –**

**THE UNIVERSITY OF XYZ** **Defendant**

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**Simon Butler** (instructed by **Simon Butler**) for the **Claimant**
**Paul Greatorex** (instructed by **Farrer & Co**) for the **Defendant**

Hearing dates: 20 – 22 October 2020

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# Approved Supplementary Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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*Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 6 November 2020.*

**Hugh Southey QC**:

## SUPPLEMENTARY JUDGMENT

1. I circulated a draft of the judgment in this matter on 27 October 2020. I sought a draft order agreed by the parties. I indicated that provision should be made for representations where aspects of the order could not be agreed. Unfortunately, I merely received representations regarding various matters. Addressing the issues as best I can.

### Relief

2. The Defendant has queried what the Court understood was meant by evidence that it was practical to hold a further disciplinary hearing. It is said to be uncertain whether the complainant is prepared to attend further disciplinary proceedings or whether she and the disciplinary committee require legal representation. It is said that I should invite further representations regarding relief. I am not willing to do that for the following reasons:

    i) Having invited the parties to clarify whether my record of the evidence is correct, it appears to be agreed that a witness called by the Defendant, Ms Gower, had given evidence that it was practical to hold a fresh disciplinary hearing. Although I did invite the parties to make representations as to whether relief should be addressed after judgment, I never ruled that it should be addressed at that stage. As a consequence, the issue of relief remained live throughout the trial and evidence was adduced regarding that issue. It is simply too late to now adduce further evidence as to the practicality of relief.

    ii) Substantive amendment of a draft judgment is only permissible in exceptional cases (*R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2011] QB 318 at [4]). I fail to see what the exceptional circumstances are in this case. Re-visiting relief would involve considering substantive amendment.

    iii) The matters raised can be addressed at a second disciplinary committee. For example, if the complainant fails to attend, it will be for the committee to decide whether it can proceed on the basis of hearsay from the first hearing. I should add that I took account of the fact that the complainant might seek legal representation in my judgment [90(vi)].

    iv) The Defendant has raised the possibility of an appeal. If an appeal is to be brought, it needs to be brought urgently in light of the possibility of the Claimant re-starting his studies in January 2021.

3. In light of these matters it appears to me that I should not reopen issues of relief.

### Permission to appeal

4. I am not willing to grant permission to appeal. Having heard argument, the applicable principles appear clear. While there may be greater room for argument about the conclusions that I reached applying those principles, that is not the sort of matter that

will normally cause an appeal to be allowed (*DB v Chief Constable of Police Service of Northern Ireland* [2017] NI 301).

**Stay**

5. Despite being unwilling to grant permission to appeal, I accept that the Defendant should be given an opportunity to appeal. As a consequence, I am willing to stay my order for 21 days to enable an appeal to be brought and a further stay to be sought from the Court of Appeal. I initially concluded that 14 days was appropriate. However, having reviewed matters it appears to me that 21 days is fairer. That short period has been set in light of the possibility of the Claimant re-starting his studies in January 2021. I am not willing to allow the stay to continue until permission is determined if an application for permission is lodged within 14 days. It appears to me that such an order would make it highly unlikely that a disciplinary hearing will be heard before the New Year whatever the Court of Appeal make of the merits of an appeal. A further stay can be sought from the Court of Appeal if appropriate.

**Costs**

6. The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. However, there is a discretion to depart from that rule. Matters that are relevant include:

> *(a) the conduct of all the parties;*
>
> *(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful …* (CPR 44.2(4))

7. Helpfully guidance on the approach to issue based costs orders is set out in the judgment of Stephen Jourdan QC sitting as a High Court judge in *Pigot v Environment Agency* [2020] EWHC 1444 (Ch). I note in particular he concluded that:

> *Where there is a discrete issue which caused additional costs to be incurred, if the issue was raised reasonably, the successful party is likely to be deprived of its costs of the issue. If the issue was raised unreasonably, the successful party is likely also to be ordered to pay the costs of the issue incurred by the unsuccessful party.* [6(3)]

8. It appears to me that both of the matters identified above point towards the Claimant being denied his full costs:

   i) Firstly, it appears to me to be the case that it is possible that costs could have been avoided in this case had the Claimant appealed to the Senate or sought an injunction at an early stage.

   ii) More significantly, it appears to me that significant costs have been expended by both sides in relation to arguments that failed. In particular, the argument as to which version of the regulations that applied appears to me to have been unmeritorious and should not have been advanced. I have no doubt that the arguments that were rejected increased the costs in this case. That is

demonstrated by the extensive written submissions of the Claimant regarding issues rejected.

9. Taking account of the two matters above, it appears to me that the just order in this case is that the Claimant should receive 50% of his costs to be assessed if not agreed.

## Reporting

10. At present there are reporting restrictions in this matter that prevent the naming of either party. I expressed concerns about this and have received representations. Neither set of representations made reference to section 1 of the Sexual Offences (Amendment) Act 1992. It appears to me that this is the starting point when considering reporting restrictions because the terms of section 1 clearly prevents the naming of the complainant. Further, section 1(2) prevents the publication of any 'matter likely to lead members of the public to identify a person' as the complainant. I cannot see how the Claimant can be identified without breaching section 1(2). The circumstances of the alleged sexual offence that led to this claim mean that the mutual friends of the Claimant are likely to be able to identify the complainant if the Claimant is named.

11. After I circulated this judgment in draft, I received representations from the Claimant that section 1 does not apply. No authority in support of that submission was received. It appears to me to be contrary to the plain language of section 1. It also appears to be contrary to High Court authority (e.g. *ABC (A mother) v Chief Constable of West Yorkshire Police* [2017] EWHC 1650 (QB) at [2]).

12. If section 1 did not apply, I would need consider whether reporting should be restricted relying on the powers of the Court under CPR 39.2(4). I would need to direct myself in accordance with *In re Guardian News and Media Ltd* [2010] 2 AC 697 that:

> *... [the] revelation of the identity of the parties is an important part of the principle of open justice and the principle is generally diminished where a newspaper is allowed to report the identity of only one of the parties.* [65]

As a consequence, as was held in *JXMX v Dartford and Gravesham NHS Trust* [2015] EWCA Civ 96:

> *Whenever the court is asked to make an order [restricting publication of a party's name], therefore, it is necessary to consider carefully whether a derogation of any kind is strictly necessary, and if so what is the minimum required for that purpose.* [17]

13. Applying the principles set out in the paragraph above, it appears to me that had section 1 of the Sexual Offences (Amendment) Act 1992 not applied, the Court should not lift the reporting restrictions in relation to the Claimant. It appears to me that the Claimant has a good claim to privacy in circumstances in which the allegation he faces would not have been made public had these High Court proceedings not been necessary. I also take account of the fact that the Claimant is a young person whose future may be harmed by publication of allegations that have not been proven. Reporting restrictions appear to me to be necessary.

14. The position in respect of the Defendant appears to me to be potentially different. I do not accept there is any automatic right to parity of treatment. The Defendant has argued that naming it would lead to the lead to the identification of the Claimant. I think that the risk of the Claimant being identified if the Defendant is identified is not very high given the number of students who attend the University of XYZ. However, I am just persuaded it is high enough to justify the reporting restrictions continuing in relation to the Defendant.

15. The order makes needs to make provision for this supplementary judgment and the order to be served on the Press Association who have liberty to apply. The Claimant is responsible for that.

## Order

16. I invite the Claimant to draft an order which is to be agreed with the Defendant. If agreement proves impossible, areas of dispute that remain should be highlighted. An order should already have been drafted and is the responsibility of the claimant.