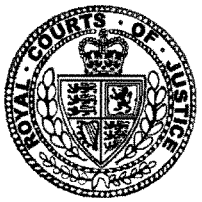

Neutral Citation Number: [2014] EWCA Civ 1275

Case No: B3/2013/2141

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BIRMINGHAM CIVIL JUSTICE CENTRE
HH Judge Barrie
0BM03894

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/10/2014

Before :

LORD JUSTICE SULLIVAN
LORD JUSTICE BEATSON
and
LADY JUSTICE SHARP

- -

Between :

Coventry University	**Appellant**
- and -	
Dr Rubina Saghir Mian	**Respondent**

- -
- -

Andrew McLaughlin (instructed by Berrymans Lace Mawer LLP) for the **Appellant**
Julian Matthews (instructed by Anthony Collins Solicitors) for the **Respondent**

Hearing dates : 14 April 2014

- -

Approved Judgment

Lady Justice Sharp :

1. This is an appeal against the determination of HH Judge Barrie that the appellant, Coventry University (the University) was liable in negligence to the respondent, Dr Rubina Mian. The judge gave permission to appeal on a number of grounds, but the sole ground now pursued is that the judge erred in finding the University in breach of its duty of care to Dr Mian.

2. In 2007, Dr Mian was a senior lecturer employed by the University in the Biomolecular and Sports Sciences Department with responsibilities for teaching and research, based in the Faculty of Health and Life Sciences in the James Starling building of the University. She also supervised research students. Her employment had begun in 1996.

3. One of her colleagues, Dr Tariq Javed, was told by the University that he was to be made redundant in August 2005. He obtained a year's extension to his employment, during which he transferred to work in the Chemistry Department in the Richard Crossman building of the University. He left the University's employment in August 2006 and subsequently took up a teaching post at the University of Greenwich (Greenwich).

4. In early March 2007 Dr Linda Merriman, the Dean of the Faculty of Health and Life Sciences, was contacted by telephone by Professor John Humphries, the Pro-Vice Chancellor of the University of Greenwich, in connection with concerns about a reference that had been provided for Dr Javed. Professor Humphreys told Dr Merriman that there was a "large disconnect" between Dr Javed's performance and some of the assertions in the reference letter (I shall call this the Greenwich reference). Dr Merriman asked Professor Humphries for a copy of the Greenwich reference, and it was sent to her on the 12 March 2007.

5. The Greenwich reference was on Coventry University headed notepaper, dated 5 December 2005. It purported to be written by Dr Mian and signed by her. It was over three pages long and very detailed. It contained Dr Mian's direct dial telephone number at the top. There is no dispute that the Greenwich reference (to put it at its lowest) had many important inaccuracies, and materially overstated Dr Javed's qualities and qualifications.

6. Dr Merriman was very concerned about the apparent promulgation of a false and misleading reference purporting to come from a member of her Faculty. She told Professor Humphries that the Greenwich reference contained a number of inaccuracies and she would instigate an internal investigation, which she did. She asked Dr Daly, an Associate Dean of the Faculty to lead the investigation.

7. The University asked Greenwich how the request for the Greenwich reference had been sent to Dr Mian, and was told that it had probably been posted to her at the (accurate) University address given for her by Dr Javed. Dr Mian's pigeonhole was in the administrative office of the James Starling building (a different building therefore to the one in which Dr Javed worked at the material time).

8. Dr Merriman showed the letter to Dr Mian's immediate superior, and line manager, Dr Valerie Cox. She said in her opinion the signature at the bottom was not that of Dr

Mian. However, after consultation with the University's Human Resources (HR) department, and in line with University policy, a search was made of Dr Mian's computer 'H' drive. On the advice of the HR department, this was done without Dr Mian's knowledge, because of the potential risk that relevant material might be deleted.

9. The search revealed three other draft references in Dr Mian's name for Dr Javed that had been saved to her computer's hard drive on three different occasions in 2004 with these file names: TJ doc reference; 10.06,04; TJ.2 doc reference, 6 July 04 and TJ 3.doc 29 November 2004. The references were for three different posts. The first draft was addressed to Professor Humber of the University of East London, for the post of Professor of Health. The second was addressed to the Faculty of Health and Applied Social Sciences, Liverpool JMU (Liverpool John Moores University), for the post of Professor of Health Sciences. The third was addressed to "ANO" for the post of Senior Lecturer in the School of Nursing and Midwifery.

10. Dr Daly analysed the four references. The three references found on Dr Mian's hard drive were very similar to the Greenwich reference (in Dr Daly's view large chunks from them, had been cut and pasted into the Greenwich reference) and were similarly inaccurate and misleading. Dr Daly produced a schedule which set out the many similarities and common inaccuracies.

11. Dr Daly invited Dr Mian by letter dated 20 March 2007 to attend a preliminary meeting with him on 27 March 2007. The letter was a formal one. Before the meeting Dr Mian was supplied with a copy of the Greenwich reference. The letter said Dr Mian could be accompanied by a union representative at the meeting, or by a friend among the staff if she wished. However Dr Mian chose to attend on her own. Another member of the University staff, Dr Harrower, attended as note taker. Dr Mian disputed the accuracy of those notes at trial, but the judge concluded they were accurate. The judge found Dr Mian's objections to what the notes recorded were made in good faith but represented what, on reflection, she would have liked to have said, rather than what she did say.

12. The meeting lasted for about 45 minutes. During the course of the meeting Dr Mian denied writing any of the references, including those found on her computer. Her account was, in summary, that she had agreed to be a referee for Dr Javed. He had provided references he would like her to produce, which she had saved onto her "H" drive. These references contained false, misleading and inaccurate statements. She had refused to use these longer references but wrote short references for him instead. She had deleted all of these (short) references from her computer, "because he was so irritating". She had retained the longer references prepared by Dr Javed, "to keep him quiet". She felt intimidated by Dr Javed, but had not raised this with her line manager (Dr Valerie Cox). She could not remember where she had sent the references she had provided for Dr Javed. She had abbreviated the file name in relation to each of the references Dr Javed had provided to her (unlike all the other saved references on her computer) because "his very name irritated me". She accepted there were 30 other references saved on her computer which were short. When asked why she had not retained the short references for Dr Javed said she did not keep robust records and regarded references as "a pain."

13. After the meeting, Dr Daly asked Dr Cox for more information about certain matters Dr Mian had raised during the interview. The topics covered were 1) Any instances when Dr Mian made Dr Cox aware of problems between her and other members of staff; 2) The relationship between Dr Mian and Dr Javed; and 3) Dr Cox's experience of Dr Javed's behaviour. Dr Cox supplied her answers in a three page memorandum dated 2 April 2007. In her memorandum Dr Cox said Dr Mian had not made any complaints to her about Dr Javed's behaviour. As far as she knew, the relations between Dr Mian and Dr Javed were cordial. In December 2006 (i.e. after he had ceased to be a member of the University) Dr Mian had asked Dr Cox if she would agree to cover Dr Javed's expenses to travel to act as an internal examiner for one of Dr Mian's PhD students. She said there had never been any indication of any physical intimidation by Dr Javed in his dealings with students and colleagues.

14. Dr Daly prepared a written summary of Dr Mian's response and then met Dr Merriman. They discussed the results of his investigation. Dr Daly recommended disciplinary proceedings should be commenced to investigate and consider the allegation that Dr Mian had been complicit with Dr Javed in the preparation of false references. In his view, Dr Mian had a case to answer for gross misconduct.

15. The actual decision to instigate disciplinary proceedings was made by Dr Merriman after consultation with the University's Human Resources Department. Dr Mian was notified of the decision in a letter dated 10 April 2007. The essential allegation was of complicity with Dr Javed in the preparation of false and misleading employment references. The letter invited Dr Mian to a formal disciplinary hearing on the 18 April 2007.

16. However, on 12 April 2007 Dr Mian submitted a sickness certificate and went off work. Thereafter the hearing was delayed, mainly as the judge found because of Dr Mian's ill health. He therefore rejected the second limb of the Dr Mian's case on breach of duty, which alleged that the University had failed to complete the conduct of the disciplinary proceedings sufficiently promptly. There is no cross appeal against that finding.

17. In October 2007, Dr Daly interviewed Dr Cox again, and three more members of the University's staff, Dr Heppinstall, Dr Carson and Dr Maddox, after he was encouraged to do so by Mr Jon Baxter, Dr Mian's union representative.

18. The result of those interviews did not cause the University to change its position, and the disciplinary hearing therefore went ahead. It took place over the course of two days in November 2007 before an independent assessor, Professor Noon. Mr Baxter represented Dr Mian. She did not attend, but at the hearing Mr Baxter produced her written response to the allegations. In his closing submissions, according to the note we have of it, Mr Baxter submitted Dr Mian was "guilty of stupidity and naivety" but not complicity. Professor Noon said he had found the case "not easy", but dismissed the allegations.

19. Dr Mian did not return to work and left the University's employment. She subsequently found employment elsewhere.

20. There was no suggestion that the disciplinary proceedings had been commenced and pursued otherwise than with proper motives and in good faith. However, the pleaded

contention for Dr Mian was that the University was in breach of contract and/or negligent so as to cause her psychiatric injury in commencing disciplinary proceedings without undertaking further enquiries (I should add that it was common ground that the University's duties under the implied term of mutual trust and confidence at common law and in contract were co-extensive). The allegation, which the judge upheld, was that if such enquiries had been undertaken, then proceedings would not have been instigated, as it would have been established that there was an insufficient basis for them.

21. The University's challenge to the judge's finding of breach of duty is made on a number of grounds.

i) Although at one point, the judge appeared to identify the correct test to apply to the decision to commence disciplinary proceedings against Dr Mian (i.e. whether the University had established that no reasonable employer would have taken that step) the judge did not then apply that test. It is not clear what test he did apply, but it appears to have been a hybrid of his own assessment as to the strength of the case against Dr Mian and a consideration of whether material eventually put before the independent assessor who decided the matter could have been obtained earlier;

ii) The judge failed to give proper weight to the fact that the decision to instigate proceedings was made, not by Dr Daly, who conducted the initial meeting with Dr Mian, but by Dr Merriman and Dr Merriman's decision was made after consultation with the appellant's Human Resources department. Dr Merriman described to the judge in evidence the factors underpinning her decision that disciplinary proceedings should commence. The judge made no finding undermining that evidence and made no finding that those reasons were improper or insufficient reasons for Dr Merriman's decision.

iii) The judge also erroneously held as relevant to the issue of the reasonableness of the instigation of proceedings, the separate issue of Dr Mian's mental state at the time the decision was made.

iv) The correct test to apply was whether in all the circumstances the decision to instigate disciplinary proceedings against Dr Mian was "unreasonable" in the sense of being one which no reasonable employer would take. If the judge had applied that test he would have found that Dr Mian had not established a breach.

22. In my opinion, essentially on those grounds, the judge was wrong to find the University in breach of its duty to Dr Mian and the reasoning which led him to that conclusion was flawed.

23. There was no dispute between the parties at the trial as to the test which the judge had to apply to the facts in order to determine whether a breach of duty was established. It was, as Mr McLaughlin submits, whether the decision to instigate disciplinary proceedings was "unreasonable" in the sense that it was outside the range of reasonable decisions open to an employer in the circumstances. This required an objective assessment, and one that was not to be made with the benefit of hindsight. The circumstances included both the evidence which was available to the University

at the time, and (potentially, subject to proof) such other evidence as would or should have been available as the result of a (non-negligently) conducted investigation. As the judge himself said, correctly, however, reasonable people could reach different judgments on the same question and it is possible to be "wrong" (in this case, both about the method by which the investigation should proceed and about Dr Mian's culpability) without being negligent.

24. The University's case was that, objectively, a reasonable employer could have concluded in the circumstances, that there was a case for Dr Mian to answer on a charge of gross misconduct. Indeed the circumstances were such that a recommendation for a serious disciplinary charge to be brought was entirely reasonable, indeed almost inevitable. In my view that case was well-founded on the basis of the concrete evidence available at the time proceedings were instigated and I think the judge was plainly wrong to conclude otherwise. I have in mind in particular the finding of three false references for Dr Javed in Dr Mian's name and saved on her computer on three separate occasions, and the fact that if Dr Mian had no involvement in the production of the false Greenwich reference, then Dr Javed must have contrived somehow to intercept Greenwich's request for a reference from her pigeon hole in a manned office without her knowledge – an occurrence that both Dr Daly and Dr Merriman, regarded as implausible.

25. Further, on her own account given to Dr Daly in the interview, Dr Mian had been asked by Dr Javed to lie about an important matter (she said Dr Javed had asked her to lie on his behalf by asserting that he contributed to one of Dr Mian's research grants), she knew that the references she had opened on her computer created in her name by Dr Javed were substantially false and misleading, she regarded Dr Javed as unreliable, and thought he may have been taking requests for references from her pigeonhole without her permission. She was a senior academic who would have understood the significance of such matters. Yet she had mentioned these matters to no-one, had agreed to be Dr Javed's referee (if only by supplying him with non-committal references as she said, but which, unlike the false references she could not produce nor could she say to whom they had been sent) and had given him access to her computer while he went through the references on a number of occasions. Moreover after the events in question, in December 2006 Dr Mian had apparently asked Dr Javed to be an internal examiner for one of her PhD students, a matter about which the University knew as a result of the inquiries made of Dr Cox about Dr Javed's travel expenses. This raised a doubt about Dr Mian's assertion to Dr Daly in the interview that she did not know where Dr Javed had gone and in particular that he was at Greenwich, and it may have suggested Dr Mian and Dr Javed were on better terms than she had described. Dr Mian described being intimidated by Dr Javed. Whether this amounted to more than mere pestering or cajoling, a matter about which there was some debate at trial, the point was that it was a matter which could reasonably be regarded as consistent with Dr Mian having been persuaded to do something for Dr Javed that she had been reluctant to do and later regretted (such as sending a false reference) rather than with her having decided not to delete from the computer a draft that she had resolved not to use.

26. True it was that Dr Mian strongly denied any complicity with Dr Javed and gave an explanation for the presence of the three references on her computer. But her account depended ultimately on her credibility. The University might have decided to accept

her explanation on the basis of her bona fides and otherwise excellent reputation, and to take the matter no further, but it was not unreasonable for it not to do so in my view given some of the peculiar features of the case. In those circumstances the matter had to go forward for a disciplinary hearing so the evidence on both sides could be considered, and a determination made as to the rights and wrongs of the case by an assessor. It is to be noted that the case against Dr Mian was not dismissed out of hand by Professor Noon. In his determination given orally after the second day of the disciplinary hearing, he said he had found the case "not easy", as I have already said, and that the process that had been gone through (by which I understand him to mean at the hearing) was "thorough". He went on to dismiss the allegations against Dr Mian, as he said in his decision letter to her of the 22nd November 2007, on the balance of probabilities having accepted her explanation for the presence of the false references on her computer.

27. Dr Daly thought there was plainly a case to answer, and that Dr Mian's explanations given to him during the course of the interview were implausible, essentially for the reasons given above. He focused in particular on the presence of the three references on Dr Mian's computer with her full knowledge and consent each of which was "littered with the same or similar inaccuracies" to those of the Greenwich reference, on the fact that there was no evidence to support her claim that she had in the past supplied short references for Dr Javed and on what might be described as the pigeonhole issue i.e. the whether Dr Javed had or could have taken the Greenwich reference from Dr Mian's pigeonhole, thereby - as Professor Noon was later to describe it in his findings - "hitting the jackpot". Given Dr Mian's status as a senior lecturer and Dr Javed's former position with the University, he considered these matters had "serious reputational implications" for the University.

28. Dr Merriman decided that a charge of gross misconduct was appropriate having regard to the finding of the three false references on Dr Mian's computer, each for a specific job, with her name at the bottom and purporting to come from her which bore a great similarity to the Greenwich reference; the pigeonhole issue, which meant that if Dr Mian was not involved Dr Javed must somehow have intercepted the Greenwich request for a reference and taken it from her pigeonhole: since he worked in a different building she thought this would have been a considerable challenge to achieve; and that Dr Daly, after interviewing Dr Mian and taking information from Dr Cox did not find Dr Mian's explanation so convincing that there was no case to answer. She emphasised, as the judge said, that Dr Mian was not charged with having given any false references for Dr Javed, but rather with complicity with Dr Javed in the preparation of false references.

29. The judge himself acknowledged that the arguments advanced on the University's behalf were "strong". He accepted the finding of the false references from 2004 on Dr Mian's computer called for a serious investigation. But to my mind he did not then really address or evaluate those arguments or explain why in particular what might be described as the central matters of the finding of the false references, and the pigeonhole issue were insufficient to justify the instigation of disciplinary proceedings.

30. The judge went wrong in my view, principally because, as Mr McLaughlin submits, though he correctly set out the relevant test (that is whether the decision to instigate disciplinary proceedings was outside the range of reasonable decisions open to an

employer in the circumstances) he did not then apply it. Instead, in substance, he made an assessment of the overall merits, which was influenced so it seems to me by his explicit acceptance of Dr Mian's account in her evidence to him at the trial about the events in question, rather than considering whether it was reasonable to instigate those proceedings in the first place. As a result he elided the question whether the allegations made in the disciplinary proceedings were true with whether there were reasonable grounds to suspect that they were; and ended up substituting his own judgment for that of the University.

31. Towards the end of his judgment the judge set out a number of matters which on his analysis supported Dr Mian's account. These included the fact that the judge thought the similarities between the 2004 references and the Greenwich references "on reflection" were ambiguous – they might show that Dr Mian was involved in drafting the Greenwich reference but only if she was also involved in drafting the 2004 references; the absence of any motive for Dr Mian to draft false references for Dr Javed; the fact that Dr Mian told Dr Daly during the interview about the presence of the 2004 references before their presence was raised with her, and the tenor of certain emails passing between Dr Javed and Dr Mian at about the time of her interview with Dr Daly on the morning of the 27 March 2007 which the judge thought was at odds with the suggestion of a conspiracy between Dr Javed and Dr Mian. He said Dr Daly did not give weight to the fact that there was no evidence that references on Dr Mian's computer had not been used or edited after 2004. He said Dr Daly did not recognise that it might be a matter of kindness or simple politeness to a colleague to talk about an issue that was troubling him, rather than shut the door in his face.

32. All these were perfectly legitimate points to make for the purposes of an overall analysis of the merits. But that was a function to be undertaken in the disciplinary proceedings themselves. The judge did not suggest that any of these points was a "game changer", to use Mr McLaughlin's phrase (the judge described them as a series of small points which added up to a system that did not work as well as it did at a time when Dr Mian's vulnerability brought a particular need for care); nor did he explain as I have indicated why given the strength, as he acknowledged of the evidence on which the University relied, it did not surmount the relevant threshold. The fact that there was evidence which on the judge's analysis and interpretation of it supported or tended to support the account given by Dr Mian did not mean, with respect to the judge that it was unreasonable or negligent of the University to instigate disciplinary proceedings against her. The implication of the judge's finding was that notwithstanding the strength of the arguments relied on by the University and the need for a "serious investigation" as he described it, it was in breach of its duty of care to Dr Mian in pursuing the case against her, rather than abandoning it.

33. The judge said that if Dr Mian had been interviewed in circumstances that made it easier for her to explain herself more fully, if Dr Merriman had carefully studied the transcript of the interview Dr Daly conducted with Dr Mian before making her decision and if Dr Carson's evidence had been available before the 10 April 2007 the notion that "Dr Mian had been complicit with Dr Javed in carrying out a serious deceit would not have passed the test for the bringing of a charge of gross misconduct against a senior and vulnerable member of staff."

34. Assuming in Dr Mian's favour for the moment that the University should have conducted its investigation more thoroughly than it did in the manner suggested by

the judge, these points might have had some bearing on the issue of liability if this prevented the emergence of evidence which altered the picture on the facts, so that a decision to instigate proceedings would have then been outwith the range of reasonable responses. But I do not think that was remotely the case here.

35. The particular criticisms made of the interview were these. The judge said that Dr Mian was not told in advance of a change in the nature of the possible misconduct that Dr Daly was to investigate (from authorship of the Greenwich reference to complicity in the production of those found on her computer); Dr Daly did not do anything to encourage Dr Mian to take advice and be represented at the interview or at a follow-up interview; he ended the interview after 45 minutes, and he did not then seek further clarification from Dr Mian - even though he professed to be struggling to understand what she was trying to say. I am not persuaded these criticisms are fair ones. The letter from Dr Daly expressly invited Dr Mian to be accompanied at the meeting by a union representative or by a friend among the staff if she wished. The letter also made it clear that the discussion with Dr Mian would not merely be confined to the authorship of the Greenwich reference, but would cover the question whether she had given to other prospective employees a similar reference for Dr Javed. The fact that Dr Mian mentioned the three references herself, demonstrated she was aware of their relevance.

36. The important point however is that nothing new of substance emerged in the account given by Dr Mian in writing many months later at the disciplinary hearing to that she had given at the interview with Dr Daly. The University knew the substance of her account at the time the decision to instigate proceedings was made and the defects in the interview process, such as they were, were therefore of no causal relevance. The judge may have had in mind in this context his finding that all Dr Mian did was open files relating to the references on her computer three times, but nothing else. This did not however reflect Dr Mian's evidence at trial, which was in summary, that Dr Javed would frequently come to her room (two or three times a week in 2005-6); he insisted on going through the references on her screen in turgid detail, but she had not actually added any text or deleted any text to them.

37. Similar considerations arise in relation to the evidence of Dr Carson. Dr Mian had told Dr Daly during their meeting that Dr Carson could tell of similar experiences to those she had had with Dr Javed. The judge thought therefore that Dr Carson was a significant witness. In the event however Dr Carson gave what might be described as positive character evidence for Dr Mian. He described Dr Javed in unflattering terms and confirmed (in Mr Matthew's words) that he was a "pest" who came into Dr Carson's office and made a nuisance of himself (there was an issue between the parties as to whether the judge was entitled in this context to look at the evidence Dr Carson gave at the disciplinary hearing rather than in the October 2007 interview with Dr Daly, but for present purposes this does not matter in my view). Dr Carson's evidence obviously lent some support to Dr Mian's account, and the judge had earlier expressed the view that the evidence of the others interviewed at the same time did as well (albeit saying expressly, and I think correctly, that this interview evidence did not radically alter the state of the evidence). It is also right to point out that there were aspects of what was said during those interviews that was not necessarily helpful to Dr Mian, and which the judge did not mention. But in the event I do not think Dr Carson's evidence, or those of the others who were interviewed for that matter,

touched on the objective reasonableness of the decision to instigate disciplinary proceedings.

38. In reaching the view that if Dr Merriman had studied the notes of the interview carefully, the notion that "Dr Mian had been complicit with Dr Javed in carrying out a serious deceit would not have passed the test for the bringing of a charge of gross misconduct against a senior and vulnerable member of staff" the judge attached importance to what he thought was a material difference between one part of the summary Dr Daly provided to Dr Merriman of his interview with Dr Mian and the notes of that interview, which she did not see before making her decision. The summary said that "[Dr Javed] provided copies of draft references which he put on her PC and they worked on them and she left him to use her PC." The notes of the meeting recorded Dr Mian as saying: "[Dr Javed] used to come and sit with [Dr Mian] and go through the changes he wanted. She would refuse but often left him in her office...[She] kept [Dr Javed's] versions because he was so annoying." He described the phrase "worked on them" as the opposite of Dr Mian's account to Dr Daly.

39. I do not accept the difference was a significant one as the judge suggested. He had earlier described the summary on this point as "not entirely accurate" and the summary when read as a whole seems to me to have accurately documented the gist of Dr Mian's account in interview. The judge had also earlier recorded as part of his factual findings (though Mr Matthews disputes the accuracy of what the judge said about this) that after the draft reference had been opened: "It may then have been edited, because Dr Javed found changes he wanted to make...". The judge said he believed that the disputed phrase was the source of the proposal (by Dr Daly) to charge Dr Mian. This was not with respect to the judge an accurate reflection of Dr Daly's evidence of his reasons for recommending the charge. Dr Daly focused on the points I have outlined at paragraph 27 above; in particular, he said he did not believe Dr Mian's explanation for the presence of the false references on her computer or for the absence of the three shorter references she said she had sent instead. But in any event, the judge did not find that Dr Merriman had been misled by Dr Daly about what Dr Mian had said in the interview or that she had concluded a charge should be brought as a result.

40. Finally I should deal with the reference made by the judge to Dr Mian's vulnerability in the part of his judgment I have quoted in paragraph 33 above. The judge heard evidence about a dispute involving Dr Mian and a former student of hers in 2006. It is not necessary to refer to the details. The judge accepted the dispute was a matter Dr Merriman had to inquire into at the time to resolve the dispute, and that objectively, Dr Mian's upset with the Dean and the Faculty about this inquiry was unreasonable. He said, subjectively however, this left her feeling vulnerable and defensive. Dr Mian referred to this episode, and others, in her email responding to Dr Daly's letter inviting her to the meeting of the 27 March 2007 in terms which the judge said "although couched in polite language, can be seen with hindsight as a cry of anguish." The judge said Dr Daly should nonetheless have seen Dr Mian's email as a warning that she may be vulnerable.

41. Mr Matthews says it is unfair to the judge to suggest, as Mr McLaughlin does, that the judge misdirected himself by using the word "vulnerability" in describing his short hand conclusions on breach of duty, and the use of this word merely reflected the judge's view that Dr Mian's vulnerability was relevant to how Dr Daly ought to have

approached the interview. Mr Matthews does not contend therefore that Dr Mian's vulnerability was relevant to the threshold test; but that it "sharpened" the nature of the judgment to be made. I accept that in certain circumstances an employee's vulnerability may be relevant to the manner in which a disciplinary investigation is conducted. Dr Mian's vulnerability might also have been relevant for example to what (pastoral) support she should have been given at the time the decision to instigate proceedings was communicated her, or as to the manner in which she was told of such a decision. If however the judge was introducing the issue into the question whether a charge of gross misconduct was open to the University on the facts, as the words he used suggested, then that was, it seems to me to put an unwarranted gloss on the correct legal test, and was a misdirection of law.

42. In my view therefore the criticisms made by the judge of the investigative process undertaken by the University were either misplaced or immaterial. He failed to apply the proper test for breach of duty to the facts; and his conclusion that the University was in breach of its duty of care was plainly wrong on the facts. I would therefore allow the appeal and dismiss the claim.

Lord Justice Beatson:

43. I am grateful to Lady Justice Sharp, for her comprehensive description and analysis of the facts and legal issues in this appeal. I agree that the judge fell into error in eliding the question of whether it was reasonable of the University to institute disciplinary proceedings and whether the allegations made against Dr Mian were true, and that the appeal should be allowed. I also agree that the claim should be dismissed. I would, however, like to add that, while recognising the importance of procedures in institutions such as the University not becoming over-technical and legalistic, I share some of the concerns expressed by the judge about the investigative process undertaken by the University. I hope that the University will consider it appropriate to review its procedures and the guidance given to those conducting investigations on its behalf in the light of this case.

Lord Justice Sullivan

44. I agree that this appeal should be allowed for the reasons given by Sharp LJ.