At an IAS Term, Part 83, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 21st day of June, 2024.

P R E S E N T:

HON. INGRID JOSEPH,
Justice.

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MARK EIDINGER,

Plaintiff,

Index No.: 501692/2019

-against-

PRIMMA, LLC,

DECISION & ORDER

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Affirmation/Exhibits/Memorandum of Law.....	42 – 46
Affirmation in Opposition/Memorandum of Law/Exhibits.....	48 – 51
Memorandum in Reply	55
Memorandum in Opposition to Motion Seq. No. 2.....	56
Reply Memorandum in Further Support of Motion Seq. No. 2.....	57

Plaintiff Mark Eidinger ("Plaintiff") moves for an order, pursuant to CPLR 5015(a)(1), (i) vacating Plaintiff's default on Defendant Primma, LLC's ("Defendant") motion to dismiss (Mot. Seq. No. 2; "Defendant's Motion"); (ii) vacating the Court's order dated September 14, 2023 and entered October 20, 2023, which granted Defendant's Motion on default; and (iii) restoring the matter to the Court's calendar (Mot. Seq. No. 3). Defendants oppose the motion on the grounds that Plaintiff failed to proffer a reasonable excuse for the default and Plaintiff cannot establish a meritorious cause of action because the issues have already been decided in Plaintiff's action that was filed in the United States District Court for the Eastern District of New York (the "Federal Action").[1]

[1] The Federal Action was titled *Mark Eidinger v. PRIMMA, LLC* under Index No. 19-cv-3219 (NG) (RER).

This action arises out of Defendant's termination of Plaintiff's employment in 2018 as part of Defendant's Reduction in Force ("RIF"). Plaintiff alleges that his termination occurred under circumstances giving rise to an inference of discrimination, i.e., disparate treatment and disparate impact age discrimination under New York State Human Rights Law ("NYSHRL").[2] At the time of Plaintiff's termination, he was sixty-six years old. Plaintiff was a help desk technician and was a member of the IT Department consisting of twenty-eight workers, sixteen of which were terminated. In his second amended complaint, Plaintiff asserts that nine out of fifteen of the older workers (sixty-one years and older) were terminated and only seven out of thirteen of the younger workers (sixty years of age or younger) were terminated. Plaintiff further avers that Defendant terminated all septuagenarian and octogenarian employees and terminated eight out of ten workers aged sixty-six or older. In addition, of the three help desk technicians, Defendant retained one worker aged thirty-nine ("Mr. Chang") and fired two workers, including Plaintiff, who were both sixty-six.

Defendant later moved to dismiss the second amended complaint under CPLR 3211(a)(1) and (5) on the grounds that Plaintiff's claims cannot be sustained and are barred due to the federal court's determination in the Federal Action. In that case, Plaintiff asserted claims under the Age Discrimination in Employment Act ("ADEA") and NYSHRL. Defendant brought a motion for summary judgment on the grounds that Plaintiff failed to establish that his age was a but-for cause of his termination or that the RIF had a disparate impact on older workers. The federal court granted Defendant's motion for summary judgment.[3] In Defendant's Motion, Defendant argued that since the court in the Federal Action held that the substance of his claims warranted dismissal on summary judgment, Plaintiff is collaterally estopped from relitigating the same issues. Defendant's Motion was granted on default, after Plaintiff failed to submit an opposition or appear on the return date (NYSCEF Doc No. 40).

Plaintiff now moves to vacate the default on the grounds that his default was the result of law office failure since the motion was miscalendared by his counsel's office. As for his meritorious cause of action with respect to disparate treatment, Plaintiff contends Defendant's RIF

[2] "[T]he central question in a disparate treatment case is whether the protected trait, at least in part, motivated the covered entity's decision or actions, [while] disparate impact claims involve policies or practices that are facially neutral, but disproportionately or more harshly impact one group" (*Roberman v Alamo Drafthouse Cinemas Holdings, LLC*, 67 Misc 3d 182, 187 [Sup Ct, Kings County 2020] [analyzing the two causes of action under New York City Human Rights Law] [internal quotation marks and citation omitted]).

[3] The Court declined to exercise supplemental jurisdiction over the state law claims (NYSCEF Doc No. 33).

was not consistent with, not required by, business necessity and that a jury could find that but for Plaintiff's age, Defendant would not have chosen him as part of its RIF. Turning to his disparate impact claim, Plaintiff argues that the statistical analysis reveals that Defendant's RIF disproportionally terminated workers sixty-one years or older.

In opposition, Defendant argue that Plaintiff has not established any reasonable excuse for his default. First, Defendant notes that a proposed order on its motion (Mot. Seq. No. 2) was emailed to Plaintiff's counsel in September 2023, but Plaintiff did not file this motion until December 2023. In addition, Defendant's counsel avers that Plaintiff was aware, as of August 15, 2023, that oral argument was scheduled for September 13, 2023 based on the parties' joint call to chambers. According to Defendant's counsel, there can be no law office failure because Plaintiff's counsel took proactive measures to clarify the return date of the motion and still failed to attend oral argument. This, according to Defendant, amounts to a willful default. Moreover, Defendant argues that Plaintiff's motion does not address his failure to file opposition papers to Defendant's Motion, even though the parties had stipulated to a briefing schedule. Defendant further claims that it is prejudiced because it will have to continue to expend resources, effort and money to defend this case, although the issues have been decided and foreclosed in the Federal Action.

Even if the Court finds that Plaintiff proffered a reasonable excuse for his default, Defendant contends that Plaintiff has not established a meritorious cause of action. Defendants argue that Plaintiff's complaint must be dismissed because of collateral estoppel (issue of whether Defendant had a legitimate, nondiscriminatory reason for terminating Plaintiff was litigated in Federal Action) and documentary evidence (the federal court's memorandum and order (the "Federal Order") on Defendant's motion). In the Federal Action, Defendant avers that the court found that Defendant had set forth evidence of a non-discriminatory reason for Plaintiff's termination—his comparatively inferior performance over Mr. Chang. Accordingly, since Plaintiff is collaterally estopped from relitigating the issue, Defendant maintains that NYSHRL claims fail as a matter of law. Defendant also argues that Plaintiff's NYSHRL claims would be dismissed based on the Federal Order. Defendant contends that the standards for determining discrimination under the ADEA and the NYSHRL are the same. Since the federal court found that Defendant retained Mr. Chang because he was a comparatively better performer and Plaintiff did not put forth evidence that Defendant's stated reason was untrue, Defendant argues that Plaintiff's disparate treatment age discrimination claim under the NYSHRL must be dismissed. In addition,

Defendant avers that Plaintiff's disparate impact age discrimination claim must be dismissed because the Second Circuit has not recognized Plaintiff's claim—a "sub-group" disparate impact claim. Defendant argues that the whole protected class, under ADEA and NYSHRL, are workers aged forty and above, but Plaintiff does not allege that more workers aged forty and older were selected for RIF more than employees younger than forty.

In his reply, Plaintiff argues that his excuse for the default is reasonable because mistakes and oversights happen, and his proffered excuse has been accepted by other courts. According to Plaintiff, there is nothing in the record to suggest the default was willful. Moreover, Plaintiff contends that it has identified potentially meritorious claims. Plaintiff further asserts that the NYSHRL provides employees with greater protection than ADEA and thus, his disparate impact age discrimination claim is viable. Plaintiff also argues that the issue of claim or issue preclusion if one for the court to decide on a motion to dismiss or a motion for summary judgment. Plaintiff further argues that the delay in filing the instant motion as *de minimus* and Defendant was not prejudiced.

The Court allowed additional time for Plaintiff to submit his opposition to Defendant's Motion and for Defendant to put in a reply in further support. In his opposition, Plaintiff concedes that his state law claims were predicated on the same allegations in the Federal Action but argues that his state claims do not die merely because the federal court held that the substance of those claims warranted dismissal at the summary judgment stage. According to Plaintiff, some courts have found that ADEA and NYSHRL have different standards. Plaintiff argues that the federal court only made its determination as it relates to the "but-for" causation standard and the remaining issue of whether Plaintiff's age was a motivating factor for his selection for the RIF is for this court to determine. In addition, Plaintiff avers that unlike the ADEA, the NYSHRL does not require proof of disparate impact on the protected class as a whole (i.e., all workers aged forty and above). Thus, Plaintiff argues, he is allowed to make a "sub-group" (i.e., all workers aged sixty and above) disparate impact claim here. Since the issue of whether Plaintiff failed to prove that Defendant's RIF had a disparate impact on workers sixty and over was not addressed by the federal court, that remaining issue is for this court to determine. Accordingly, Plaintiff contends that collateral estoppel does not apply where the federal court decided issues other than those presented in the second amended complaint. Moreover, Plaintiff argues that (a) there is no final judgment on the merits because the federal court dismissed Plaintiff's state law claims without prejudice and (b)

Plaintiff did not have a previous opportunity to litigate the issues in this case because of the different applicable standards.

In its reply, Defendant cites to *Summit v. Equinox Holdings, Inc.* (US Dist Ct, SD NY, 20 Civ 4905, Engelmayer, J., 2022) for the proposition that claims accruing before October 11, 2019 (the date of the amendment to the NYSHRL) are subject to "but-for" causation standard. Since Plaintiff's claims accrued in January 2018 when the RIF occurred, Defendant argues that they are not subject to the more liberal standard as Plaintiff maintains. With respect to the "sub-group" disparate impact claim, Defendant concedes that the Court of Appeals has not addressed whether such claim is viable and the appellate departments have issued conflicting opinions. Nonetheless, Defendant claims that whether or not Plaintiff can plead a "sub-group" claim is irrelevant because Plaintiff cannot *maintain* these claims due to collateral estoppel.

The Court now turns to the portion of Plaintiff's motion seeking to vacate his default. To vacate a default entered after a party's failure to appear at oral argument, that party is "required to demonstrate a reasonable excuse for [its] default and a potentially meritorious opposition to each motion (*Rudsky v Schechtman*, 219 AD3d 1453, 1454 [2d Dept 2023]; CPLR 5015[a][1]). "The determination of what constitutes a reasonable excuse lies within the Supreme Court's discretion, and the court has discretion to accept law office failure as a reasonable excuse where that claim is supported by a detailed and credible explanation of the default at issue" (*Ki Tae Kim v Bishop*, 156 AD3d 776, 777 [2d Dept 2017] [internal citations omitted]). In addition to demonstrating a reasonable excuse, the defaulting plaintiff must also establish a meritorious cause of action (*see Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co.*, 67 NY2d 138, 141 [1986]; *Swensen v MV Transp., Inc.*, 89 AD3d 924, 925 [2d Dept 2011]).

The Court first addresses whether Plaintiff has proffered a reasonable excuse for his default. Here, Plaintiff's counsel alleges that he calendared the oral argument for October 4, 2023, rather than September 13, 2023, based on the markings in NYSCEF and eTrack systems and a telephone conference with chambers in August 2023. Upon the Court's review of the eCourts website, the Court notes that a preliminary conference was initially scheduled for October 4, 2023. This October appearance was not only unrelated to Defendant's Motion, it was also before another part. In addition, the parties filed a corrected stipulation adjourning Defendant's Motion to September 13, 2023, after they were advised that September 13, 2023 was the next available date for oral argument. The stipulation also included a specific briefing schedule indicating that

opposition was due by September 3, 2023. With respect to the telephone conference, Defendant's counsel submitted an affirmation in which he affirms that during that conference, the Court confirmed the return date was September 13, 2023. Plaintiff's counsel offered no rebuttal. In this case, there has been no allegation of repeated neglect and Plaintiff's default may be considered an isolated, inadvertent mistake (*see Chery v Anthony*, 156 AD2d 414 [2d Dept 1989]; *Thomas v Avalon Gardens Rehab. & Health Care Ctr.*, 107 AD3d 694, 695 [2d Dept 2013]; *Bank of NY v Mohammed*, 130 AD3d 1419, 1420 [3d Dept 2015] [affirming denial of motions to vacate dismissal because plaintiff's proffered excuse that he failed to appear at two conferences because they were calendared on the wrong date was not reasonable, especially since counsel made same error twice]). Though Plaintiff failed to proffer a more compelling excuse for his default, public policy favors the resolution of cases on the merits (*see Franco Belli Plumbing & Heating & Sons, Inc. v Imperial Dev. & Const. Corp.*, 45 AD3d 634, 637 [2d Dept 2007]).

The Court next turns to the issue of whether Plaintiff has demonstrated a meritorious opposition to Defendant's Motion. In its motion, Defendants argued that Plaintiff's second amended complaint must be dismissed due to documentary evidence (CPLR 3211 [a] [1]) and collateral estoppel (CPLR 3211 [a] [5]). Pursuant to CPLR 3211(a)(1), a complaint will only be dismissed if there is documentary evidence that "utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law" (*Granada Condo. III Ass'n v Palomino*, 78 AD3d 996, 996 [2d Dept 2010]). "Although a judicial order may qualify as 'documentary evidence' for purposes of admissibility under CPLR 3211 (a) (1) . . . , it cannot be used to preclude a party in a subsequent action from litigating an issue decided in that judicial order unless the doctrines of res judicata or collateral estoppel apply" (*J & JT Holding Corp. v Deutsche Bank Natl. Trust Co.*, 173 AD3d 704, 712 [2d Dept 2019] [internal citation omitted]).

"Collateral estoppel . . . provides that, 'as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action'" (*Highlands Ctr., LLC v Home Depot U.S.A., Inc.*, 149 AD3d 919, 921 [2d Dept 2017], quoting *Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]). On a motion to dismiss pursuant to CPLR 3211 [a] [5], "the burden rests upon the [movant] to demonstrate the identicality and decisiveness of the issue, while the burden rests upon the opponent to establish the absence of a full and fair

opportunity to litigate the issue in prior action or proceeding" (*Ryan v NY Tel. Co.*, 62 NY2d 494, 501 [1984]). "Where a federal court declines to exercise jurisdiction over a plaintiff's state law claims, collateral estoppel may still bar those claims provided that the federal court decided issues identical to those raised by the plaintiff's state claims" (*Afrat v Kimber Mfg.*, 179 AD3d 880, 881 [2d Dept 2020]).

Defendant argues that Plaintiff has already unsuccessfully litigated issues in the Federal Action that are vital to his NYSHRL claims. Even though the federal court's factual findings related to Plaintiff's federal claims, Defendant contends that these findings preclude Plaintiff from making a successful state claim under NYSHRL. Specifically, Defendant avers that the federal court's findings that Defendant had a legitimate, nondiscriminatory reason for termination Plaintiff and that this reason was not pretextual are fatal to the NYSHRL claims and thus, Plaintiff's disparate treatment claim must be dismissed. Defendants further argue that since the Second Circuit has not recognized a "sub-group" disparate impact claim, Plaintiff cannot make such a claim here.

In his opposition to Defendant's motion to dismiss, Plaintiff contends that collateral estoppel does not apply because issues raised in his state law claims were not addressed in the Federal Action, namely (1) whether age was a motivating factor in persons selected for the RIF and (2) whether a "sub-group" disparate impact claim occurred.

The Court finds that Plaintiff has demonstrated a potentially meritorious opposition to Defendant's Motion; thus, Plaintiff's motion seeking to vacate his default and the order entered October 20, 2023 is granted. Thus, the Court will now consider Defendant's Motion (Mot. Seq. No. 2) on its merits.

In deciding Defendant's Motion, the Court's inquiry turns on whether the federal court's factual determinations as to Plaintiff's disparate treatment and disparate impact claims under ADEA are determinative of Plaintiff's claims under NYSHRL (*Karimian v Time Equities, Inc.*, 164 AD3d 486, 489 [2d Dept 2018]). The Court of Appeals has held that "the standards for recovery under the New York Human Rights Law are in nearly all instances identical to title VII and other federal law" (*Margerum v City of Buffalo*, 24 NY3d 721, 731 [2015]; *see also Connaughton v Mount Vernon City Sch. Dist.*, US Dist Ct, SD NY, 21 Civ 692, Roman, J., 2024 ["[T]he standard of liability under the NYSHRL is coterminous with those under Title VII and the ADEA"]).

"A plaintiff alleging discrimination in violation of the NYSHRL must establish that (1) he or she is a member of a protected class, (2) he or she was qualified to hold the position, (3) he or she suffered an adverse employment action, and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination" (*Shapiro v State of NY*, 217 AD3d 700, 701 [2d Dept 2023]). To rebut a plaintiff's prima facie showing of age discrimination, the defendant must proffer a legitimate, non-discriminatory reason for Plaintiff's termination (*Ferrante v Am. Lung Assn.*, 90 NY2d 623, 629 [1997]). If the defendant does proffer such reason, the burden then shifts to Plaintiff to establish that defendant's stated reason was a pretext for discrimination (*id.* at 629-630).

In regard to Plaintiff's ADEA claim of disparate treatment, the federal court noted that "[t]he parties agree that [Defendant] proffered a legitimate, non-discriminatory reason—a RIF, necessitated by financial circumstances—for plaintiff's termination" (NYSCEF Doc 33, at 9). The federal court also found that Defendant submitted evidence that, as compared to Mr. Chang, it terminated Plaintiff because of his comparatively inferior performance (*id.*). Though Plaintiff argued that Defendant's rationale for terminating him and retaining Mr. Chang was a pretext for age discrimination, the federal court determined that Plaintiff failed to cite any evidence from which a jury could conclude that he was, in fact, the better performer and thus infer that Defendant's reason for terminating him were untrue (*id.*). With respect to Plaintiff's statistical evidence, the court held that though it may show a relationship between the RIF and age, it was not probative of whether age was the but-for cause of Plaintiff's termination (*id.* at 13).[4]

In *Russell v. New York University*, the Court of Appeals noted that where there are "no factual findings to sustain a discrimination . . . claim no matter the standard, plaintiff's claims must be dismissed" (*Russell*, 2024 NY Slip Op 02226, *4). Thus, it is not necessary for this Court to determine whether the "but-for" or "mixed-motive" standard applies because collateral estoppel is warranted if the federal court made an "explicit finding that plaintiff produced no evidence" from which a "'reasonable jury could draw an inference of discrimination'" (*id.*). The Second Department has held that a federal court's determination that a defendant had legitimate, non-discriminatory reasons for its employment actions and that those reasons were not a pretext for

[4] The federal court found that Plaintiff's "statistical evidence fail[ed] to account for other possible causes" of termination," and noted that the "record lack[ed] evidence about the comparative importance of, or skill sets required for, their jobs, or whether [the other employees] were supervised or evaluated by the same supervisor as plaintiff and Mr. Chang" (NYSCEF Doc No. 33, at 13).

discrimination is dispositive of a plaintiff's claims under NYSHRL (*Clifford v County of Rockland*, 140 AD3d 1108, 1110 [2d Dept 2016]; *Milione v City Univ. of NY*, 153 AD3d 807, 809 [2d Dept 2017]; *Afrat*, 179 AD3d at 881; *see also Williams v NY City Tr. Auth.*, 171 AD3d 990, 992 [2d Dept 2019]). In the Federal Action, the parties agreed that Defendant proffered a legitimate, non-discriminatory reason for Plaintiff's termination but the court found that Plaintiff had not established that it was pretextual since there was "simply insufficient evidence for a reasonable jury to conclude that age was the but-for cause of plaintiff's termination" (NYSCEF Doc No. 33, at 13). Accordingly, the Court finds that Plaintiff is estopped from pursuing his disparate treatment claim under NYSHRL.

With respect to a disparate impact claim based on age under New York state or federal law, a plaintiff is required to establish that "a facially neutral employment policy or practice has a significant disparate impact on members of a protected class" (*Teasdale v City of NY*, US Dist Ct, ED NY, 08 CV 1684, Matsumoto, J., 2013 [internal quotation marks and citations omitted]; *see also Domitz v City of Long Beach*, 187 AD3d 853, 855 [2d Dept 2020]).

Turning to Plaintiff's ADEA claim of disparate impact, the federal court determined that Plaintiff "failed to create a genuine issue of material fact as to whether the RIF resulted in a disparate impact on the entire ADEA-protected group of workers aged 40 and over, as required" (NYSCEF Doc No. 33, at 16).[5] Instead, the federal court agreed with Defendant's argument that Plaintiff's attempt to bring a disparate impact claim by identifying the group as individuals aged sixty and older is not cognizable in the Second Circuit (*id.* at 14).

In its motion, Defendant acknowledges that there has been no decisive ruling on this issue in state court, but it argues that Plaintiff's disparate impact claim must be dismissed "consistent with New York's adherence to federal standards when assessing age discrimination" (NYSCEF Doc No. 48, at 16). Plaintiff contends that since "NYSHRL provides employees with greater protection than" ADEA and "does not exactly follow ADEA standards and paradigm" (NYSCEF Doc No. 55, at 3). Accordingly, the issue before this Court is whether Plaintiff is precluded from pursuing its NYSHRL disparate impact claim where the federal court found that he could sustain such claim by creating a subgroup under ADEA.

[5] The federal court did not address whether the RIF qualified as a "specific employment practice" since Defendant did not raise it in its motion for summary judgment (NYSCEF Doc No. 33, at 14).

Both Plaintiff and Defendant cite to cases in other appellate divisions in support of their positions on the disparate impact claim. This Court is bound to "follow precedents set by the Appellate Division of another department until the Court of Appeals or [the Second Department] pronounces a contrary rule" (*Mtn. View Coach Lines, Inc. v Storms*, 102 AD2d 663, 664 [2d Dept 1984]). The Third Department previously held that a disparate impact claim cannot survive under state law because "all of defendant's employees are over the age of 18 and fall within the protected class" (*Bohlke v General Electric Co.*, 293 AD2d 198, 200 [3d Dept 2002], *lv denied* 98 NY2d 693 [2002]).[6] However, the First Department declined to follow the Third Department and instead, found that "disparate impact claims alleging age discrimination are cognizable under the State Human Rights Law" (*Bennett v Time Warner Cable, Inc.*, 138 AD3d 598, 598-599 [1st Dept 2016], citing *Mete v NY State Off. of Mental Retardation & Dev. Disabilities*, 21 AD3d 288, 296-297 [1st Dept 2005]). More recently, in *Domitz v City of Long Beach*, the Second Department found that the complaint sufficiently alleged a cause of action under a disparate impact theory by alleging that his employer's practice adversely affected only retired officers over forty years old (187 AD3d 853, 855 [2d Dept 2020], *lv denied* 37 NY3d 1010 [2021]).[7] Thus, unlike the Third Department, the Second Department recognizes that a disparate impact claim under state law can be asserted as it relates to a facially neutral practice affecting a specific age group. Having found that Plaintiff had not identified the correct population for analysis, the federal court did not "address whether plaintiff has created a genuine issue of material fact on the other elements of his disparate impact claim" (NYSCEF Doc No. 33, at 14). Thus, it cannot be said that Plaintiff had a "full and fair opportunity to litigate" this issue. Accordingly, the Court finds that collateral estoppel does not apply to Plaintiff's disparate impact claim.

Accordingly, it is hereby

ORDERED, that Plaintiff's motion (Mot. Seq. No. 3) to vacate his default and restore the matter is granted; and it is further,

ORDERED, that upon considering Plaintiff's opposition to Defendant's motion for summary judgment (Mot. Seq. No. 2), the order entered on October 20, 2023 is vacated and

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[6] Under ADEA, discrimination against people aged forty and older is prohibited ((29 USCS § 631 [a]). Under NYSHRL, employees eighteen and older are protected from age discrimination (Executive Law § 296 [3-a] [a]).
[7] In *Blumberg v Patchogue-Medford Union Free Sch. Dist.*, the Second Department did not rule definitively on whether a disparate impact claim could be asserted under state law, after finding that plaintiff had abandoned her cause of action under that theory (18 AD3d 486, 488 [2d Dept 2005]).

summary judgment is granted only to the extent that Plaintiff's disparate treatment cause of action is dismissed.

All other issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the Court.

HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice