Neutral Citation Number: [2019] EWHC 1973 (QB)

Claim No. QB-2019-00290

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/07/2019

Before :

MR ROGER TER HAAR QC

Sitting as a Deputy High Court Judge

- -

Between :

MR EMAD ALDIN SMO	**Claimant**
- and –	
HYWEL DDA UNIVERSITY HEALTH BOARD	**Defendant**

- -
- -

Ms Betsan Criddle (instructed by **Radcliffes Le Brasseur**) for the **Claimant**
Mr Giles Powell and Ms Nicola Newbegin (instructed by **Blake Morgan**) for the **Defendant**

Hearing date: 4th July 2019

- -

Approved 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.

.....

MR ROGER TER HAAR QC

Mr Roger ter Haar QC:

1. There is before the Court an application for an interim injunction pending the trial of the substantive issues in this action.

2. The application was argued before me by counsel with enormous experience in the areas of professional conduct and employment law in particular in respect of the issues involving the relationship between hospitals and hospital trusts and consultants (as shown by the fact that the three counsel appearing before me have appeared in a wide range of the leading cases relevant to these issues) and I wish at the outset of this judgment to thank all three for the considerable assistance I received from them.

3. The Claimant is employed by the Defendant as a consultant colorectal surgeon, albeit that he has been excluded (suspended) from work since the 21st October 2016 pursuant to a disciplinary process into allegations about his capability and conduct.

4. The event which has triggered the present proceedings, put shortly, is that, whilst the disciplinary process is still ongoing, the Defendant has decided to start an investigation into whether there has been a breakdown of working relationships involving the Claimant, and, if so, what steps can or should be taken in respect of that breakdown of relationships.

5. It is the Claimant's case that the commissioning and continuance of the working relationships investigation constitute breaches by the Defendant of the Claimant's contract of employment.

The present procedural position

6. The application before the Court was issued on the 24th June 2019. It was accompanied by a draft order and draft Particulars of Claim.

7. At the time of the hearing before me the Particulars of Claim remained in draft and the claim had not been served.

8. The relief sought in the draft Particulars of Claim is:

"1. An injunction restraining the Defendant, by itself, its employees or agents or otherwise howsoever from:-

i) *requiring the Claimant to attend a meeting with Dr. Diggle on 25 June 2019 or at any time pursuant to the purported SOSR investigation;*

ii) *continuing with the purported SOSR investigation and from taking any steps consequent upon that report;*

iii) *continuing with the purported SOSR investigation and from taking any steps consequent upon any investigation report generated therein prior to the conclusion of the UPSW process, including but not limited to hearing the Claimant's appeal against categorisation.*

2. A declaration in respect of the Claimant's contractual rights as aforesaid."

9. The draft Order sought is as follows:

> *"1. The Defendant shall not, by itself or its employees or agents require the Claimant to attend a meeting with Dr. Diggle on 25 June 2019 or at any time pursuant to its SOSR investigation.*
>
> *2. The Defendant shall not continue with its SOSR investigation or take any steps consequent upon that investigation:*
>
> *a) prior to the conclusion of the UPSW process, including but not limited to hearing the Claimant's appeal against categorisation; or*
>
> *b) at all."*

10. Thus, the order sought was in the form of a final order: however, before me Ms. Criddle confirmed that what she was seeking on behalf of the Claimant was an injunction pending trial.

11. Before me it was the position of both counsel that there should be an order for speedy trial. I agree that that is entirely appropriate in the circumstances set out below. The hope is that such a hearing could be fixed during October 2019. In exercising my discretion below, I do so on the basis that such a fixture will be forthcoming. If not, then it might be necessary to reconsider the order which I intend to make.

12. As was agreed between counsel and the Court, at the time of the formal handing down of this judgment the Court will make whatever directions are necessary to enable the trial to take place.

American Cyanamid

13. It is common ground that the test which the Court is required to apply in order to determine whether or not to grant interim relief is the well-known test in *American Cyanamid* [1975] 1 A.C. 396 as clarified in subsequent case law – see *National Commercial Bank Jamaica Ltd v Olint Corpn Ltd* [2009] 1 W.L.R. 1405, per Lord Hoffmann, namely:

a) whether there is a serious issue or an issue with real prospects of success to be tried at trial;

b) are damages an adequate remedy? That includes consideration of whether a cross undertaking in damages is an adequate remedy for the Defendant;

c) where does the balance of convenience lie?

The Claimant's Contract of Employment

14. The Claimant is a consultant colorectal surgeon. The Claimant qualified with a Doctor of Medicine Diploma in 1998 from Aleppo University and was certified by the Arab Board of Health Specialities (General Surgery) in 2004. He was first entered on the General Medical Council Register in 2006, was admitted as a Fellow of the Royal

College of Surgeons FRCS (Gen. Surg.) in 2009 and was entered on the GMC Specialist Register in March 2014.

15. The Defendant is the provider of acute, primary, community, mental health and learning disabilities healthcare services to the populations of Carmarthenshire, Ceredigion and Pembrokeshire. Amongst others, it is responsible for the Glangwili General Hospital in Carmarthen.

16. The Claimant entered into a Contract of Employment with the Defendant on or about the 22nd December 2015. He commenced work at the Glangwili General Hospital on the 4th January 2016.

17. Clause 7 of the Claimant's "Principal Statement of Main Terms and Particulars of Employment" (the "Principal Statement") provides that:

"7.1 You will be managerially accountable to the Service Manager/General Manager and have ultimate accountability to the Chief Executive.

7.2 You will be professionally responsible to the Medical Director".

18. Clause 9 of the Claimant's Principal Statement provides that:

"9.1 Wherever possible, any issues relating to conduct, competence and behaviour should be identified and resolved without recourse to formal procedures.

9.2 Otherwise these will be handled in accordance with employers' existing Medical and Dental Disciplinary procedures, and where these do not exist, this will be in accordance with WHC(90)22, WHC(82)17, and DGM(95)44, pending the outcome of negotiations on an All Wales Policy with the Joint Welsh Consultant Contract Committee (JWCCC) or any successor body."

Upholding Professional Standards in Wales ("UPSW")

19. With effect from the 1st September 2015, the disciplinary procedure agreed between the Welsh Government, Welsh Local Health Boards and NHS Trusts with the British Medical Association in respect of the discipline of doctors and dentists in Wales is Upholding Professional Standards in Wales ("UPSW"). There is an equivalent, but not identical, procedure in England called Maintaining High Professional Standards in the Modern NHS ("MHPS").

20. There is an issue in these proceedings as to whether UPSW is or is not incorporated into the Claimant's Contract of Employment. For the purpose of deciding whether to grant the interim relief sought, I do not need to decide that issue. I am satisfied, following the decisions in respect of the English MHPS in *Kerslake v North West London Hospitals NHS Trust* [2012] EWHC 1999 (QB) and *Jain v Manchester University NHS Foundation Trust* [2018] EWHC 3016 (QB) that it is well arguable that the UPSW was incorporated expressly or implicitly into the Claimant's Contract of Employment, so that there is at the very least a serious issue to be tried as to whether it was so incorporated.

21. In any event, the issue as to incorporation may not be significant, given that in paragraph 42 of the Defendant's Skeleton Argument for this hearing, it is accepted

that the Defendant applied UPSW to its investigation into concerns that had been raised about the Claimant's conduct and capability.

22. However, what is important to note is that the Defendant says that UPSW does not apply to investigations relating to breakdowns in working relationships. The Defendant says that UPSW is expressly limited to the approach for addressing concerns about "capability, performance and conduct". I do not understand Ms. Criddle to disagree with this as a general proposition.

23. Under UPSW, when a concern has arisen as to the capability or conduct or performance of a practitioner, the relevant Medical Director must first decide whether to carry out an investigation into the nature of the problem or concern. If so, a Case Manager is appointed. The role of the Case Manager is defined by paragraph 1.2 of UPSW as follows:

> "The Case Manager's role will be to evaluate the nature of the problem or concern raised about a practitioner and to assess the seriousness of the matter based on available information. He/she will undertake an initial assessment of the concern(s) raised and will determine whether a formal investigation needs to be carried out or whether the issue can be resolved informally.
>
> "Where it is determined that a formal investigation should be instigated the Case Manager will:-
>
> i) Formulate the Terms of Reference for an investigation;
>
> ii) Appoint a Case Investigator;
>
> iii) Provide progress reports to the Designated Board member;
>
> iv) Determine what action should be taken in response to the findings and recommendations of the Case Investigator."

24. That paragraph refers to the appointment of a Case Investigator. The role of the Case Investigator is described in paragraph 1.15 of UPSW.

25. Once the Case Investigator has completed his or her investigation, an investigation report will be prepared. Paragraph 1.23 provides:

> "The investigation report, together with the practitioner's comments, should give the Case Manager sufficient information to make a decision whether:-
>
> i) There are concerns about the practitioner's capability or performance that should be addressed with assistance from NCAS/or equivalent body;

> ii) There are concerns about the practitioner's health that should be considered in accordance with Part 3 of this Procedure;
>
> iii) There are concerns which should be determined at a hearing in accordance with section 4 or 5 of the Procedure;
>
> iv) Restrictions on practice or exclusion from work should be considered in accordance with Part 2 of this Procedure;
>
> v) There are serious concerns that should be referred to the GMC or GDC;
>
> vi) No further action is called for.
>
> It may be that in some cases a combination of the above is considered appropriate."

26. The third bullet point refers to "section 4 or 5 of the Procedure". Section 4 is what is described as "The Standard Procedure" and Section 5 as "The Extended Procedure".

27. After the Case Manager has made the decision as to how to proceed under paragraph 1.23 of UPSW, the affected practitioner has a right of appeal under paragraph 1.27:

> "The practitioner can appeal against the Case Manager's decision on the process to be followed. The practitioner must register the appeal in writing to the Chief Executive within 14 days of receiving written confirmation from the Case Manager of the process to be followed, and must clearly state in writing the grounds of the Appeal. The Appeal will be heard by a panel comprising of an Independent Member/non-Executive Director (other than the Designated Board Member), the Chair of the Medical Staff Committee or equivalent and a consultant nominated by the Chief Executive. The practitioner may be represented by a workplace colleague or representative who may be from (or retained by) a trade union or defence organisation. The decision of the panel will be binding on both parties."

28. If the Case Manager decides that there are concerns which should be determined at a hearing whether under Section 4 or Section 5 of UPSW, and if there has been no appeal or no successful appeal against that decision, the matter proceeds to a hearing. Because the Section 5 Extended Procedure is intended for what the Case Manager must perceive are more serious cases than justify the Section 4 Standard Procedure, the Extended Procedure contains more complicated safeguards for the practitioner, but it is not necessary for the purposes of this judgment to spell out what those safeguards are.

Working Relationships investigations

29. From time to time it may appear to the management of a hospital or hospital trust that there are working relationships between members of staff which impede the efficient conduct of the hospital's business.

30. In such cases, the difficulties will not infrequently involve the relationship between one particular member of staff and his or her colleagues. The situations under consideration, and the solutions to those situations are likely to be varied. Some may involve disciplinary considerations. Some, on investigation, may involve inter-personal relationships which can be resolved by reassignment of employees to different departments. Others may be capable of resolution through mediation, or further training, or in some other way. However, as I have said, some may involve disciplinary situations: those disciplinary situations may involve conduct or capability issues falling within UPSW, but they may well not do so.

31. As in the case of a number of other cases which have come before the Courts, the case before me involves issues which (depending upon findings which may be made at a full trial) may be at the boundary between UPSW procedures and other investigations.

Categorisation

32. In *Skidmore v Dartford and Gravesham NHS Trust* [2003] UKHL 27; [2003] ICR 721, the House of Lords considered the disciplinary code in Department of Health Circular HC (90)9, which was a predecessor to the MHPS/UPSW regime. At paragraph 18 Lord Steyn said:

> "It is now necessary to consider how the case against Mr. Skidmore should be categorised. The starting point must be the proper interpretation of the definitions contained in the disciplinary code. It seems right to treat the definitions of professional conduct ("behaviour of practitioners arising from the exercise of medical or dental skills") and professional competence ("adequacy of performance of practitioners related to the exercise of their medical or dental skills and professional judgment") as the primary categories. Personal conduct is the residual category consisting of "behaviour … due to factors *other* than those associated with the exercise of medical or dental skills" (emphasis added). If a case is properly to be categorised as involving professional conduct or competence, the judicialised disciplinary route under Circular HC(90)9 is obligatory. That is so even if the case could also be said to amount to professional misconduct."

33. In *Mattu v University Hospitals Coventry and Warwickshire NHS Trust* [2012] EWCA Civ 641; [2013] ICR 270 at paragraphs 81 to 83, Elias L.J. said:

> "81. The question here is whether the disciplinary hearing involved issues of professional conduct. If it did, then under clause 2.3 of the Procedure for Conduct and Capability Concerns …. the trust was obliged to have a medically qualified person on the disciplinary panel. The failure so to constitute the panel would be a breach of contract. I do not

> accept the submission of Mr. Cavanagh that a term in the contract which provides that "it is for the trust to decide upon the most appropriate way forward" makes the Trust the final arbiter of which procedure should be adopted, subject at least to bad faith or the absence of reasonable grounds for the decision. A similar argument was advanced before the House of Lords in *Skidmore v Dartford and Gravesham NHS Trust* …. when the relevant clause in earlier disciplinary provisions stated that "it is for the authority to decide under which category a case falls.
>
> Lord Steyn, with whose judgment Lord Bingham of Cornhill, Lord Clyde, Lord Hutton and Lord Scott of Foscote agreed, held that this language was insufficient to confer the final decision on classification to the authority, thereby excluding the role of the court. In my judgment that principle applies equally here….
>
> 82. Both Sir Stephen Sedley and Stanley Burnton LJ start from the premise that the definition of professional conduct is inextricably linked with the procedure for determining conduct issues: if there is some purpose in having a medically qualified person on the disciplinary panel because that person can provide a valuable professional insight into a relevant issue before the disciplinary body, the proceedings should be interpreted as involving an issue of professional conduct. As Keen LJ put it in *Skidmore v Dartford and Gravesham NHS trust* …, in language subsequently approved by Lord Steyn in the House of Lords … a relevant factor will be whether the allegations raise issues "which, at least to a degree, needed medical experience or expertise for their determination". That observation was made in the context of the old rules contained in Circular HC (90)9, but in my judgment, it is equally applicable to these procedures. Accordingly, for reasons given by Sir Stephen, I would reject the submission of Mr Cavanagh, for the trust, that professional misconduct should always and necessarily be equated with clinical misconduct, although no doubt in the vast majority of cases it will be.
>
> 83. So the issue is whether the expertise and experience of a qualified medical member were required to deal with the issue in dispute..."

34. In ***Mattu***, the Court of Appeal was concerned with MHPS. The guidance in ***Mattu*** appears to me to be equally applicable to UPSW.

35. Basing his submissions upon ***Skidmore*** and ***Mattu***, Mr. Powell says that the investigation into working relationships commenced by the Defendant must be viewed objectively and categorised as concerning matters falling within UPSW or not: if not, then, he submits, the case brought against the Defendant must fail.

Sidestepping UPSW (or not): the authorities

36. In *Ezsias v North Glamorgan NHS Trust* [2011] IRLR 550 the Employment Appeal Tribunal had to consider whether the dismissal of a consultant was unfair where the employing Trust had not followed what it described as *"the Whitley Council terms"*. Reference was made in the judgment to *Skidmore*. At paragraphs 57 and 58, Keith J. said:

> "57. …. The concern he expressed was driven, we think, by the worry that if the trust's approach in Mr. Ezsias' case is sanctioned, an unscrupulous NHS trust which wants to get rid of a medical or dental professional who may be a thorn in its side will be able to avoid the need for the kind of external scrutiny which the Whitley Council terms provide for by dismissing the member of staff in the way Mr. Ezsias was. That raises the spectre of the Whitley Council terms being bypassed in cases to which they were intended to apply.
>
> "58. We understand that concern, but the fact is that the Whitley Council terms only apply when it is the employee's conduct or competence which is the real reason for why the action was taken against him. Although as a matter of history Mr. Ezsias' conduct was blamed for the breakdown, the tribunal's finding in the present case was that his contribution to that breakdown was not the reason for his dismissal. We do not suppose that those who were responsible for negotiating the Whitley Council terms had this in mind, but the fact is that the Whitley Council terms do not apply to cases where, even though the employee's conduct caused the breakdown of their relationship, the employee's role in the events which led to that breakdown was not the reason why action was taken against him. We have no reason to think that employment tribunals will not be on the lookout, in cases of this kind, to see whether an employer is using the rubric of 'some other substantial reason' as a pretext to conceal the real reason for the employee's dismissal."

37. Both Ms. Criddle and Mr. Powell referred me to the decision of H.H. Judge Curran Q.C. in *Kerslake v North West London Hospitals NHS Trust* [2012] EWHC 1999 (QB). Unlike *Ezsias*, *Kerslake* was not a case in which there had been a dismissal. The Claimant had been the subject of consideration as to her capability, but investigations had established that there was no case to answer in that respect. There had never been any serious suggestion that any conduct of the Claimant had ever been a cause for concern, in the sense of professional or personal misconduct.

38. The Claimant's employer set in train an investigation into differences between the Claimant and her colleagues at work. The Claimant was fearful that that procedure might, if allowed to continue, result in her being dismissed. One issue was whether she was entitled to insist on the employer following the MHPS procedure.

39. H.H. Judge Curran referred to the *Ezsias* case not only in the EAT, but also when Mummery LJ considered an application to appeal ([2011] EWCA Civ 1440). He held, in effect that the investigation being carried out was, viewed objectively, not an

investigation into conduct or capability falling within MHPS, but rather was an investigation into the working relationships involving the Claimant.

40. Whilst this decision is of significant assistance to the Defendant in the present case, it is also of assistance to the Claimant. Ms. Criddle drew attention to the following passages in particular:

(1) Paragraph 150:

> "In the instant case, (1) MHPS is self-evidently of major importance to both parties in dealing with conduct and capability concerns. It is of similar importance to all NHS doctors and employers. Matters of conduct and capability are of very serious import to a medical practitioner's reputation and employability within the NHS, and thus MHPS is of crucial significance to the contractual arrangements between the Claimant and the Defendant …."

(2) Paragraph 151 (4):

> "… it is inappropriate for [an investigation rather than disciplinary procedure] to be applied to the investigation of a possible breakdown in relationships between employees where (a) the suggested basis breakdown is a perception of lack of capability; and (b) assertions of such lack of capability have already been formally and properly investigated and found to have no substance".

(3) Paragraph 182:

> "The Trust is not permitted to dismiss under the guise of 'some other substantial reason' if the real reason for dismissal is capability or conduct. This has been referred to as "sidestepping" by Mr. Forde in this case ….."

41. In ***Kerslake***, H.H. Judge Curran referred to a decision of Holroyde J. in ***Lauffer v Barking, Havering & Redbridge University Hospitals NHS Trust*** [2009] EWHC 2360 (QB). In that case there had been a purported dismissal by the Defendant Trust, which the Claimant said was invalid. What the Defendant did in this case was to purport to abandon a disciplinary process and instead to purport to dismiss the Claimant on the basis of a breakdown of trust and confidence.

42. Giving judgment, Holroyde J. said:

(1) Paragraph 24:

> "The essence of the claimant's case, as summarised by Mr. Stafford [counsel for the Claimant], is that the defendant thought that the claimant lacked the skill, knowledge or judgment to do his work at an acceptable level. The matters relied upon, contends Mr. Stafford, are manifestly within the

> scope of the contractual policy relating to capability…. An assertion of a loss of trust and confidence cannot sensibly be made without considering why such an assertion is put forward. Any such consideration, submits Mr. Stafford, inevitably raises in the circumstances of this case issues of capability."

(2) Paragraph 37:

> "To my mind there can be no doubt that it is strongly arguable that a lack of judgment and a lack of insight on the part of a consultant general surgeon go to his capability to perform his role as a surgeon. Moreover, a loss of trust and confidence must be based on some intelligible and proper cause. Again, I have no doubt that it is strongly arguable that what is here relied upon as the intelligible and proper cause for a loss of trust and confidence is in reality an adverse view of the claimant's capability."

(3) Paragraph 39:

> "Having considered the arguments advanced by Mr. Bowers [counsel for the Defendant], I accept the submission on behalf of the claimant that in the circumstances of this case the reference to "some other substantial reason" is a misdescription of what is in truth an allegation or series of allegations relating to the claimant's capabilities…. Finally on this point, I accept Mr. Stafford's submission that the MHPS inspired scheme cannot, as he puts it, be sidestepped by relabelling."

(4) Paragraph 41:

> "It is, in my conclusion, arguable that in truth what has changed since late 2008 is that the defendant has simply decided that an alternative and better way to proceed would be to change the course which had been set and to dismiss on a different basis. Crucially the change of course has occurred whilst the course initially set was still being followed and before any destination had been reached".

43. Paragraph 41 of that judgment is, unsurprisingly, heavily relied upon by Ms. Criddle.

44. For his part, Mr. Powell relies heavily upon a decision of Swift J. in *Jain v Manchester University NHS Foundation Trust* [2018] EWHC 3016 (QB). In that case disciplinary proceedings had been commenced, but then suspended. Amongst the other matters being considered in the disciplinary proceedings was the suggestion that "there are ongoing issues concerning Dr. Jain's interpersonal and communication style regarding his relationships and approach to his line managers".

45. Those disciplinary proceedings were suspended and, after some time had elapsed, an investigation was commenced into the working relationships involving the Claimant.

46. Swift J. held at paragraph 63 of his judgment that the simple existence of a connection between the earlier disciplinary proceedings and the later investigation was not enough to render the resort to the working relationships investigation a breach of contract in failing to go through an MHPS procedure. He also held at paragraph 61 that "by December 2017 … the issue of working relationships had taken on a far greater importance, such that the Trust could appropriately conclude that it was a matter that was not simply or obviously an MHPS capability matter".

47. I am struck by the fact that Swift J.'s judgment in ***Jain*** followed a 5-day hearing as did that of H.H. Judge Curran Q.C. in ***Kerslake***. This illustrates that the exercise of categorisation envisaged by ***Skidmore*** may involve a substantial body of evidence and careful analysis, not least because in many cases several years of events will fall for consideration.

48. In some cases it will doubtless be relatively clear that the true concerns are disciplinary matters going to professional conduct and capability, and, indeed, in some cases the conclusion to which the Court will come on the evidence is that the *"working relationships"* investigation or dismissal for alleged breakdown of trust and confidence unrelated to professional misconduct or lack of professional capability is no such thing, but rather an attempt to side-step the carefully negotiated and calibrated MHPS/UPSW procedures. In other cases, the conclusion will be clear either that there is no linkage or inadequate linkage between the *"working relationships"* investigation or dismissal for alleged breakdown of trust and confidence and any disciplinary proceedings whether concluded, suspended or ongoing.

49. However, where, as in ***Lauffer***, there is a change of course during ongoing MHPS/UPSW disciplinary proceedings to a course which covers similar factual territory to those proceedings, but avoids the safeguards of such disciplinary proceedings, a court will be likely to be astute to ensure that the disciplinary procedures are not being illegitimately *"side-stepped".*

50. It also seems to me that there may be cases where to conduct MHPS/UPSW procedures contemporaneously with a working relationships investigation may unacceptably diminish the efficacy of the MHPS/UPSW procedures, or at least give the affected practitioner a legitimate concern that that is happening. This does not appear to me to be a situation clearly discussed in the authorities to which my attention has been drawn. In such circumstances it seems to me at least arguable that if the MHPS/UPSW procedures are contractually applicable, then to reduce their efficacy or, possibly, simply to appear to reduce their efficacy, might be a breach of contract. In this context it is important to note that MHPS/UPSW contains safeguards, not least the right in certain circumstances to legal representation and the right to a hearing before an independent panel, which do not apply to disciplinary procedures between a practitioner and employer not falling within MHPS/UPSW or to working relationships investigations outside MHPS/UPSW.

51. My attention was drawn to the relatively recent decision of the Court of Appeal in ***North West Anglia NHS Foundation Trust v Gregg*** [2019] EWCA Civ. 387. In my view, that decision does not affect the highly conditional view I have expressed in the previous paragraph of this judgment: in ***Gregg*** the Court was concerned with whether it was a breach of contract for the employer to pursue its own internal disciplinary

process in parallel with a police investigation, that seems to me to be a different situation from where, at least arguably, the employer has two different contractual processes – (1) a wholly internal process of investigation into contractual relationships; and (2) a contractual disciplinary process involving independent third parties. The view I have expressed is that in that situation it may be a breach of contract to conduct the internal process in such a way as to impede, or seem to impede, the contractual disciplinary process involving third parties. Similarly, the decision in *Chakrabarty v Ipswich NHS Trust* [2014] EWHC 2735 (QB) involving the issue as to whether it is legitimate for a doctor to face parallel proceedings instigated by his employer, on the one hand, and by the General Medical Council, on the other, seems to me arguably distinguishable from a tension between two different contractual processes. I emphasise my use of the word *"arguably".*

52. After this somewhat lengthy review of authority, I turn now to consider whether there is a serious issue to be tried that the Defendant was in breach of contract in deciding to commence and to continue a working relationships investigation concerning the Claimant.

A Serious Issue to be tried?

53. I have received witness statements from the Claimant himself, from Dr. Philip Kloer, the Medical Director and Director of Clinical Strategy of the Defendant, and from Dr. Eiry Edmunds, the Hospital Director at Glangwili General Hospital. I have considered the contents of those statements with care, but for present purposes the facts as I now set them out are taken substantially from the Claimant's Skeleton Argument, which appear to me to be supported by those statements and the substantial documentation placed before me. I emphasise at the outset of this section of this judgment that I make no findings whatsoever as to whether the Claimant has or has not been guilty of professional misconduct, whether there is any lack of capability on his part, whether there has been any breakdown in working relationships, and, if so, what the cause of or possible cure for any such breakdown might be.

54. The Claimant has been excluded (suspended) from work since the 21st October 2016 in connection with an investigation pursuant to the Defendant's UPSW disciplinary procedure.

55. The terms of reference for that investigation were issued on the 21st November 2016. The investigator was required to consider the broad allegation, by reference to specific alleged events, that:

> "Mr. Smo's standards of behaviour and attitude have been unacceptable and that he failed to display the required standards of behaviour and attitude expected within his role and responsibilities."

56. Thereafter, the terms of reference provided that:

> "The investigation report should provide the [case manager] with sufficient information to make a decision whether:

> i) There are concerns about Mr. Smo's capability or performance that should be addressed with assistance from NCAS or equivalent body;
>
> ii) There are concerns about Mr. Smo's health that should be considered in accordance with Part 3 [of UPSW];
>
> iii) There are concerns which should be determined at a hearing in accordance with sections 4 or 5 [of UPSW];
>
> iv) There are serious concerns which require notification to the GMC;
>
> v) No further action is called for.
>
> It may be that in some cases a combination of the above is considered appropriate."

57. Since at least July 2017, concerns about a breakdown in working relationships arising from the Claimant's behaviour have been said to be part of the reason for his exclusion from work.

58. The investigation was completed in October 2017. The case investigator, Dr. Robertson-Steel, recorded the scope of his instruction in the following terms

> "4.3 In essence, therefore, there were two areas for the investigator to consider:
>
> 4.4 Mr. Smo's overall standard of behaviour, including team working, relationships with other members of staff.
>
> 4.5 Mr. Smo's professional competence and standards as a Consultant Colorectal Surgeon."

59. The investigation report contains multiple findings that the Claimant had, by reason of his behaviour, caused a breakdown in working relationships between himself and other staff (see paragraphs 8.3.11, 8.8.16, 8.11.3, 8.13.1, 8.13.13, 8.13.15 and 8.13.16).

60. The conclusions of the report in relation to behavioural concerns are at section 9. At section 9.19, the case investigator writes:

> "The investigator notes that all of the Consultants and Team members interviewed were of the view that there was a functioning and effective system of Colorectal and Surgical care in place before the arrival of [the Claimant]. Unanimously, members of the Team who were interviewed were of the view that Mr. Smo's behaviours, as demonstrated throughout the investigation report, destabilised a functional working Team."

61. On the 20th April 2018, the Defendant decided that the behavioural allegations about the Claimant should be referred to the UPSW Extended Procedure (Section 5 of UPSW) and to refer the clinical concerns to Practitioner Performance Advice for advice on a way forward.

62. By that decision, the case manager, Dr. Edmunds, largely adopted the findings of the case investigator and wrote this:

> "The Case Investigator's conclusions are set out in paragraphs 9.1 to 9.20. I agree with the conclusions and consider that there are a number of concerns listed in Allegation One which had been demonstrated. The Case Investigator notes that all of the Consultants and Team members interviewed were of the view that there was a functioning and effective system of Colorectal and Surgical care in place before the arrival of [the Claimant]. Unanimously, members of the Team who were interviewed were of the view that Mr. Smo's behaviours, as demonstrated throughout the investigation report, destabilised a functional working Team.
>
> There are concerns which should be determined at a hearing in accordance with Section 5 of UPSW … I have concluded that this procedure should be followed for the following reasons:"
>
> The volume of concerns which were investigated …
>
> This is not a case of an isolated incident of behavioural and attitude concerns relating to interactions with one or two individuals but a number of incidents involving a wide range of professionals in a multi-disciplinary team;
>
> …
>
> A breakdown in relationships to this extent with such a range of individuals involved in the delivery of care has a real risk of impacting on the quality and safety of the care being delivered.
>
> …
>
> It is for the above reasons that I am unable to consider any of the other options available to me including use of the Standard Procedure as opposed to the Extended Procedure. There is evidence which suggests that working relationships have broken down with a number of individuals involved in a multi-disciplinary team. Having taken everything into consideration I have concluded this to be a serious as opposed to a minor issue".

63. The Claimant submits that it is thus clear that Dr. Edmunds determined that allegations about the Claimant's behaviour which were said to have caused a breakdown in working relationships should be referred to the Extended Procedure for

an inquiry panel into the facts followed, if appropriate, by a disciplinary hearing. That appears to me to be correct.

64. The Claimant appealed this decision by letter dated the 19th July 2018. That appeal has still not been heard. I make no observations about or findings as to the reasons for that delay. A possible date for the appeal was mooted before me as being the 17th July 2019, but there is doubt as to whether the appeal can go ahead on that day because of lack of availability on the part of the Claimant's legal representative.

65. On the 31st October 2018, the Defendant's Medical Director, Dr. Philip Kloer, wrote to the Claimant to inform him of a decision to commission an investigation into whether there had been a breakdown in working relationships and what action should be taken as a result. The Claimant was told that this investigation would not be dealt with in accordance with the provisions of UPSW and that he was not entitled to legal representation in connection with it. He was told that Dr. Roger Diggle, Associate Medical Director, would be in touch with him *"in due course"* to seek his views and take a statement.

66. On the 17th May 2019, Dr. Diggle wrote to the Claimant seeking to arrange an interview and saying:

> "It is important that you attend this interview as this is your opportunity to respond to the allegation that has been made against you."

67. In paragraph 20 of the Claimant's Skeleton Argument it is said:

> "In its bundle for the application hearing, however, the Defendant has produced a number of transcripts of interviews that appear to have been conducted by Dr. Diggle since January 2019 without the Claimant's knowledge. Of note:
>
> *a) Five of the eight interviewees were interviewed as part of the UPSW investigation. The majority of those interviewed as part of the UPSW investigation were not re-interviewed for the simple reason that they are no longer employed by the Defendant.*
>
> *b) Each interviewee is asked about the nature of their working relationship with the Claimant. They (predictably) give the same examples of conduct by the Claimant which they gave to the UPSW investigation (or give hearsay evidence about the same events).*
>
> *c) They are not asked whether there has been a breakdown in working relationships generally, but whether there has been a breakdown in their relationship with the Claimant as a result of these matters and thereafter whether they consider that breakdown to be remediable."*

68. There seems to me strength in points (b) and (c) in that submission.

69. Having set out what is essentially the Claimant's recital of the facts, and emphasising that at this stage I am making no findings of fact, it seems to me that there are serious

issues to be tried as to whether the Defendant is in breach of contract in commencing and continuing the working relationships investigation:

(1) when the UPSW procedures are far from complete, if the appeal fails;

(2) in circumstances where there are substantial overlaps between the matters under consideration in the UPSW procedures and in the working relationships investigation;

(3) so that findings might be reached in the working relationships investigation which pre-judge the findings in the Extended Procedure;

(4) giving, at a minimum, an appearance of an unfair process.

70. Thus, in my judgment the Claimant has satisfied the first requirement for obtaining an interim injunction, namely that there is a serious issue to be tried.

Are damages an adequate remedy?

71. In the Defendant's Skeleton Argument, it is suggested that an injunction should not be granted because damages are an adequate remedy.

72. The Claimant refers to the decision of Gray J. in *Gryf-Lowczowski v Hinchinbrooke Healthcare NHS Trust* [2005] EWHC 2407 (Admin); [2006] ICR 425.

73. I am not sure that authority helps the Claimant in the present circumstances where I am considering the grant of an interim injunction: *Gryf-Lowczowski* was concerned with a permanent injunction.

74. However, I am satisfied that I should not refuse an injunction I would otherwise grant upon the basis that damages are an adequate remedy: here the argument is whether the Claimant will receive due process through the UPSW procedure. It is precisely because it is difficult to judge the value of that process that it is impossible to say that damages would be an adequate remedy. The UPSW procedure is intended to protect practitioners in respect of matters at the heart of their professional lives, something which is not lightly to be displaced by an attempt to value damage to professional reputation in money terms.

Cross-Undertaking in Damages

75. At the outset of his submissions, Mr. Powell pointed out that the Claimant had failed to offer a cross-undertaking in damages. In response Ms. Criddle told me that she had instructions to offer such a cross-undertaking.

76. Mr. Powell then submitted, rightly, that it is usual practice for a party seeking an injunction not only to offer a cross-undertaking, but also to put forward evidence as to that party's ability to honour such cross-undertaking.

77. Whilst I accept that general proposition, and that the evidence is deficient in this respect, for reasons set out below, the injunction which I am going to order is very limited in time and scope, and in the circumstances I assume for present purposes that the Claimant will be able to satisfy any liability under the cross-undertaking out of his

continuing income from the Defendant, by whom, even if suspended from work, he is still employed. I note also that he also has some continuing income from work he is doing in the Plymouth area.

Balance of Convenience

78. In this respect matters have moved substantially from where they were before the parties came into court.

79. Most importantly, the parties agreed that there should be a speedy trial, and that that should take place, if possible, in October.

80. The Defendant's main point is that it is continuing to employ locums whilst the Claimant is not carrying out his functions.

81. However, that position will continue until the UPSW procedure involving the Claimant has been concluded. Unless there is an ulterior motive to the working relationships investigation, which the Defendant fervently denies, I do not understand how the Defendant suggests it will regain the services of the Claimant, and thus save the costs of locums, until the disciplinary process under UPSW is over: that will not conclude until, at the earliest, the UPSW appeal has been determined. If the Defendant's present position be right, then the appeal will fail, in which case locums will be employed until the Extended Procedure has reached a result.

82. For these reasons, I am unconvinced that between now and a trial in December in this action the grant or refusal to grant an injunction will make any difference to the Defendant in monetary terms.

83. However, I accept that if the Claimant succeeds in his UPSW appeal, the Defendant has a substantial interest in determining whether and how the staff at the hospital can work together. Accordingly, upon the basis that the disciplinary proceedings under the UPSW Extended Procedure result in the Claimant being absolved of any allegations of misconduct or lack of capability, I can see that there may be a legitimate residual investigation into the working relationships issue.

84. Insofar as that involves the Defendant carrying out inquiries with people other than the Claimant, I see no substantial injustice in those inquiries continuing.

85. On the other hand, Dr. Diggle is seeking an interview with the Claimant. I accept that this potentially presents him with a dilemma: if he does not attend the interview, he loses the opportunity to put his case. If he does attend, he may be said to have acquiesced in the working relationships process.

86. Given that I am considering a period between July and October 2019, and given the delays which have already taken place (and without judging who has been responsible for those delays, and whether they could, or should, have been avoided) I regard it as reasonable for the Defendant, and in particular Dr. Diggle, to be restrained from interviewing the Claimant until the trial of the issues in these proceedings.

Conclusion

87. For the reasons given above, I grant an injunction limited to restraining the Defendant and Dr. Diggle from interviewing the Claimant in respect of the *"working relationships investigation"* until trial or further order, and I will issue directions to enable a speedy trial.