Neutral Citation Number: [2020] EWHC 727 (QB)

Case No: QB-2019-002290

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/03/2020

Before :

MR JUSTICE LINDEN

- -

Between :

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

- -
- -

Mr Mark Sutton QC and Ms Betsan Criddle
(instructed by **RadcliffesLeBrasseur**) for the Claimant
Mr Giles Powell and Ms Nicola Newbegin
(instructed by Blake Morgan LLP) for the Defendant

Hearing dates: 4, 5, 6, 7 February 2020

- -

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.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 26.03.2020 at 10:00am.

....

MR JUSTICE LINDEN

The Honourable Mr Justice Linden:

INTRODUCTION

1. The claimant is a consultant colorectal surgeon who has been employed by the defendant since 4 January 2016. Since 2 June 2016, he has been subject to disciplinary proceedings pursuant to a procedure entitled "Upholding Professional Standards in Wales" ("UPSW/the Procedure") which applies to all NHS doctors and dentists employed in Wales. In those proceedings the claimant faces complaints about his conduct and aspects of his approach to clinical practice, the majority of which relate to his alleged interactions with colleagues.

2. The claimant was excluded (suspended) pursuant to USPW on 24 October 2016 and he has not been permitted to return to work for the defendant since then.

3. Although the USPW proceedings were, and indeed are, still ongoing, on 31 October 2018 Dr Philip Kloer, the Medical Director and Director of Clinical Strategy of the defendant, wrote to the claimant informing him that Dr Kloer intended to launch an additional investigation into the claimant's relationships with his colleagues with a view to determining whether they had irretrievably broken down and, if so, what should be done. These proceedings have been coined "the working relationships investigation" and I will use that shorthand in this judgment.

4. Dr Kloer informed the claimant that Dr Roger Diggle, then the Associate Medical Director of the defendant, had been appointed to undertake the investigation and that Dr Diggle would be in touch with him in due course to seek his views and take a statement. The claimant was also told that the matter was not being considered under UPSW as the defendant did not consider that it applied to Dr Diggle's investigation and that, although he could be accompanied during the process by a work colleague or trade union representative, he had no right to legal representation.

5. More than six months later, on 17 May 2019, Dr Diggle wrote to the claimant for the first time, setting out what he described as "allegations" which he had been appointed to investigate and inviting the claimant to attend an interview on 25 June 2019. The claimant responded by letter dated 21 May 2019, expressing concerns about the delay since Dr Kloer's 31 October 2018 letter, disputing the right of the defendant to initiate a parallel process and accusing it of attempting to circumvent UPSW and the procedural safeguards which the Procedure provides. He advocated postponing Dr Diggle's investigation.

6. The defendant was not willing to do so. These proceedings were therefore issued on 24 June 2019 in which the claimant alleges breach of contract and seeks a mandatory injunction to restrain the defendant from proceeding with the working relationships investigation ("the Claim"). He also made an application for interim relief.

7. On 25 July 2019 Mr Roger Ter Haar QC, sitting as a Deputy High Court Judge, made an order that there be a speedy trial which was to take place on the first open date after 4 November 2019 although, in the event, the matter did not come before me until the week of 3 February 2020. He also ordered that, in the interim, the defendant was prohibited from requiring the claimant to be interviewed by Dr Diggle in respect of

the working relationships investigation. Mr Ter Haar QC set out his reasons in a judgment dated 25 July 2019.

THE BROAD ISSUES.

8. At the outset of the trial I canvassed with the parties my provisional view that there were three broad issues which I had to determine, and they agreed. These issues are:

   i) The construction of the claimant's contract of employment: do the express terms of that contract require the defendant to investigate the matters which are the subject of the working relationships investigation under UPSW rather than by the defendant's parallel procedure? The parties agree that if they do then the defendant acted in breach of contract and the question of relief arises.

   ii) Breach of mutual trust and confidence: even if the express terms of the contract in principle permitted the defendant to commence the working relationships investigation other than under UPSW, was it nevertheless a breach of the implied duty of mutual trust and confidence for the defendant to do so in the circumstances in which that investigation was commenced and/or would it be a breach for the defendant to continue to purse that investigation?

   iii) Relief: if the defendant acted and is seeking to act in breach of contract, what relief, if any, is appropriate? The defendant's pleaded case was that injunctive relief should be refused on the grounds of acquiescence and/or delay but, in the event, Mr Powell indicated in closing submissions that this was no longer pursued.

9. I also confirmed with Mr Sutton QC that he had not pleaded, and was not alleging, bad faith on the part of the defendant. Nor, it became clear during the trial, was he challenging the evidence of the defendant's witnesses as to their subjective beliefs about the scope of UPSW or their intentions in commencing the working relationships investigations or their reasons for doing so. This is a point to which I will return.

10. At the conclusion of the evidence I also pointed out that Mr Sutton's pleaded case and Sections 4 and 5 of his skeleton argument dated 29 January 2020 were not in line with what I understood to be his real case i.e. that there was a breach of clause 9.2 of the claimant's "Principal Statement of Main Terms and Particulars of Employment" dated 22 December 2015 ("the Contract") or, alternatively, even if clause 9.2 permitted the working relationships investigation, it was in breach of the duty of mutual trust and confidence term for it to be commenced or continued in all the circumstances. Mr Sutton therefore sought permission to amend the Particulars of Claim in the terms of a draft which was provided to me. His application was not opposed and I granted permission.

11. Finally in relation to the issues, it will be noted that although I am required to consider the nature of what is said about and against the claimant I am not asked to consider or determine the merits of the allegations against him and I do not do so. Similarly, I will consider what is said about the claimant's working relationships and about whether it is feasible for him to return to work, but I do not make any findings as to these issues. These all matters which will need to be considered by others in due course.

OTHER APPLICATIONS BY THE PARTIES

12. On 23 December 2019, the claimant applied for a stay of these proceedings. His application was considered by Mr Ter Haar QC on 22 January 2020 and rejected. Mr Ter Haar's reasons for doing so are set out in the transcript of his ex tempore judgement and I am grateful to him for taking steps to ensure that they have been made available to me.

13. Shortly before the trial commenced I received a supplemental skeleton argument from Mr Powell and Ms Newbegin, on behalf of the defendant, in which they complained about the fact that the claimant did not propose to give oral evidence but intended to rely on the witness statement, dated 24 June 2019, which he had prepared for the purposes of his application for interim relief. They indicated that, in the event that the claimant maintained this approach, Mr Powell would submit that I should disregard the claimant's written evidence and dismiss the Claim *"by reason that there cannot be a fair trial and the claim is an abuse"* (paragraph 13 of the supplemental skeleton argument dated 3 February 2020).

14. At the beginning of the trial Mr Powell indicated that he would make this submission after the trial had been opened on both sides. He duly did so and I rejected it for reasons which are set out in more detail in Annex 1 to this judgment. In short, however, I considered that the suggestion that I should dismiss the Claim was wholly misconceived. I did, however, decide that there were five paragraphs of the claimant's witness statement (paragraphs 16-19 and 25) in respect of which he should make himself available for cross-examination if he wished them to be admitted in evidence. The claimant therefore gave oral evidence for this limited purpose and answered questions from Mr Powell and the court. Paragraph 24 of the claimant's witness statement, in which he expressed his view that the defendant was *"seeking to sidestep"* UPSW, was also withdrawn by the claimant and was not admitted in evidence.

15. Mr Sutton also indicated, in his skeleton argument on behalf of the claimant, that he proposed to object to the admission of the witness statement and report of Mrs Clacey-Roberts into evidence on the grounds that this material was irrelevant. Very sensibly, however, in the event this objection was not maintained albeit after a provisional indication from me.

THE HEARING

16. The bulk of the hearing was taken up with "openings" from both sides and then closing submissions, in the course of which I was helpfully taken to a number of documents and authorities. Apart from brief oral evidence from the claimant, only Dr Kloer gave oral evidence. The statements of the other witnesses on behalf of the defendant were admitted in evidence but they did not give oral evidence, Mr Sutton having indicated that he did not wish to cross-examine them.

17. The defendant's witness statements comprised:

    i) Two witness statements of Dr Kloer, the first dated 3 July 2019 and the second dated 18 October 2019;

ii) A witness statement of Dr Eiry Edmunds (Consultant Cardiologist), dated 2 July 2019;

iii) A witness statement of Mr Stephen Morgan (Assistant Director of Workforce) dated 11 October 2019;

iv) A witness statement of Mr Mark Henwood (Consultant General Surgeon) dated 17 October 2019; and

v) A witness statement of Mrs Ruth Clacey-Roberts (Associate Director, Ibex Gale Ltd) dated 12 November 2019.

18. There was also a five volume bundle of documentary material, a core bundle and a two-volume bundle of authorities. I also received further materials on the question of relief from both parties after the hearing had concluded.

THE RELEVANT EXPRESS TERMS OF THE CLAIMANT'S CONTRACT OF EMPLOYMENT

19. The material express terms of the claimant's contract of employment are set out in the Contract. I was told by Mr Sutton that this document is in standard form and that greater details of the claimant's terms and conditions are set out in the Medical and Dental Staff (Wales) Handbook but that this document sheds no light on the issues which I have to decide.

20. Section 4 of the Contract incorporated nationally agreed terms and conditions:

> *"MAIN TERMS AND CONDITIONS OF SERVICE*
>
> *4.1 The terms and conditions of service including pay, which apply to the post are those which apply to the medical and dental staff employed in Wales as amended from time to time.*
>
> *4.2 No employer shall form an agreement that is less favourable than those specified within the terms and conditions of service which apply to medical and dental staff employed in Wales as amended from time to time".*

21. Central to the present case is Section 9 of the Contract which provided as follows:

> *"DISCIPLINARY PROCEDURES*
>
> *9.1 Wherever possible, <u>any issues relating to conduct, competence and behaviour</u> should be identified and resolved without recourse to formal procedures.*
>
> *9.2 Otherwise <u>these will</u> 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."* (emphasis added)

22. It is common ground that the provisions referred to in clause 9.2 have been superseded but that the effect of clause 9.2 is expressly to incorporate UPSW. UPSW is a relatively new disciplinary procedure which was agreed between NHS staff side representatives, including the BMA, NHS Employers in Wales, and the Welsh Government following very lengthy negotiations. Its equivalent in relation to the NHS in England is *"Maintaining High Professional Standards in the Modern NHS"* ("MHPS"), which was required to be implemented by employers by 1 June 2005 and which is considered in some of the decided cases which I refer to below.

23. Although the version of UPSW which I have been shown is dated October 2015, it took effect from 1 September 2015 and it was formally adopted by the Local Negotiating Committee of the defendant on 7 October 2015. As noted above, the Procedure applies to all NHS doctors and dentists employed in Wales. It replaced all previous disciplinary procedures which were applicable to this group, as well as abolishing the right of appeal to the Secretary of State which some practitioners enjoyed under paragraph 190 of their terms and conditions of service.

24. Mr Powell drew my attention to the Welsh Government circular, dated 26 August 2015, which notified employers of the introduction of UPSW, and he emphasised that the circular repeatedly referred to UPSW as a *disciplinary* procedure. He also pointed out that, in addition to clause 9.2 of the Contract, paragraph 189 of the Medical and Dental Staff (Wales) Handbook and Chapter 6 of the Amendment to the National Consultant Contract in Wales Document were amended, with effect from 1 September 2015, so that they provided as follows:

> "*Upholding Professional Standards sets out <u>the approach for addressing concerns about capability, performance and conduct</u> for all doctors and dentists. It replaces all existing procedures in operation within the Local Health Boards and NHS Trusts in NHS Wales all successor bodies…."* (emphasis added)

25. This, he submitted, was the true route through which UPSW was incorporated given that clause 4.1 of the Contract incorporated nationally agreed terms as amended from time to time. I deal with this submission below.

<u>SUMMARY OF UPSW</u>

26. A brief consideration of the contents of UPSW is necessary to assist in following the chronological narrative set out below and because it may shed light on the issues of contractual interpretation and breach of contract which I have to determine.

27. As far as the application of the Procedure is concerned, the Preface to UPSW explains its purpose as follows:

> *"This procedure sets out the approach <u>for addressing concerns about capability, performance and conduct</u> for all doctors and dentists (referred to below as "practitioners" in the rest of the document) employed by Local Health Boards or other NHS organisations in Wales"* (emphasis added).

28. The highlighted phrase is repeated in the *"Principles"* section of the document, albeit with the three types of concern expressed in a different order: *"conduct, capability and performance"*. This section also makes the point that *"the management of*

conduct, capability and performance is a continuous process" and that potential *"concerns about"* these matters may come to light in a wide variety of ways including:

> "*Concerns raised by other NHS professionals; healthcare managers; students and non-clinical staff;"....*

29. The *"Principles"* section of the Procedure also encourages employers to make use of available advice:

> *"Employers should seek to use available sources of specialist and independent advice in responding to the areas of concern covered by this procedure. In particular, where the organisation considers it appropriate, the National Clinical Assessment Service ("NCAS") provides advice on the appropriate response to performance concerns and expert guidance on remedial action."*

30. The role and availability of NCAS at each stage of the Procedure is further highlighted: see, for example, paragraphs 1.6, 1.12, 1.23, 2.12, 3.6 and 5.18.

31. As to the relevant stages of the Procedure for present purposes, in summary they are as follows:

    i) Where the Medical Director considers that an investigation *"into the nature of the problem or concern is required"* they will appoint a Case Manager whose role it is to evaluate the nature and seriousness of the concern, to make an initial assessment and to decide whether a formal investigation needs to be carried out, or whether the issues can be resolved informally (paragraphs 1.2 and 1.5).

    ii) Where the Case Manager considers that a formal investigation is required they will, in consultation with the Medical Director and Workforce and OD Director, appoint a Case Investigator to carry out this task (paragraph 1.13). The Case Investigator is required to produce an investigation report which, together with the practitioner's comments, gives the Case Manager sufficient information to make a decision as to next steps (paragraphs 1.15-1.19 and 1.23). For this purpose, the Case Manager formulates: *"the specific allegations and set[s] out the Terms of Reference for [the] investigation"* (paragraph 1.15).

    iii) Paragraph 1.23 of the Procedure sets out the options open to the Case Manager upon receipt of the Case Investigator's report. These range from taking no further action, to pursuing the matter under Part 3 as giving rise to concerns about the practitioner's health, to pursuing the matter as requiring a hearing, to addressing concerns about the capability or performance of the practitioner with assistance from NCAS or an equivalent body.

    > *"The investigation report, together with the practitioner's comments, should give the Case Manager sufficient information to make a decision whether:*

- *There are concerns about the practitioner's capability or performance that should be addressed with assistance from NCAS/or equivalent body;*

- *There are concerns about the practitioner's health that should be considered in accordance with Part 3 of this Procedure;*

- *There are concerns which should be determined at a hearing in accordance with section 4 or 5 of this Procedure;*

- *Restrictions on practice or exclusion from work should be considered in accordance with Part 2 of this Procedure;*

- *There are serious concerns that should be referred to the GMC or GDC;*

- *No further action is called for.*

It may be that in some cases a combination of the above is considered appropriate."

iv) Under paragraph 1.27 of the Procedure there is a right of appeal against the Case Manager's decision on the process to be followed following receipt of the Case Investigator's report.

v) There is a "Standard Procedure" under Part 4 of UPSW which contains detailed provisions as to the required procedural steps where there are concerns about the practitioner which require a hearing. The Extended Procedure under Part 5 *"will be used when handling more serious issues, where the outcome of disciplinary action could potentially lead to the dismissal of the medical or dental practitioner… or the issuing of a final written warning"* (paragraph 5.1). It is clear from their terms that Parts 4 and 5 may be applied to issues of capability as well as conduct.

vi) Part 5 of the Procedure requires that an Inquiry Panel be convened *"to establish the relevant facts of the case and to make recommendations as to action"* (paragraph 5.2). The members of the Inquiry Panel are external appointees and they comprise an independent legally qualified member who chairs the proceedings, a professional member and either a non-medical member or a professional member in the same speciality as the practitioner *"where the matter involves solely allegations relating to the practitioner's clinical capability"*.

vii) The Inquiry Panel is then required to hold a hearing at which the practitioner is entitled to appear, to be legally represented, to call witnesses and to cross examine the witnesses called by the employer. The Chair of the Inquiry Panel is then required to write a report which sets out the Panel's *"findings and all relevant facts of the case"* in Part 1 and states the Panel's views *"as to whether the practitioner is at fault and recommendations as to disciplinary action"* in Part 2 (paragraph 5.10). Part 1 of the Inquiry Panel's report is then sent to the practitioner for comment, following which it is finalised by the

Chair and becomes binding on both sides as to the facts in any subsequent consideration of the matter (paragraph 5.11). By implication, the Inquiry Panel's views as to fault in Part 2 are not binding.

viii) The final report of the Inquiry Panel is then provided to the Medical Director of the employer who decides what action to take. In the event that Part 2 of the report finds that the practitioner *"is at fault, the substance of their views on the case and recommendations"* is required to be made available to the practitioner 14 days before *"any disciplinary hearing takes place"* (paragraph 5.13). The implication of this is that the matter will not proceed to a hearing which could potentially lead to the dismissal of the practitioner unless they have been found by the Inquiry Panel to have been *"at fault"*, although the Procedure does not in terms prevent such a hearing where there is no finding of fault or define the words *"at fault"* .

ix) Part 5 of UPSW then provides for a disciplinary hearing before a Disciplinary Panel comprising three internal appointees who will normally be the Medical Director, an Executive Director and a Clinical Director of the employer, none of whom should have been involved in any formal part of the proceedings thus far. Paragraphs 5.15 and 5.16 make detailed provision as to the conduct of the disciplinary hearing and paragraph 5.18 prevents the Disciplinary Panel from taking more severe action than that recommended by the Inquiry Panel, albeit less severe action may be taken. Subject to this, the decisions as to disciplinary action which the Disciplinary Panel may take range from no further action to dismissal, or a combination of steps, but they specifically include a decision that:

> *"The situation may be more appropriately addressed through another part of the procedure e.g. Health or by another policy e.g. Dignity at Work;"*

x) The decision of the Disciplinary Panel may then be appealed by the practitioner and there are detailed provisions as to the conduct of such an appeal which is decided by a three-person Panel comprising a member nominated by the employer, a professional member and a barrister or solicitor who chairs the proceedings. Again, the practitioner has a right to appear before the Appeal Panel and to be legally represented (paragraphs 5.22-5.30).

32. Apart from the safeguards summarised above, including the right to external scrutiny in relation to serious disciplinary allegations, an important feature of the Procedure is that the practitioner has a right to representation at all material stages. Paragraph 1.4 sets out an expectation that the practitioner will *"ordinarily be represented by a workforce colleague or representative who may be from (or retained by) a trade union or defence organisation"* but it goes on to provide that *"If the matter proceeds to a hearing, and in particular under the Extended Procedure, the practitioner, may be represented at any such hearing by a legally qualified person who is retained by a recognised trade union or defence organisation"*. This right is reiterated at paragraph 5.6a of the Extended Procedure.

CHRONOLOGICAL NARRATIVE

Disciplinary issues surface in 2016

33. In May 2016, not long after the commencement of his employment, concerns were expressed about the claimant by his colleagues based on various alleged incidents and dealings with him. The issues, at that stage, were set out in a letter dated 10 May 2016 which recorded discussions which had taken place at a meeting on the previous day between the claimant, Mr Mark Henwood and Ms Caroline Lewis (a Service Delivery Manager who worked on job planning and related issues).

34. Very briefly, there were issues in relation to agreeing the claimant's job plan, *"Team working"*, management of outpatient clinics and clinical care. The letter included concerns about the claimant's relationships with key colleagues and how they impacted on these issues. By way of example, the key colleagues included Mr Deans and Miss Singh who were two other consultants in the colorectal team. The claimant was said to have been *"very forthright"* about his unwillingness to work as part of a team with Mr Deans and Miss Singh. He was told that that *"team working [is] an essential part of practice in the National Health Service and [it was] felt that he needed to develop a good team working relationship with [his] colleagues"*. Essentially the same point was made about his relationship with one of the defendant's Cardiology Consultants. It was also emphasised that *"poor working relationships do not generate high quality care for our patients"*.

35. Subsequently, further issues arose in relation to the claimant:

    i) The claimant copied his email response to Mr Henwood's letter, dated 18 May 2016, to 18 colleagues including doctors and nursing staff as well as secretarial support staff, in which he disputed Mr Henwood's account of the 9 May 2016 meeting and alleged *"clear discrimination"* and attempts to deskill and *"frame"* him.

    ii) Also on 18 May 2016, the claimant is alleged to have displayed intimidating and aggressive behaviour towards Miss Gita Maharaj, a locum consultant surgeon, and to have sent unprofessional emails about her that day and on 24 May 2016.

    iii) It is alleged that there was a further incident on 19 May 2016 when the claimant is said to have displayed aggressive and intimidating behaviour towards the Bed Manager (Gemma Brown) and A & E Sister (Emma Hickman) relating to a patient admission.

Dr Edmunds' appointment as Case Manager and her initial assessment

36. On 2 June 2016, Dr Kloer, wrote to the claimant informing him that he had asked Dr Edmunds to act as Case Manager under UPSW. Dr Edmunds was to carry out an initial assessment of the concerns which had arisen and these concerns were summarised in Dr Kloer's letter. Dr Kloer also summarised the process which Dr Edmunds would follow under the UPSW and enclosed a copy of the Procedure itself.

37. At a meeting on 26 September 2016, the claimant was notified by Dr Kloer of further complaints which were said to have come to his attention in relation to the claimant's *"behaviour"* and also in relation to his *"clinical decision-making and practice"* since Dr Kloer had written in June 2016. The complaints were summarised in a subsequent letter from Dr Kloer, dated 29 September 2016, and the claimant was told that Dr Kloer was minded to ask Dr Edmunds to consider these issues as part of her initial assessment. In light of the fact that the majority of the patient-related concerns appeared to relate to periods when the claimant was on-call the claimant was required, with immediate effect, to cease to undertake on-call duties. Dr Kloer's letter stated that, at the meeting on 26 September, the claimant had said that he did not have faith in the defendant to look into the concerns fairly and that he felt humiliated and was minded to resign. The decision to ask Dr Edmunds to look into the further concerns was confirmed by letter dated 30 September 2016.

38. There was then a further incident on 13 October 2016 when the claimant was said to have discharged a patient without examination or investigation. It was said that, on examination, the patient had been found to have a large low rectal tumour.

39. Dr Edmunds' initial assessment was set out in a report dated 21 October 2016. She had apparently interviewed in the order of 16 witnesses who were involved in the incidents which gave rise to the concerns as well as considering relevant documentary evidence. Her report did not consider the additional issues which had been raised at the end of September, and in October, because Dr Edmunds concluded that, in any event, there should be a formal investigation under UPSW and that all of the issues could be considered in the course of that investigation. She summarised the position as follows:

> *"During* [her] *investigation more and more concerns were raised by various people. Some of them were clinical and involved issues regarding patient care, others have been about his attendance, <u>his lack of team working</u> and it is clear that there is significant disruption to the working of the department<u>. Many of his colleagues feel that they cannot work with him any longer</u>.".* (emphasis added)

40. At a meeting on 21 October 2016 the claimant was excluded from practice i.e. suspended. Dr Kloer gave his account of the meeting in a subsequent letter to him, which is dated 24 October 2016. Dr Kloer explained this decision as being based on the additional concerns which had come to light and said that he was particularly concerned about some of the clinical issues that had come to his attention since the previous meeting. He added:

> "*I had also become increasingly concerned about the impact on team working and team dynamics since the last meeting as tensions seemed to be increasing and further deteriorating to the point where patient care was in danger of being compromised"*

41. The *"UPSW Restriction of Practice and Exclusion from Work Checklist"* which was completed by Dr Edmunds, apparently on 27 October 2016, contains the following passages:

    i) In answer to the question *"Do you have reasonable grounds to believe the allegation(s) at this stage?"* Dr Edmunds wrote:

> *"Given the number of concerns raised from different parties it is reasonable to conclude that this is not a breakdown in relationships with one individual or a clash of personality. Concerns have been raised from medical, nursing and administrative staff with witnesses present for many of the concerns. In this connection, there are reasonable grounds to conclude that the allegations may be proven."*

ii) Under the heading *"Risk Assessment"* and in answer to the question *"If the employee was to remain at work what are the risks…?"* Dr Edmunds explained that there was a real risk of the incidents continuing to occur and that there were potential risks to patients if the claimant were to remain in work *"in terms of the indirect impact of the deterioration in working relationships"*. She wrote:

> *"There are risks to other staff if he were to remain in work in terms of the impact of his behaviour. Staff have used strong terms like intimidation, aggression and fear in terms of the concerns raised. <u>There is clearly a breakdown in working relations between [the claimant] and a significant proportion of the Surgical team</u>."* (emphasis added)

iii) In the box which raised the question whether there were alternatives to exclusion, one of the reasons given for the view that there were no alternatives was:

> *"[the claimant] has clearly upset a large number of colleagues including admin, nursing as well as other surgeons. It is therefore not considered appropriate for him to remain in work whether on site in GGH or elsewhere in the H Board until such time as the behavioural issues have been investigated."*

<u>Dr Robertson-Steel's investigation and report</u>

42. Pursuant to Dr Edmunds' assessment that the allegations against the claimant should be the subject of a formal investigation under UPSW, Dr Robertson-Steel, a Hospital Director at Withybush General Hospital, was appointed as the Case Investigator under the Procedure. Dr Robertson-Steel's terms of reference were issued on 21 November 2016 (they were updated subsequently but nothing turns on this.). He was required to investigate two broad allegations namely that:

> *"1 [The claimant's] standard of behaviour and attitude have been unacceptable and that he has failed to display the required standards of behaviour and attitude expected within his role and responsibilities.* ("Allegation 1")
>
> *2 [The claimant] has allegedly failed to display the required standards of performance in respect of clinical decision-making and practice as expected within his role and responsibilities."* ("Allegation 2")

43. The terms of reference included particulars of each broad allegation. Allegation 1, which was essentially an allegation of misconduct, was based on 12 specified examples. The first two examples were the issues raised in Mr Henwood's letter of 10 May 2016 and the claimant's actions in copying his response to 18 colleagues. The

rest of the examples were of instances of alleged intimidating and/or aggressive and/or inappropriate and/or unprofessional behaviour towards specified colleagues, and the final one was as follows:

> *"Mr Henwood reports that [the claimant] has repeatedly failed to demonstrate appropriate team working behaviour, has not shared responsibilities or workload in the department and has been rude and aggressive when asked to do so."*

44. There was also a list of 13 examples of concerns raised in relation to Allegation 2, the penultimate one of which was: *"One of the secretaries has indicated that [the claimant] is not working as part of the team and is refusing to write letters following MDTs"*.

45. Dr Robertson-Steel's investigation took the best part of a year. As part of that investigation he carried out 29 interviews of 23 members of staff, including those who were involved in the various incidents which were said to have given rise to the concerns, with a view to making findings on each of the examples going to the two broad allegations which he had been asked to investigate. This meant that all bar two of the colleagues interviewed by Dr Edmunds were re-interviewed in relation to essentially the same matters by Dr Robertson-Steel. Dr Robertson-Steel also interviewed additional witnesses in relation to the issues which had not been considered by Dr Edmunds and he reviewed relevant documentary evidence.

46. Dr Robertson-Steel produced a lengthy and detailed report which was sent to Dr Edmunds on 18 September 2017, and then to the claimant and his representatives on 9 October 2017 with the invitation to comment which was required by the Procedure. Comments were duly submitted on the Claimant's behalf on 29 November 2017.

47. It is noteworthy that, under the heading *"Allegations"* Dr Robertson-Steel set out Allegations 1 and 2 and then summarised his task as follows:

> *"4.3. In essence, therefore, there were two areas for the Investigator to consider:*
>
> *4.4. [The claimant's] overall standard of behaviour, <u>including team working, relationships with other members of staff</u>.* (emphasis added)
>
> *4.5 [The claimant's] professional competence and standards as a Consultant Colorectal Surgeon."*

48. In summary, Dr Robertson-Steel's views, as set out in the *"Recommendations"* section of his report were that:

    i) Allegation 1 was established to a standard of proof which was sufficient to justify the instigation of formal action and the convening of an Inquiry Panel hearing. *"The nature of the allegation… suggests that assistance from NCAS/or equivalent body may also be appropriate"*.

    ii) Allegation 2 had not been established to a standard of proof which was sufficient to justify the instigation of formal action. Dr Robertson-Steel recommended that the claimant be referred to NCAS for a formal review of his clinical and personal performance and identification of areas of deficiency

"with the intention of providing opportunities to enhance his skills in both team-working, communication, patient management and surgical care of patients." He added *"[The claimant] will require coaching and team-working skills training"*. He did not rule out the possibility that disciplinary action could be considered in the light of the NCAS review but he considered that *"an assessment approach is more likely to be effective and in the public interest"*.

49. In Sections 8 and 9 of his report Dr Robertson-Steel made various findings in relation to Allegation 1 which were critical of the claimant's conduct, attitude and behaviour which, Dr Robertson-Steel considered, repeatedly showed poor teamworking and had caused a breakdown in working relationships between the claimant and other staff. I highlight some of these findings below when I consider the report of Mrs Clacey-Roberts but, by way of example:

> *"[the claimant] has repeatedly failed to demonstrate appropriate team working behaviour, has not shared responsibilities or workload in the Department and has been rude and aggressive when asked to do so"*

50. At the end of his conclusions on Allegation 1, Dr Robertson-Steel said:

> *"9.19 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 were of the view that [the claimant's] behaviours, as demonstrated throughout this report, destabilised a functional working Team."*

51. Also in the Recommendations section of his report Dr Robertson-Steel added the following under the heading *"Other observations"*:

> *"13.13 Following the review by NCAS and the outcome of the assessment, a plan of remediation should be considered. It is likely with good engagement from [the claimant] that he will be able to return to a role as Consultant General Surgeon with an interest in colorectal surgery at some point in the future in an appropriate environment with good monitoring and support.*
>
> *13.14 The Investigator notes, however, that there has been a breakdown in the working relationships with the Surgical Team at Glangwili General Hospital.*
>
> *13.15 It is the opinion of the Investigator that it would not be possible to re-introduce [the claimant] as a functioning member of the Surgical Team at Glangwili General Hospital or elsewhere in Hywel Dda University Health Board.*
>
> *13.16 It would be in the best interest of [the claimant] and the University Health Board to encourage [the claimant], following assessment and appropriate retraining, to seek employment elsewhere.*
>
> *13.17 This would be in the interests of the National Health Service, [the claimant], the patients for which the University Health Board is responsible and working relationships within Hywel Dda University Health Board."*

52. Dr Robertson-Steel therefore clearly concluded, as a result of his investigation of the evidence, that it was possible that claimant could return to work elsewhere but that it would not be possible for him to return to work with the defendant given the breakdown in working relationships. Although Dr Kloer said, in evidence, that these and others of Dr Robertson-Steel's findings and observations went beyond his terms of reference, it does not appear that that was the view of Dr Robertson-Steel. He clearly and understandably saw himself as being tasked with investigating the truth of the allegations against the claimant, the seriousness or otherwise of the claimant's behaviour and attitude, and the impact which they had on working relationships and team working. His view is unsurprising given that his report was to inform decisions about whether there should be disciplinary action against the claimant and, if so, whether such action should or should not be with a view to the termination of the claimant's employment by the defendant.

<u>Dr Edmunds' decision in the light of Dr Robertson-Steel's report</u>

53. It was 5 months later that Dr Edmunds then produced a "*Decision Making Framework*" as required by UPSW. This document was dated 20 April 2018. Essentially, Dr Edmunds accepted Dr Robertson-Steel's recommendations. She concluded, pursuant to paragraph 1.23 of UPSW, that the allegations relating to the claimant's standard of behaviour and attitude should be considered further under the Extended Procedure set out in Section 5 of UPSW. She concluded that the issues relating to the claimant's capability and performance under Allegation 2 should be addressed with assistance from NCAS.

54. The reasoning which led to Dr Edmunds' conclusion in relation to Allegation 1 is set out at internal pages 14 to 16 of the Decision Making Framework document. She expressed disappointment with the claimant's attitude. She noted that the claimant had *"had significant negative interactions"* with a list of nine key colleagues and that a significant proportion of those who had been adversely affected were female members of staff. She specifically noted the point made at paragraph 9.19 of Dr Robinson Steel's report (cited at paragraph [50] above). She said that proceedings under Section 5 of UPSW were appropriate, amongst other reasons, because:

> *"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;…"*

55. Her concluding paragraph in this section of her Decision Making Framework was as follows:

> *"It is for the above reasons that I am unable to consider any of the other options available to me including the use of the Standard Procedure as opposed to the Extended Procedure. <u>There is evidence which suggests that working relationships have broken down with a number of individuals involved in a multi-disciplinary team working environment</u>. Having taken everything into consideration I have concluded this to be a serious as opposed to a minor issue."* (emphasis added)

56. It is also worth noting that the issues of working relationships and team working were relevant to Dr Edmunds' conclusion in relation to Allegation 2. Internal page 28 of her document included the following passage:

> *"The Case Investigator concluded that there were clear issues about [the claimant's] ability to function in a crisis and to cooperate with others in the Colorectal and General Surgical Teams. The Case Investigator concluded that there were significant issues with team working and [the claimant's] relationship with his colleagues which, on occasion, resulted in confusion over who was responsible for management, how care was handed over and how care was delivered."* (emphasis added)

57. On 20 April 2018, Dr Edmunds also wrote to Dr Kloer setting out her concerns about working relationships between the claimant and his colleagues. Her letter included the following passage:

> *"Having thoroughly reviewed the content of the Case Investigator's report I am very concerned about the extent to which working relationships with a range of professionals appears to have broken down. I have arrived at this conclusion having read the witness statements included in the Case Investigator's report along with the Investigation report itself. This does not appear to be a case of a breakdown in relationships between [the claimant] and one or even two members of a team, but a very large cohort of individuals who work in a multi-disciplinary environment. In this connection, I do not believe it would be appropriate for me to consider this at this stage, in my role as Case Manager, based on the Terms of Reference for this investigation. I have advised [the claimant] that I will be writing to you to notify you of these concerns which have materialised as a result of the evidence contained in the Case Investigator's report."* (emphasis added)

58. It is not clear why Dr Edmunds took the view that she should not or could not look into this issue given that the impact of the claimant's alleged behaviour on working relationships was inevitably part of the assessment of the seriousness of his behaviour, given that she had commented on this very issue in her earlier assessments and given how Dr Robertson-Steel had interpreted his brief. Similarly, Dr Kloer asserts at paragraph 31 of his first witness statement that the terms of reference for Dr Robertson-Steel's investigation did not provide for an investigation of working relationships, of any breakdown in those relationships or of any resolution of such a breakdown. As I have noted, his position in oral evidence was that Dr Robertson-Steel had in some respects gone beyond his terms of reference.

59. Mr Powell accepted that insofar as a Case Manager or a Case Investigator considers that their terms of reference need to be amended to permit a consideration of additional or wider matters which emerge in the course of the proceedings this can, in principle, be done. Insofar as there was a problem, then, it is not clear why Dr Edmunds did not suggest that this be done. Nor do Dr Edmunds' witness statement or her reports and letters explain this, other than to say that she took advice from human resources and decided that a separate investigation would be necessary. Nor did Dr Kloer explain why the terms of reference could not be amended other than to return to his assertion that the issues under investigation in the working relationships investigation were not susceptible to investigation under UPSW.

60. In fact, Dr Edmunds wrote to the claimant on 23 April 2018 enclosing the Decision Making Framework document. Her letter "cut and pasted" the passage in her letter to Dr Kloer which is set out at paragraph 57 above and it informed him that she would be writing to Dr Kleor *"to notify him of these concerns which have materialised as a result of the evidence contained in the Case Investigator's report."* By letter dated 3 May 2018, she subsequently confirmed to the claimant that she had done so.

The commissioning of Dr Diggle's investigation

61. Thereafter, there was a meeting between the parties on 4 June 2018 to discuss the claimant's continued exclusion and there was a meeting on 12 June 2018 to discuss the Decision Making Framework document and Dr Edmunds' views as to next steps. The claimant then appealed against Dr Edmunds' decision as to next steps on 19 July 2018 and there was a small number of written exchanges about the claimant's grounds of appeal and the date for an appeal hearing.

62. However, the claimant heard nothing further from the defendant about Dr Edmunds' 20 April 2018 letter to Dr Kloer, expressing concerns about the extent of the breakdown in working relationships, until 31 October 2018, some six months later. In the interim, however, a letter from Dr Kloer to the claimant dated 27 June 2018 had been prepared and signed but not sent. This stated, presumably by way of explanation of the then delay of more than two months, that Dr Kloer had wanted to reflect on Dr Edmunds' letter and seek advice in relation to any necessary steps.

63. The 27 June letter went on to notify the claimant that:

> *"In this connection, I have now given this matter some consideration and sought advice. I am extremely concerned about the suggested extent of relationship breakdown in the Surgical team and given this issue was not* <u>*formally*</u> *investigated by Dr Robertson-Steel, I have decided to commission a separate investigation in order to determine whether there is in fact a serious breakdown in working relationships and if so, the extent of the breakdown. If it transpires that there is a serious breakdown in working relationships then I will need to consider whether this is remedial or whether it fundamentally impacts on you continuing in your role within the Health Board."* (emphasis added)

64. This investigation was to be carried out by Dr Roger Diggle.

65. The letter added that, having sought advice, Dr Kloer had concluded that it would not be appropriate to follow UPSW in relation to this matter as he did not consider that the concerns in relation to relationship breakdown related to capability, performance or conduct. Dr Kloer did, however, intend to follow a fair and transparent process *"under the principles of the ACAS Code of Practice on Disciplinary and Grievance Procedure"* as part of which the claimant would have a right to be accompanied and *"an opportunity to state [his] case"*. The letter confirmed that *"in the event of a sanction being imposed .. you will also be afforded the right of appeal against that sanction"*.

66. On the face of this letter, it is therefore clear that:

i) Dr Kloer recognised that Dr Robertson-Steel had in fact investigated the question of working relationships, albeit (he said) not formally.

ii) The proposed working relationships investigation was recognised as being of a disciplinary nature, with the potential for termination of the claimant's employment.

67. In the course of the hearing before me there was some investigation of why this letter was not sent, given that it was signed and there was nothing on the face of the document to suggest that it was in draft. Dr Kloer gave oral evidence that the letter had been the subject of legal advice but that he had been concerned about how it was expressed and decided that further legal advice should be taken face to face, which he believed was done on 12 July 2018. The letter therefore was not sent. He also said that he had not necessarily signed the letter as his personal assistant was able to do so using his electronic signature. He acknowledged, however, that it would have been irregular for her to do so without his authority.

68. Given that the letter was attached to an email of 27 June 2018 from Sarah Jenkins of human resources to Karen Morris "Personal Assistant" (cc'd to Mr Stephen Morgan) which said: *"Phil [i.e. Dr Kloer] signed this off yesterday with Steve. Can we get this sent out please today."* I consider, on the balance of probabilities, that the letter had been signed off by Dr Kloer and did reflect his intentions and understanding in relation to the working relationships investigation. I am, however, prepared to accept that the letter did not go out because there were concerns about its contents and further legal advice was taken.

69. Dr Kloer finally wrote to the claimant on 31 October 2018, notifying him of the working relationships investigation. The letter stated that:

> "*The Investigation Report and the Decision Making Framework highlighted that there were concerns regarding the working relationships with you and a number of your colleagues…. This led the Case Manager appointed under the UPSW process, Dr Eiry Edmunds to write to me as Medical Director raising concerns on 20 April 2018. Having now taken appropriate advice and after deliberating for some time, I have determined that an investigation is necessary in order to look into the concerns as appropriate".*

70. Dr Kloer notified the claimant that he had appointed Dr Roger Diggle and that it was proposed that the investigation was undertaken:

> *"1. To consider the working relationships between you and your colleagues at the UHB; and*
>
> *2. (In particular) to consider whether or not there has been a breakdown in those relationships; and*
>
> *3. (If so) to consider between whom those working relationships have broken down; and*
>
> *4. (If so) to consider the extent to which working relationships have broken down; and to consider with you and your colleagues the issue of mediation in order to*

assess your and their willingness to participate in mediation to address any issues in respect of the working relationships."

71. It was therefore clear that Dr Diggle was not being asked to investigate working relationships generally. The focus was to be specifically on the claimant and his working relationships with colleagues.

72. The claimant was informed that Dr Diggle would be in touch with him *"in due course"* to seek his views and to take a statement. He was told that he would have a right to be accompanied during the process, by a work colleague or trade union representative, but he did not have the right to legal representation. The letter stated in terms that: *"to confirm this matter is not being considered under the Upholding Professional Standards in Wales, as we do not consider such a policy applies in this case."*.

73. Although the terms of reference were essentially the same, gone were the references in the 27 June 2018 letter which indicated that this was to be a disciplinary process in the course of which the claimant would make his case and as a result of which he might be dismissed. Indeed, the only potential "next step" referred to in the letter was discussion with the claimant and his colleagues of their willingness to participate in mediation.

74. The terms of reference were issued to Dr Diggle on 15 November 2018 and a copy was provided to the claimant. They included the four issues which were set out in Dr Kloer's letter of 31 October 2018 and they contained the following passage:

"In addressing the above matters and questions, it is acknowledged that the investigation and written report should provide detailed evidence in respect of the state of the working relationships and in respect of the issue of mediation so that the UHB can reach conclusions as to whether there has been a breakdown in working relationships, as to the extent of any such breakdown and as to the utility of mediation. The UHB does not anticipate that it will be appropriate or necessary for you to make findings in relation to other matters, such as fault or responsibility for any breakdown in working relationships." (emphasis added)

75. It is to be noted that this statement of what the defendant anticipated did not prohibit Dr Diggle from considering the reasons for any breakdown in the working relationship between the claimant and a given colleague. Nor, indeed, did it actually prohibit him from investigating, and taking a view about, who was responsible, or indeed at fault, for the relevant state of affairs.

76. Although the defendant said that it did not anticipate that Dr Diggle would make findings about these matters, it is difficult to see how he could assess the extent of any breakdown in working relationships and/or whether it was remediable without looking at the cause of the breakdown and the reasonableness of the respective positions of the claimant and the relevant colleague. If, for example, it was clear that the claimant had behaved badly and/or he was entirely unwilling to accept any responsibility for his actions this might well mean that a colleague who had lost trust and confidence in him would be unlikely to regain that trust and confidence in the context of a mediation. If, on the other hand, the claimant had not behaved inappropriately and/or what he had done was not particularly serious and/or he was apologetic then, assuming that the

colleague was reasonable, it would seem more likely that the working relationship with that colleague would be capable of being restored. If, on the other hand, the colleague was acting unreasonably then a question would arise as to whether it would be fair for the claimant to suffer the consequences of this.

Dr Diggle's investigation and report

77. Between 8 November 2018 and 13 May 2019, when the claimant's solicitors chased the defendant, neither party communicated with the other in respect of the claimant's appeal against Dr Edmunds' conclusions in her Decision Making Framework document. Dr Diggle did, however, carry out his investigations. I agree with Mr Sutton that the working relationships investigation had effectively supplanted the UPSW proceedings.

78. Between 30 January and 22 March 2019, Dr Diggle apparently interviewed eight of the claimant's individual colleagues, most of whom were being interviewed for the third time about their dealings with the claimant, plus certain specialist cancer nurses. I was shown the notes of some of Dr Diggle's interviews so as to get a flavour of what was being discussed. Predictably, the interviewees reiterated the problems in their working relationships with the claimant and give examples of his alleged behaviour which included a number of the examples which were relied on by the defendant in the UPSW proceedings in relation to Allegations 1 and 2.

79. The interviewees also criticised the claimant's behaviour and blamed him for the breakdown in working relationships. It also appears from some of Dr Diggle's questions that he was, at least, interested in the question whether the claimant's behaviour was normal or abnormal. That Dr Diggle effectively told interviewees that he was carrying out an essentially disciplinary function is apparent from the fact that he introduced himself to them as conducting an investigation *"under the ACAS rules"*.

80. Dr Diggle's report, which is undated but had been completed by 2 August 2019, albeit without interviewing the claimant, confirms the impression that Dr Diggle saw himself as carrying out a disciplinary investigation:

i) His *"Introduction"* stated that the investigation had *"been conducted in line with the ACAS code of practice on Disciplinary and Grievance Procedures"*.

ii) It went on to say that Dr Diggle's report *"is based on facts obtained from interviews with staff members <u>which focused on the actions of [the claimant]</u> and the perceived breakdown in working relationships between [the claimant] and his clinical colleagues."* (emphasis added)

iii) The report went on to make findings which essentially record the views of surgical, and accident and emergency staff. These views are essentially the same as the views which they expressed in the UPSW proceedings and they appear to be largely based on the examples relied on by the defendant in those proceedings.

iv) Dr Diggle then considered whether the claimant's behaviour was contrary to the "All Wales Dignity at Work Policy". He cited the definition of bullying

under that policy as "*Offensive, intimidating, malicious or insulting behaviour involving the misuse of power that can make a person feel vulnerable, upset, humiliated, undermined or threatened"* and he concluded:

> *"The evidence from the witness statements suggests that the behaviour of [the claimant] with his surgical colleagues in particular would be considered a breach of the Health Board Values and the standards of conduct and behaviour expected of staff and the All Wales Dignity at Work Policy"*.

v) Dr Diggle went on to find that:

> *"..the behaviour and the working relationships that [the claimant] has in general with his surgical colleagues demonstrates that this wasn't an isolated incident and it would appear that [the claimant] does not want to work in a team and is not prepared to consider others views. His behaviour often appears to be intimidating."*

vi) In his *"Conclusion"* Dr Diggle states:

> *"All [the claimant's] working relationships with his close surgical colleagues have broken down and none of the team believe that if [the claimant] returned the behaviours and attitudes he has demonstrated in the past would change. Not one of the surgical team think mediation would make any difference and all have said that the relationship is not remediable."*

81. It is therefore plain that, entirely realistically, Dr Diggle considered that the investigation should focus on the claimant's alleged behaviours and their impact on colleagues. And he recognised that he would need to take a view about whether, and what extent, the claimant was responsible and/or at fault in order to reach a sensible conclusion as to whether the reactions of his colleagues were genuine and/or to what extent, if at all, they were justified and/or remediable. He also recognised this as being a disciplinary investigation.

<u>The dispute as to the legitimacy of the working relationships investigation arises</u>

82. Nothing was heard from Dr Diggle by the claimant until, on 17 May 2019, Dr Diggle wrote inviting him to a meeting on 25 June 2019. Again, Dr Diggle referred to *"allegations"* which were to be considered *"using the principles of the ACAS code of Practice in Managing Discipline"*. He also notified the claimant that: *"It is important that you attend this interview as this is your opportunity to respond to the allegation that has been made against you."*.

83. As noted above, on 21 May 2019 the claimant responded in writing. His letter disputed, for the first time, the claim that the Diggle investigation fell outside UPSW and argued that the process should be stayed pending the outcome of the disciplinary proceedings against him.

84. Dr Kloer responded on 22 May 2019, saying that Dr Diggle was *"well advanced with his enquiries"*. He denied that he had any desire to circumvent the UPSW

proceedings which, he said, would continue to be progressed. The working relationships investigation was, *"separate"* and would be progressed "*outwith UPSW*".

85. There were further exchanges between the parties which, as noted above, did not resolve the matter. Proceedings were issued and, on 25 July 2019, interim relief was granted to restrain the defendant from requiring the claimant to be interviewed by Dr Diggle.

Mrs Clacey-Roberts' working relationships investigation and report

86. On 2 August 2019, Ms Morris then sent instructions to Mrs Clacey-Roberts, an Associate at Ibex Gale Limited, to conduct an investigation into working relationships between the claimant and his colleagues. Her terms of reference were the same as those of Dr Diggle's investigation including the passage, cited above, which stated that it was not anticipated that it would be appropriate or necessary for her to make findings in relation to fault or responsibility for any breakdown in working relationships. The covering email attached various documents including Dr Diggle's report, the correspondence between Dr Diggle and the claimant, 8 witness statements which had been prepared during Dr Diggle's investigation, Dr Robertson-Steel's report and a list of staff who might be relevant to interview.

87. The covering email to Mrs Clacey-Roberts added:

> *"I should make it clear if it is not already clear from the Terms of Reference, that you are not being invited to undertake a misconduct or disciplinary investigation concerning the behaviour conduct or capability of [the claimant], or any of the other witnesses you interview. As set out in the Terms of Reference the Health Board hopes and anticipates that it will not be necessary for you to apportion any fault or blame in respect of the particular reasons for the breakdown. Rather the purpose of the investigation is to permit the Health Board to understand the extent of the breakdown in working relationships if there is any breakdown; what steps may be undertaken if any to remediate such breakdown; and the prospects of such steps been successful in addressing any breakdown in working relationships that you may identify."* (emphasis added)

88. Again, it is to be noted that the defendant implicitly recognised that Mrs Clacey-Roberts would be likely to examine the reasons for any breakdown in the working relationship between the claimant and a given colleague and it did not prohibit her from doing so. It hoped and anticipated that it would not be necessary for her to apportion fault or blame but it did not forbid her to do this either. As noted above in relation to Dr Diggle, although the defendant may have had this hope or anticipation, realistically she would have to look at the reasonableness or otherwise of the respective positions of the claimant and each of the colleagues who said that they were unable to work with him in order to decide the prospects of remediation and who should suffer the consequences if remediation was not possible.

89. On 7 August 2019, the claimant was notified of the appointment of Mrs Clacey-Roberts and provided with a copy of her terms of reference. He was told that this step had been taken *"in the light of Dr Diggle's recent retirement from the Health Board"*.

90. It is apparent from Mrs Clacey-Roberts "interim" report, dated 22 October 2019, that she proceeded to interview 21 witnesses including re-interviewing 5 of the witnesses who were interviewed by Dr Diggle. Some of those who were involved in the incidents which originally gave rise to the UPSW proceedings were being interviewed for the third or fourth time about essentially the same matters. On the other hand, Mrs Clacey-Roberts cast her net wider in that 12 of the colleagues interviewed by her about their views of the claimant had not been interviewed as part of the UPSW proceedings. Consistently with the fact that she was concerned with working relationships, she did not interview individuals who were no longer employed by the defendant.

91. As to her approach to these interviews, Mrs Clacey-Roberts states, at paragraph 13 of her report, that:

> *"Where an individual identified that they (or others) had a poor working relationship with [the claimant], I explored with them their view of the basis for this. I do not make any findings as to whether any issues and/or incidents occurred as alleged or where any blame is attributable. I have been provided with a copy of the UPSW Investigation report (without appendices) and I accept the findings made within that report and I have referred to these findings where they are relevant to the working relationships between [the claimant] and his colleagues."*

92. In other words Mrs Clacey-Roberts may not have made her own express findings but she proceeded on the basis that the findings of Dr Robertson-Steel, including those which criticised the claimant's conduct and behaviour, were well-founded and relevant to her investigation. Indeed, in Part 5 of her report she states, again, that where an interviewee had said that there was a poor working relationship she had *"explored the reasons for that and I have looked at their willingness to work [with the claimant] in the future"* (paragraph 48). At paragraph 49 she then says this:

> *"A number of the matters which were raised with me as being the reason for poor relationships are issues which had been investigated as part of the UPSW Investigation. As such, there are a number of findings from the UPSP Investigation which are relevant to this investigation."*

93. She then lists ten of Dr Robertson-Steel's findings against the claimant taken from Sections 8 and 9 of his report, which she describes as *"particularly relevant"*. These findings are essentially findings that the claimant's lack of insight, attitude and behaviour were incompatible with working effectively as a member of his departmental team. By way of example, she notes that Dr Robertson-Steel found that:

    i) *"[The claimant] clearly demonstrated inappropriate behaviour to the team at all levels…."* (paragraph 49.2);

    ii) *"The Investigator is of the view that [the claimant] has repeatedly failed to demonstrate appropriate team working behaviour, has failed to share responsibilities or workload…"* (paragraph 49.4)

    iii) *"[The claimant] failed to work within the standards that the DEPARTMENT had set for itself in terms of managing referrals, joint operating from a pooled*

list and the turn around of work of a routine nature and emergency nature.." (paragraph 49.6)

iv) *"[The claimant] had behaved in an "intimidating, degrading and aggressive manner"* towards Geta Maharaj and emails he had sent *"could be perceived as professionally undermining"*. (paragraph 49.9).

94. In carrying out her investigation Mrs Clacey-Roberts also reviewed the defendant's "Values and Behaviours Framework" which is at Appendix C to her report. In Part 3 of her report she then set out what she regarded as relevant passages from this guidance. At paragraph 20, Mrs Clacey-Roberts noted that the defendant has a set of organisational values and personal values. She then focused on <u>personal</u> values in particular:

> *"The personal values that the Health Board believes its employees should demonstrate daily are: (i) dignity, respect and fairness; (ii) integrity, openness and honesty; and (iii) caring, kindness and compassion."*

95. At paragraphs 21 to 23.2 she then provided further detail as to what each of these three requirements entails. For example, at paragraph 21 she noted that:

> "*The category of dignity, respect and fairness includes:*
>
> *21.1 "take time to build professional relationships with colleagues, patients and stakeholders";*
>
> *21.2 "you respect people as individuals and are considerate"; and*
>
> *21.3 "you communicate respectfully, openly and professionally"."*

96. Mrs Clacey-Roberts also reviewed various sources of external guidance including *"Good Medical Practice"* which was issued by the General Medical Council ("the GMC") in 2013. At paragraph 25.1 to 25.7 she then listed a series of the GMC's behavioural requirements of an individual practitioner which were taken from this document, such as to consult colleagues when necessary, *"to promote and encourage a culture that allows all staff to raise concerns"*, to work collaboratively with colleagues and respect their skills and contributions and to *"treat colleagues fairly and with respect"*.

97. Mrs Clacey-Roberts states, at paragraph 8 of her witness statement dated 12 November 2019, that she reviewed these materials *"to assist with determining whether there had been a breakdown in the working relationships and, if so, whether they were capable of remediation"*. It is therefore clear that she considered that it was relevant for her to consider, in addition to Dr Robertson-Steel's criticisms of the claimant, the behavioural standards required of the claimant and to compare them with his actual behaviour as part of her overall task of assessing the prospects of remediation.

98. In her "*Conclusions*" section Mrs Clacey-Roberts states that there has been a complete breakdown in working relationships between the claimant and key colleagues, that it is highly unlikely that these relationships can be repaired through

mediation and that if the claimant returned to the workplace it is likely that a number of Consultant and/or managerial resignations would follow. She says that it is highly unlikely that working arrangements could be organised so that the claimant worked separately from those with whom relationships had broken down.

99. Significantly, Mrs Clacey-Roberts says this in relation to the possibility of the claimant working at a different hospital run by the defendant:

> "*294.7 Whilst there are vacancies for Consultant general surgeons at Bronglais, [the claimant's] ability to work in a team and build relationships is likely to mean that such a move would not resolve issues and might lead to relationship breakdowns there which would impact on the functioning of those teams and potentially affect patient care and service delivery in a service that can be fragile."*

100. As is clear from the passage, she therefore formed a view about the claimant's "*ability to work in a team and build relationships"*. It is difficult to see how she could hold this view or reach her conclusion that he could not work elsewhere unless she accepted that the claimant's behaviour was problematic and that he was to blame for the breakdown in relationships which she had found. Unless she had a view about his behaviour, attitude and conduct she could not express the view that moving the claimant to a different job at a different site was unlikely to resolve issues and risked further relationship breakdowns.

101. At paragraphs 295-295.5 of her report Mrs Clacey-Roberts explains the actual or likely impact of the "relationship breakdowns" by reference to the ability of colleagues to work effectively with the claimant, to communicate with him, to trust and respect him, to raise issues with him and to work with him in a way which was in accordance with the defendant's values. This is a further illustration of the point that she was not conducting a general investigation into working relationships: her investigation was into the claimant's working relationships. Moreover, the fact that Mrs Clacey-Roberts felt the need to consider the reasons for alleged breakdowns in working relationships, saw that the question whether the claimant was at fault was relevant and, indeed, had her own view on the matter, is unsurprising for the reasons I have given.

102. At the hearing before me there was some discussion of why Mrs Clacey-Roberts needed to redo the work which had been done by Dr Diggle. Mr Powell said that the defendant had been advised that it needed to commission a further investigation and that, as appears from Ms Morris' covering email of 2 August 2019, it was left to Mrs Clacey-Roberts to decide, in the light of the statements which were already available, whether she wished to re interview witnesses. At all events, it appears that Mrs Clacey-Roberts took more care to avoid expressly characterising her investigation as disciplinary in nature and making her own findings of fault on the part of the claimant than Dr Diggle did although, in my judgement, she was not entirely successful in this endeavour.

The claimant's appeal against the Dr Edmunds' Decision Making Framework decision is dismissed

103. The hearing of the claimant's appeal against Dr Edmunds' decision as to next steps took place on 2 September 2019. The appeal was not successful.

104. In explaining why disciplinary proceedings under the Extended Procedure were appropriate, the Appeal Panel emphasised the seriousness of the alleged problems with the claimant's relationships with his colleagues. The Panel was satisfied that the claimant had demonstrated *"a lack of insight into the workings of the department and the responsibility to work as a team"*. It referred to his *"negative interactions"* with nine listed colleagues. It noted that there was *"unanimity that the conduct of [the claimant] adversely impacted on the working of the Department.":*

> *"The concerns about [the claimant's behaviour and conduct were not limited to a small number of people or to a particular staff group. They extend across a wide range of individuals who were clinical and non-clinical staff. They are clearly much more than differences of professional opinion."*

105. The Appeal Panel also noted that the actions of the claimant had *"had a very significant and negative impact"* on colleagues and that *"the concerns cover a wide range of actions and conduct by [the claimant] including communication style, working relationships and methods of working."*.

The Inquiry Panel proceedings

106. Thereafter, the parties corresponded about the arrangements for the Inquiry Panel hearing which was to take place pursuant to paragraphs 5.2-5.6 of UPSW.

107. The Inquiry Panel hearing took place between 20 and 24 January 2020 and was chaired by Mr Angus Moon QC. The terms of reference for that hearing cover virtually all of the issues investigated by Dr Robertson-Steel, whose report was in evidence, albeit with those passages which refer to Allegation 2 redacted. Paragraphs 13.14-13.17 of Dr Robertson-Steel's *"Other observations"* about working relationships, cited at paragraph [51] above, were therefore relied on by the defendant as part of its case in the UPSW proceedings. The case against the claimant is now framed as nine broad allegations of gross misconduct including, as allegation 8, that the claimant *"has repeatedly failed to demonstrate appropriate team working behaviour, has not shared responsibilities or worked in the department and has been rude and aggressive when asked to do so"*.

108. Witnesses who had been interviewed by Dr Edmunds, by Dr Robertson-Steel and, in a number of cases, by Dr Diggle and/or Mrs Clacey-Roberts were called to give evidence and cross examined. I understand that a total of 15 witnesses gave evidence.

109. Although the evidence was completed, there was insufficient time for the parties to make closing submissions and a further hearing was listed for this purpose on 23 March 2020. The Panel has directed that this be about facts only and that the question of fault will be dealt with at a subsequent hearing. It is not known when the first stage will be completed, still less the second stage. The matter may then go to a Disciplinary Panel hearing and then potentially on to an appeal. I accept that there

may therefore be considerable further delay before the UPSW proceedings are completed although my sympathy for the defendant in this regard is limited given the appalling delays which have occurred thus far for reasons which were within its control.

The NCAS referral

110. A draft of the NCAS referral was sent to the claimant for comment on 18 December 2019 after the claimant's appeal against Dr Edmunds' decision was dismissed. I understand that this part of the process is also on going.

THE WITNESS EVIDENCE ABOUT WHY THE DEFENDANT DECIDED TO UNDERTAKE THE WORKING RELATIONSHIPS INVESTIGATION AND WHAT IT WAS TO INVESTIGATE

111. The witness statements relied on by the defendant were at pains to explain *why* the working relationships investigation was launched and, the merits of the defendant's approach, but they were less specific about precisely what the scope of the investigation would be.

112. As to *why* the investigation was launched, in summary it was said that:

i) The issue of working relationships and/or team working had not been formally or *"separately and discretely"* investigated by Dr Edmunds or Dr Robinson-Steel because their terms of reference did not provide for this. They had been asked to consider issues of conduct and capability in relation to the claimant and their concerns about working relationships had arisen in that context;

ii) Nor could these matters or the question of remedying any breakdown in relationships be investigated or considered under UPSW. The Procedure is intended and designed to investigate capability and conduct and, in the case of the latter, to determine whether a given employee is at fault;

iii) Given that part of the reason for excluding the claimant was the apparent breakdown in working relationships, he could not return to work unless this issue was addressed, and it was undesirable from his point of view and that of the public for him to be prevented from treating patients for a protracted period whilst the UPSW proceedings are completed. He would be de-skilled, locum cover is less than optimum from the point of view of the patients and there are additional costs as a result of the need to provide cover;

iv) The UPSW proceedings were likely to take a long time and might not provide a decisive outcome or finality. If, for example, the claimant was not dismissed, the issue of working relationships with his colleagues would then need to be addressed. The Inquiry Panel considering the matter under the Extended Procedure could decide whether the claimant was at fault and make a recommendation of disciplinary sanctions but it could not make decisions or provide any action plan to address or resolve the issues in relation to the breakdown of working relationships.

113. I also detected an understandable desire on the part of the defendant to "cut to the chase". If the reality was that there was no prospect of the claimant returning to work for the defendant because of an irretrievable breakdown in working relationships it was considered that it would be better for all concerned to face that reality sooner rather than later. Mr Powell did not deny this.

114. As to the precise scope of the investigation, paragraph 41 of Dr Kloer's first witness statement, dated 3 July 2019, drew attention to Dr Diggle's terms of reference and, in particular, the passage, cited above, which stated that it was not anticipated that it would be appropriate or necessary for him to make findings on questions such as fault or responsibility for any breakdown in working relationships. Paragraph 49 of Dr Kloer's witness statement states:

> *"The issue which is currently under investigation by Dr Diggle is whether there has been a breakdown in working relationships, the extent of that breakdown and the potential for mediation. It is the view of the Health Board that those matters have been correctly classified as falling outside of UPSW because they are not issues of conduct or capability relating to [the claimant]…. That the breakdown in working relationships have (sic) arisen out of the behaviour or performance of [the claimant] the perception of his behaviour or performance, the behaviour or performance of others or their perception of others behaviour or performance does not make them issues of conduct or performance on the part of [the claimant]"*

115. In his oral evidence Dr Kloer emphasised that his concern was about "teamworking". He accepted that Dr Robinson-Steel had a good vantage point from which to assess working relationships as a result of his investigation but Dr Kloer said that his concern was that Dr Robinson-Steel was looking at these issues as allegations of misconduct rather than looking more broadly at whether working relationships were or were not functioning and, if not, what could be done about this. Dr Kloer said that looking at the matter from a different perspective might throw up factors which were not relevant to Dr Robinson-Steel's investigation.

116. In his witness statement dated 11 October 2019 Mr Stephen Morgan, who apparently advised Dr Kloer from a human resources perspective, states his view that UPSW *"was not intended to address unforeseen issues which are not categorised as either conduct or capability"*. At paragraph 14 he says *"essentially it was my view that UPSW did not apply to or cater for an investigation or resolution of an issues (sic) concerning a breakdown in working relationships. That was endorsed by the legal advice I obtained, the content of which is privileged and remains [so]"*.

117. It seemed to me that the evidence of the defendant's witnesses contained a number of assertions about UPSW but did not address, in any detail, the practical realities of what the working relationships investigation would entail. None of the defendant's witnesses ruled out the possibility that consideration of the reasons for any breakdown in working relationships and/or whether the claimant's behaviour was problematic would be relevant and nor did Dr Kloer in his oral evidence. Although Dr Kloer said, at paragraph 49 of his witness first statement (noted above at paragraph [114]), what he understood Dr Diggle to be investigating and asserted that these matters did not fall within UPSW because they were not issues of conduct or capability relating to the claimant, in fact Dr Diggle did treat the matter as disciplinary in nature and apportion

blame, as I have pointed out. Although Mrs Clacey-Roberts did not explicitly make findings as to whether the claimant's behaviour was problematic she relied on the findings of Dr Robertson-Steel, and it is implicit in her finding about the feasibility of working for the defendant at a different hospital that she did have a view on which she placed reliance in coming to her conclusions.

118. Mr Morgan's witness statement said that no decision had been taken about the working relationship issue yet, and that the defendant would respect the outcome of the investigation and consider Mrs Clacey-Roberts' recommendations when they were made. But, other than this, the witness statements submitted on behalf the defendant were somewhat reticent on the question what would happen if it was concluded that the working relationships between the claimant and his colleagues were not capable of being repaired.

119. Mr Powell maintained that the defendants were agnostic at this stage but he did not deny that a potential outcome of the working relationships process is dismissal. Indeed, as matter of common sense this seems at least a possibility on the materials I have seen so far, given the terms of the letter of 27 June 2018 and given that the defendant also relies on the witness statement of Mr Henwood who makes a number of criticisms of the claimant in his evidence and concludes that *"the breakdown in working relationships is irretrievable"* for which he blames the claimant. His final paragraph reads, so far as material, as follows:

> "*In short there were too many issues on too many levels and most of us have completely lost faith in and respect for [the claimant]....I cannot actually believe that he wants to return to work ...It would certainly undermine the existing relationships if he were to return"*

120. Although Mr Powell maintained that the claimant might say something in his proposed interview with Mrs Clacey-Roberts which would make reconciliation with his colleagues a realistic possibility. In her witness statement dated 12 November 2019 Ms Clacey-Roberts asserts that, although her views are "interim" in the sense that she has not interviewed the claimant:

> "*the evidence in respect of [the breakdown in working relationships] and the strength and depth of feeling among [the claimant's colleagues] was very significant. At present it is unclear to me what material or information [the claimant] could provide which would undermine that evidence or the strength and depth of feeling expressed by those individuals, or show that there has in fact been no such breakdown."*

121. If this view is right (and I express no view for the reasons I have given), the possibility of a return to work for the claimant pending the outcome of the UPSW proceedings appears likely to be regarded by the defendant as inconceivable absent anything short of full acceptance of the blame, an abject apology and an undertaking that there will be no repetition. Even then, it seems highly unlikely that the defendant would decide to permit a return to work on the evidence I have seen.

RELEVANT CASE LAW ON THE APPLICATION OF THE EXPRESS TERMS OF THE CLAIMANT'S CONTRACT OF EMPLOYMENT

The approach to interpretation

122. The parties agreed that it was for me to decide whether the issues and concerns which are being considered in the working relationships investigation are ones which the Contract requires the defendant to investigate under UPSW. This is not a case, like *Braganza v BP Shipping Ltd* [2015] ICR 449 UKSC, where it is for the employer to determine the issue subject only to arguments based on bad faith, breach of mutual trust and confidence or irrationality. Essentially the same view was taken, albeit in the context of different contractual provisions, in *Skidmore v Dartford and Gravesham NHS Trust* [2003] ICR 721 at paragraphs 15-16 and in *Mattu v University Hospitals of Coventry and Warwickshire NHS Trust* [2013] ICR 270 CA at paragraph 81.

123. In relation to the overall approach to contractual interpretation, the parties made passing reference to the well-known principles set out by Lord Hoffmann in the *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912. I have also borne in mind the more recent guidance from the Supreme Court in *Arnold v Britton* [2015] AC 1619 paragraphs 14-23 and *Wood v Capita Insurance Services Ltd* [2017] AC 1173 paragraphs 8-14.

124. Mr Sutton also placed reliance on the following dicta which, he submitted, showed that a purposive approach should be adopted:

    i) Paragraph 19 of the speech of Lord Steyn in *Skidmore* where he advocated *"a broad and purposive interpretation enabling sensible procedural decisions to be taken"*

    ii) Paragraph 76 of the judgment of Gray J in *Gryf-Lowczowski v Hinchingbrooke Healthcare NHS Trust* [2006] ICR 425 where Gray J pointed out that disciplinary procedures provide employees with an opportunity to justify and vindicate themselves in relation to allegations of misconduct or incompetence or other criticisms of them. They also provide safeguards against loss of congenial employment and potential career damage consequent upon dismissal for such reasons.

    iii) Paragraph 150 of the judgment of HHJ Curran QC (sitting as a deputy High Court judge) in *Kerslake v North West London Hospitals NHS Trust* [2012] EWHC 1999 (QB) where he said this:

    > *"In this instant case, (1) MHPS is self-evidently of major importance to both parties in dealing with the 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"*

125. For his part, Mr Powell relied on paragraphs 47 and 48 of the judgement of Elias LJ in *Christou v Haringey LBC* [2013] ICR 1007 CA where he stated that the purpose of disciplinary procedures:

> *"is not to allow a body independent of the parties to determine a dispute between them. Typically it is to enable the employer to inform himself whether the employee has acted in breach of contract or in some other inappropriate way and, if so, to determine how that should affect future relations between them."*

126. This passage is helpful as far as it goes but the issue which Elias LJ was addressing in *Christou* was whether a disciplinary process in the context of employment is sufficiently analogous to the litigation process for the res judicata principle to apply. He was seeking to draw a contrast between the two processes, rather than giving guidance on how the interpretation of employment disciplinary procedures should be approached.

127. I consider that, in interpreting the contractual provisions in the present case, I should obviously have regard to the words which define the application of UPSW and the content of the Procedure as a whole with a view to considering whether it contemplates that the relevant issues or concerns will be dealt with under the machinery which it establishes.

128. The context in which the provisions were agreed is also important i.e. one in which there is a public interest in the effective and efficient management of the conduct, capability and performance of medical professionals but there is also potentially a great deal at stake for the practitioner and the Procedure may provide them with an opportunity for vindication. In this connection, Mr Powell accepted that if the claimant was dismissed as a result of the findings of Mrs Clacey-Roberts he would not be entitled to insist that the UPSW proceedings be completed. Mr Powell said that the defendant would do so voluntarily but he did not give a formal undertaking to this effect. Even if he had, the voluntary actions of one employer cannot affect the interpretation of a procedure which is applicable nationally. Finally, I should work on the basis that the parties to UPSW considered that it struck a fair balance between these important, potentially competing, interests or, at least, that the faithful application of the Procedure would ensure fairness.

<u>Case law on "some other substantial reason"</u>.

129. In the context of statutory employment protection, the fact that different employers may have different "takes" on a given factual situation, and therefore have different reasons for their responses to it, is well recognised. This is inherent in the fact that a person's reason for his actions is a subjective question. In my view, however, any analogy between the present case and the cases on statutory employment protection should be approached with caution given that, in the latter, the issue as to the employer's reasons turns on the interpretation and application of the particular statute under consideration including, in the case of the Equality Act 2010 for example, its EU law underpinning. There are also differences between the statutory torts in terms of the degree of connection required between the employer's reasons and the actions complained of. In the case of direct discrimination, for example, it is sufficient if the protected characteristic is a significant or material influence on the employer's thinking (*Nagarajan v London Regional Transport* [2000] 1 AC 501). In the case of unfair dismissal, the question is as to the employer's *"reason (or, if more than one, the principal reason for the dismissal"* (section 98(1)(a) Employment Rights Act 1996).

130. Mr Powell placed particular reliance on cases which are concerned with the dividing line, for the purposes of the law of unfair dismissal, between dismissal for a reason *"which relates to the conduct of the employee"* (section 98(2)(a) Employment Rights Act 1996) and dismissal for *"some other substantial reason"* under section 98(1)(b). His argument is that an analogy can be drawn between this distinction and the distinction which, he says, has been drawn by the defendant in the present case between the issues in the UPSW proceedings and the issues in the working relationships investigation.

131. One of the authorities on which Mr Powell relied to illustrate this point is *Perkin v St George's Healthcare NHS Trust* [2006] ICR 617 CA where a breakdown in working relationships led to the dismissal of the claimant. The claimant director of finance had been asked to resign by the chief executive of the Trust because of his management style and perceived lack of ability to represent the Trust. He had responded by lodging a grievance and the Trust then began disciplinary proceedings against him. In the course of the disciplinary proceedings he attacked the honesty and integrity of the chief executive and accused a colleague of lying. The Trust's dismissal letter stated that he was being dismissed because of his failure to engage with service centre chairs and other clinicians which had resulted in a loss of confidence in him as director of finance. It also said that he had taken a *"disabling and negative approach"* rather than contributing constructively to finding a solution to the problem, as a result of which his relationship with the executive team had broken down. But the Trust also considered that his conduct at the disciplinary hearing would in any event have led to his dismissal.

132. In discussing the Trust's reasons for dismissing the claimant, the employment tribunal's Reasons did not distinguish between *"conduct"* and *"some other substantial reason"*. The tribunal said that "*In a nutshell the difficulties that gave rise to the matters which led to [the claimant's] dismissal were those of personality and inter-relation with colleagues and of management style"*. It appeared to accept the Trust's case as to its reasons for dismissal, characterising them as *"style of working... manner of dealing with....requests for information which resulted in his not only being perceived as not being a corporate/team player but actually not playing a proactive part in effectively assisting the managers to suggest and implement a cost saving programme"*. The tribunal also made references to *"problems of personality approach and trust and confidence"*. It found that the claimant's dismissal was for a permissible reason, that the dismissal was procedurally unfair but that a reduction of 100% in the claimant's compensation was appropriate on grounds of contributory fault and/or under the *Polkey* principle.

133. The appeal to the Court of Appeal was on the basis that the claimant was dismissed on account of his personality. It was said that this was not capable of constituting *"conduct"* within the meaning of section 98 (2)(b) of the 1996 Act and capability had never been relied on by the Trust. Had the employment tribunal analysed the reason for dismissal correctly, it was argued, it would have approached the question of fairness differently and would not have made a 100% reduction to the claimant's compensation.

134. The Court of Appeal considered that this was a *"some other substantial reason"* case but held that the incorrect classification of the reason for dismissal did not matter as, on any basis, there was a permissible reason for dismissal and the classification did

not affect the considerations which went to the question of fairness or remedy. At paragraph 60, Wall LJ accepted what he perceived to be a concession on the part of the claimant that: *"in a given case a breakdown in confidence between an employer and one of its senior executives: (a) for which the latter was responsible; and (b) which actually or potentially damaged the operations of the employer's organisation (or which rendered it impossible for the senior executives to work together as a team)"* was capable of being *"some other substantial reason"* and therefore could result in an employer fairly dismissing the employee *"whom the employer deemed responsible for that state of affairs"*.

135. At paragraph 62, Wall LJ also agreed with Sedley LJ's view, when refusing permission to appeal on paper that *"this was a "some other substantial reason" case: an employee in a senior position could not or would not work harmoniously with colleagues and outsiders with whom a harmonious relationship was essential."*. At paragraph 63 Wall LJ went on to say:

> *"I see this, speaking for myself, as a case falling within some other substantial reason rather than conduct, and it would have been* <u>*preferable*</u>*, in my judgement, if the employment tribunal had so analysed it. However….I do not see the tribunal's failure to categorise the reason as fatal to its reasoning or to the safety of its decision"*. (emphasis added)

136. *Perkin* is thus a case in which the Court of Appeal expressed a view as to the classification of the reason for dismissal but considered that this did not affect the outcome of the case. Although it has been applied in subsequent cases *Perkin* did not turn on the classification of the reason for dismissal and the Court of Appeal therefore did not analyse the terms of section 98(2(a) of the 1996 Act closely. I also think that it is arguable that *Perkin* was a case in which the reason for dismissal *"relate[d] to the conduct of the employee"*. Arguably, this is a broad formulation, not necessarily requiring <u>mis</u>conduct, and *"some other substantial reason"* under the statute is very much a residual category of case in which it cannot be said that the employer's reason is even *"related to"* the employee's conduct or capability. But I do not need to decide this issue, and nor am I bound by *Perkin* given that the present case turns on the interpretation of the claimant's contract of employment rather than the interpretation of the 1996 Act.

137. Mr Powell also relied on the decision of the Employment Appeal Tribunal in *Ezsias v North Glamorgan NHS Trust (No 2)* [2011] IRLR 550. Here, a maxillofacial surgeon was dismissed after nine senior members of his department signed a petition registering their grave concerns about what they saw as a lack of progress in resolving their concerns about his *"excessively frequent, unacceptably detailed and unrelenting to an extreme degree"* complaints against them. He was dismissed without disciplinary proceedings against him and part of his case was that his dismissal was unfair because the employer had, in breach of contract, failed to follow Whitley Council disciplinary procedures which were applicable to *"allegations of misconduct"* and distinguished between allegations of personal or professional misconduct. This point therefore turned on the application of the particular terms of his contract.

138. Applying *Perkin*, the employment tribunal found as a fact that the reason for dismissal was the breakdown in working relationships between the claimant and his colleagues, and therefore *"some other substantial reason"* rather than *"conduct"*, so that the

Whitley Council procedures did not apply. The Employment Appeal Tribunal did not interfere with this conclusion. Keith J said this at paragraph 53:

> *"..the tribunal was alive to the refined but important distinction between dismissing [the claimant] for his conduct in causing the breakdown of relationships, and dismissing him for the fact that those relationships had broken down…..although as a matter of history it was [the claimant's] conduct which had in the main been responsible for the breakdown of the relationships, it was the fact of the breakdown which was the reason for his dismissal (his responsibility for that being incidental)."* (emphasis added)

139. At paragraph 54, Keith J went on to say:

> *"Once you have excluded [the claimant's] responsibility for the breakdown of the relationships as the cause of, or a factor contributing to, that breakdown, and you concentrate only on the fact of the breakdown of the relationships, the answer, in our view is inevitable. However you characterise the reason for the action taken against him, it was not his conduct."* (emphasis added)

140. In other words, it was found as a fact that the sole reason for dismissal was the fact of the breakdown in working relationships rather than the reason for the breakdown. The claimant had not been dismissed because an *"allegation of misconduct"* against him had been upheld and there had therefore been no breach of the terms of his contract. As Keith J said at paragraph 58

> *"…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 up 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."*

141. Permission to appeal was refused by Elias LJ on the papers and then by Mummery LJ at an oral hearing: see [2011] EWCA Civ 1440. Mummery LJ held that the argument on behalf of the claimant impermissibly sought to go behind the tribunal's finding that the reason for dismissal was the objective fact of the breakdown of relationships in the department and to look at what Mummery LJ called *"the reasons for the reason"*.

142. At paragraph 21 Mummery LJ agreed with the submission that *"It would obviously be wrong… for an employer in a case to which the contractual disciplinary procedure applied to seek to sidestep it by categorising allegations of personal professional misconduct as some other substantial reason, or, …… as breaches of the implied duty of trust and confidence"*. However, on the tribunal's findings, this was not what had happened in that case. He also approved Elias LJ's observation that employment tribunals "*must be alert to the possibility that an employer will seek to evade the disciplinary procedures by describing the reason for dismissal as a breakdown in a relationship"*. Indeed, this is an important safeguard against abusive behaviour by the employer. But it remains the case that, at least in the context of statutory employment

rights, the fact that the conduct or performance of an employee may lead to dysfunctional working relationships does not necessarily mean that the employer's reason for its response to that situation is the conduct or performance of the employee. Whether it does mean this is a matter for evidence.

Three cases on enforcing disciplinary procedures in the health service

143. The parties also drew particular attention to a trilogy of cases in which claims for injunctive relief based on breach of contract were made in the courts by NHS medical practitioners. In each case the practitioner alleged that they were entitled to the protection of contractual disciplinary procedures in relation to investigations being carried out by their employer and/or attempts to dismiss them.

Lauffer

144. The first of these cases was *Lauffer v Barking, Havering and Redbridge University Hospitals NHS Trust* [2009] EWHC 2360 (QB). Here, the claimant consultant general surgeon was entitled to the protection of the disciplinary procedures set out in MHPS which apply to concerns about the "conduct, performance and health" of medical and dental employees as these terms defined or described in those procedures. Various concerns about the claimant's clinical performance arose, as a result of which he was suspended from practice and his registration was suspended on an interim basis by the GMC.

145. On 16 September 2008 the claimant was invited to a formal disciplinary hearing. The allegation against him was "unprofessional conduct" based on two particular episodes which had led to a loss of trust and confidence in him. When the claimant argued that these were issues of capability, there were various delays culminating in an invitation to a "catch up" meeting on 25 June 2009 at which the claimant was handed a letter purporting to give him three months' notice of termination on the grounds that there had been a loss of trust and confidence in him.

146. The claimant applied for interim injunctive relief and the central issue was whether there was a serious issue to be tried as to whether the Trust was in breach of contract in failing to address its concerns under MHPS. Holroyde J (as he then was) accepted that, in principle, a loss of trust and confidence between employer and employee may be *"some other substantial reason"* which is capable of justifying dismissal but he granted interim relief. His view was that a common theme in the witness statements relied on by the defendant was that "*what has given rise to concern about the claimant is his lack of judgement and his lack of insight"*. It was strongly arguable that these went to the claimant's capability to perform his role as a surgeon.

147. Mr Sutton places reliance on Holroyde J's reasoning in coming to his decision. In particular:

i) First, Holroyde J appeared to accept that cause and effect are two sides of the same coin in this type of case: *"a loss of trust and confidence must be based on some intelligible and proper cause"* (paragraph 37). This appears to refer to a submission on behalf of Mr Lauffer that *"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….inevitably raises in the circumstances of this case issues of capability” (paragraph 24).

ii) Second, at paragraph 39 Holroyde J also said:

> "*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 claimants capabilities….I further accept… That the contractual provision in relation to "some other substantial reason" is a residual category for cases where there is no misconduct or no capability issue, for example, a clash of personalities…"the MHPS inspired scheme cannot… Be sidestepped by relabelling"* (emphasis added)

iii) Third, Mr Sutton places reliance on paragraph 40 of the judgement of Holroyde J where he said that:

> *"In coming to those views it has been an important factor in my consideration that the defendant itself regarded the disciplinary route is applicable to the circumstances of this case".*

iv) Fourth, he also places particular reliance on paragraph 41 of the judgment of Holroyde J where he said the following:

> *"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."*

148. In my judgement these passage highlight evidential features of the *Lauffer* case which led to the conclusion that interim relief was appropriate, rather than establishing any generally applicable legal principle. Apart from the fact that *Lauffer* was an application for interim relief, and Holroyde J therefore merely accepted that the claimant's case was *"strongly arguable"*, in the light of the well-established principles in the case law on statutory employment protection, he cannot be taken to have been saying that there can never be cases in which an employer's concern is solely about effect rather than cause.

149. Secondly, a key feature of the *Lauffer* case was that the only cause of the alleged loss of trust and confidence was Mr Lauffer's alleged lack of judgement and insight. This was not presented as a "dysfunctional working relationships" case (i.e one where the concern was that colleagues would not work with him) and it was therefore significantly more difficult for the Trust to persuade the court that cause and effect could be distinct concerns (in this connection, see the remarks of Underhill P as he then was in *Macfarlane v Relate Avon Ltd* [2010] ICR 507, paragraph 39). Moreover, the fact that the Trust had changed course, having previously regarded the matter as an issue to which the disciplinary procedures did apply, was a further evidential pointer to the conclusion that its professed reason was not its true reason. There were also other aspects of the Trust's behaviour which supported this view.

150. In my view *Lauffer* should therefore be seen as a case in which, on the facts, it was strongly arguable that the employer's professed reasons for its actions were not its real reasons.

Kerslake

151. The second case in the trilogy is *Kerslake v North West London Hospitals NHS Trust* [2012] EWHC 1999 (QB). This was another case in which the contract of a Consultant Obstetrician and Gynaecologist incorporated MHPS. Ms Kerslake had problematic relationships with three key colleagues and, in February 2009, lodged a grievance against them in which she complained that two of them were bullying her, interfering with and placing unnecessary restrictions on her work, as well as engaging in unprofessional conduct. The complaint against the third colleague was that he had not taken adequate steps to improve working relationships with the other two colleagues and had failed to protect her clinical practice.

152. In response to this grievance, the Trust asked a distinguished independent practitioner to investigate. He rejected Ms Kerslake's complaints and found that she was not fit to practice as an independent consultant surgeon in her field. As a result, the Trust suspended Ms Kerslake and referred her to NCAS, pursuant to MHPS, for an assessment of her capability.

153. NCAS found that in fact Ms Kerslake was performing at a satisfactory level for a consultant so that, in principle, there was no reason why she could not continue to work as such. In its final conclusions, however, NCAS pointed out that *"given the breakdown in the relationship between Miss Kerslake and [the Trust] (as detailed by both parties), the Trust will need to consider the feasibility of Miss Kerslake's reintegration"*.

154. When he received the NCAS assessment Professor Shaw, the Medical Director of the Trust, asked an outside firm of solicitors, Capsticks, to investigate whether, as a matter of objective fact, there had been a breakdown in relationships between Ms Kerslake and her colleagues *"regardless of who (or indeed whether anyone) was to blame"* for this. Capsticks duly investigated and its report stated that there was *"a clear lack of trust and confidence"* in Ms Kerslake. Whilst she considered that the issues were in the past and there was no problem with her returning to work, and while some others shared this view, various colleagues, including one of the individuals she had complained against and five other consultants, expressed serious concerns about her. Those concerns were, broadly, about her performance as a clinician.

155. The advice of Capsticks was that the concerns of Ms Kerslake's colleagues should be considered. The Capsticks view was that MHPS did not apply as the issues to be considered did not involve conduct, capability or ill-health. The issue of capability had been fully explored and excluded as a concern by NCAS and Ms Kerslake's behaviours could not possibly be identified as misconduct. Any possibility of dismissal therefore could only be considered on a *"some other substantial reason"* basis and dismissal would only be appropriate if it were found that trust and confidence had irretrievably broken down. They recommended that there be a formal hearing to determine whether there had in fact been an irretrievable breakdown in trust and confidence between Ms Kerslake and the Trust resulting from irreconcilable

differences in day-to-day working relationships between her and other key members of the department.

156. The breach of contract claim which came before HHJ Curran QC, sitting as a High Court Judge, was for, amongst other things, an injunction to prevent the process from going any further. That claim was unsuccessful. Judge Curran accepted that the Trust was acting in good faith at all material times in its dealings with Ms Kerslake. He accepted that Professor Shaw genuinely accepted the conclusion of NCAS that Ms Kerslake was clinically competent and that he was entirely genuinely seeking to address the question of reintegration when he commissioned the Capsticks investigation. Professor Shaw was not seeking to sidestep MHPS and/or to dismiss Ms Kerslake by a more convenient procedural route. There was therefore no sense in which Professor Shaw was acting capriciously, arbitrarily or irrationally or in breach of mutual trust and confidence.

157. Judge Curran went on to find that, as a matter of contractual interpretation, it was inappropriate for MHPS to be applied to the investigation of a possible breakdown in relationships between employees *"where (a) the suggested basis [for the] 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"* (paragraph 151 (4)).

158. This, then, is the key to the *Kerslake* decision. The MHPS process had been completed and any concerns about Ms Kerslake's capability or conduct had been finally determined in her favour. As Judge Curran put it:

> *"for Professor Shaw, capability was a matter which was cut and dried. He had no choice but to accept the NCAS report….He did so in good faith, so that that, as Medical Director, represented his subjective view. It was also the only view which could be taken objectively."* (paragraph 169).

159. The Judge on to say, at paragraph 170, that:

> *"in no meaningful sense of the word was the issue under investigation one which involved the 'conduct' of the claimant of the Claimant… It is more realistic to say that the "conduct" of those who oppose her return is possibly involved…"* .

160. By way of explanation of this point:

    i) At paragraph 172 Judge Curran said: *"Here the doctor's conduct is entirely blameless. The perception of dysfunction is not one which will be 'created' by her behaviour at all. The perception is that her mere presence within the Department will result in a reaction by colleagues which will result in dysfunction."*.

    ii) At paragraph 176 he said, in addressing an argument that the case fell within the definition of 'misconduct' under paragraph 5 of Part III of MHPS: *"If the behaviour characterised as misconduct i.e. 'unreasonable or inappropriate behaviour… towards… other employees' is their behaviour rather than hers, it is surely clear that it is wrong to regard that as a case against her which involves conduct of capability issues"*.

161. At paragraph 186 Judge Curran QC drew a contrast with the situation in *Lauffer*: referring to the position of the Trust in the *Kerslake* case he said:

> *"It does not rely upon the statements of the witnesses who made adverse comments about capability as evidence of the truth or accuracy of those comments, but as evidence that there are potentially irreconcilable differences between the witnesses and the Claimant. Whether or not other consultants have lost confidence in the Claimant's capability is an issue which has to be approached as a matter of fact: do the witnesses hold that belief and is it an unshakeable belief? Is there any way of persuading them to modify? It is difficult to see how the Trust, having accepted the NCAS report, could proceed on any basis other than that it is a mistaken belief. Many mistaken beliefs are nevertheless genuinely held. Someone may be an entirely competent surgeon, as a matter of fact. But it may equally be a matter of fact that a number of colleagues think that he or she is incompetent."*

162. Judge Curran QC accepted that the Trust was genuinely concerned solely with the feasibility or otherwise of reintegrating Ms Kerslake into its workforce given the evidence of a breakdown in working relationships between her and her colleagues. He accepted Professor Shaw's evidence that he needed *"some information on the breadth, depth and magnitude of the other consultants views ... To get a measure of whether reintegration [would] not be feasible, which could result in a dysfunctional team, and that in turn endangering patient safety"*. The concern was *"not to measure <u>why</u> people held that view but to assess the extent of that view and to try to get a sense of whether that view was reversible"* (paragraphs 167 and 168).

163. In my judgement *Kerslake* is therefore a case where, on the evidence, the court was able to conclude that it was no part of the Trust's purpose to investigate concerns about the claimant's capability or conduct. That conclusion was more readily available to the court than in the present case because the MHPS process had been undertaken and completed. In contrast to the present case, the issue as to the appropriate procedure arose in the context of consideration of whether the claimant could be reintegrated into the workforce having been exonerated. Given that the Trust genuinely accepted that the claimant was both competent and blameless, absent bad faith it was logical to conclude that it could not be investigating concerns about her competence or conduct. Added to this, and again in contrast to the present case, Professor Shaw was quite clear as to the narrow issue which was to be considered – there was no interest in why relationships had broken down - and the court was able to take the view that that the Trust was proceeding on the basis that the colleagues had a mistaken and unreasonable view of the claimant but that it was strongly and genuinely felt.

Jain

164. The third case in the trilogy is *Jain v Manchester University NHS Foundation Trust* [2018] EWHC 3016 HC. Here, Dr Jain was employed by the Trust as a Consultant Radiologist. In November 2015, the Trust embarked on proceedings under Part IV of MHPS which were said to relate to Dr Jain's clinical practice. The concerns related to (1) participation in breast assessment clinics, (2) film reading performance, (3) a serious untoward incident and (4) *"on going issues concerning Dr Jain's interpersonal and communication style regarding his relationships and approach to*

his line managers". Restrictions were placed on his practice pending the outcome of these proceedings.

165. In March 2017, the Trust proposed a "stay" of the MHPS investigation and mediation between Dr Jain and the other Consultant Radiologists in the Breast Service. It was then agreed between the parties that there would be a relaxation of certain of the restrictions on Dr Jain's practice and that there would be a mediation involving Dr Jain and other consultant radiologists as part of the return to work.

166. The mediation took place in June/July 2017 and was unsuccessful. The mediator reported that:

> *"in the light of the strength of feeling against Dr Jain it would appear that relationships have irretrievably broken down and hence it is no longer possible for this group of people to work with Dr Jain. This being the case it would not be possible to achieve a safe team, due to the level of dysfunction, while the membership of the team remains unchanged."*

167. The Trust subsequently wrote to Dr Jain stating that, although it was committed to the principles of reintegration, it was now apparent that there were fundamental issues which could impact on the Trust's ability to integrate him into the team that needed to be investigated before any further action was taken. An independent inquiry into the impact of the breakdown in relationships reported by the mediator would therefore be commissioned in the light of the fact that all of the consultants within the Breast Radiology team had indicated that they felt unable to support his reintegration into the team or to work with him in future.

168. A Ms Lockett was instructed to carry out the investigation. Her terms of reference were:

> "*4.1 To investigate the extent to which relationships have broken down between Dr Jain and his colleagues in the Breast Radiology Team; and*
>
> *4.2 To investigate the potential impact that such breakdown in relationships may have on the proper functioning of the Breast Radiology team, and delivery of safe patient care, should Dr Jain be permitted to return to his former duties (if appropriate <u>and subject to clinical concerns being properly addressed</u>)*; and (emphasis added)
>
> *4.3 To investigate any factors that may ameliorate the potential impact on the proper functioning of the Breast Radiology team and the delivery of safe patient care"*

169. Dr Jain issued proceedings for breach of contract, amongst other things, on the basis that the Trust was not permitted to carry out an investigation outside MHPS in circumstances where an investigation under Part IV of MHPS into the same matters was currently suspended and/or without seeking to resolve the underlying concerns pursuant to Part IV.

170. Importantly, Swift J held that MHPS was <u>not</u> incorporated into Dr Jain's contract of employment. He accepted, however, that the provisions of MHPS were relevant

considerations when determining whether the Trust had acted consistently with the implied duty of mutual trust and confidence. Indeed, he held that, the Trust having made clear that its concerns relating to Dr Jain's competence and professional relationships would be addressed under Part IV MHPS, *"the obligation to maintain trust and confidence required the Trust to follow the procedure set out in that part of the MHPS unless there was a justifiable reason not to do so."* (paragraph 35)

171. At paragraphs 57-64 Swift J concluded that there had not been a breach of the duty of mutual trust and confidence. He noted that the Lockett investigation did reflect the key features of MHPS (paragraph 60).

172. Importantly, at paragraph 61 Swift J also considered that "*The matters within Mrs Lockett's terms of reference did not sit easily with the description of capability issues in Part 4 MHPS, paragraph 3*". I agree with him on this point. Paragraph 3 described capability issues as follows:

> *"…occasions where an employer considers that there has been a clear failure by an individual to deliver an adequate standard of care, or standard of management, through lack of knowledge, ability or consistently poor performance."*

173. Swift J added:

> *"As I see it, given the other allegations in the November 2015 investigation that were clearly capability issues, it made sense then for the allegation about interpersonal communication style to be wrapped into the MHPS investigation. But, by December 2017, following the mediation, 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."* (paragraph 61)

174. Swift J accepted that there was a link between the matters which were being considered in both investigations but did not consider that this gave rise to a breach of the implied term given that the difference between the two processes was "slight" and given that that the terms of reference for the Lockett investigation rested on the premise that the capability concerns could and would be addressed separately. The simple existence of a link between the November 2015 issues and the issues which were to be investigated by Ms Lockett was not sufficient to require the Trust to treat the investigation as an MHPS investigation (paragraph 63).

175. Nor did Swift J consider that the fact that the possibility of further formal action was left open meant that the commissioning of the Lockett investigation was a breach of mutual trust and confidence:

> *"As I have said, in this case, the contents of the MHPS inform but do not necessarily determine the content of the trust and confidence obligation. The outcome of the mediation put a new light on the state of the working relationships between the Claimant and the remainder of the consultant radiologists in the Breast Service, and that being so, the decision to commission the Lockett investigation was not a breach of the trust and confidence obligation."* (paragraph 64)

176. *Jain* was therefore a case which turned on the duty of mutual trust and confidence rather than directly on the interpretation of MHPS. Swift J found that the Trust had not breached this term given that it was genuinely concerned only with the question of working relationships in the context of the proposed reintegration of Dr Jain into the team, given that the concerns which had given rise to the working relationships issues did not readily fall within the description of capability under the MHPS (i.e. the procedure probably did not apply in any event) and given that in substance the key requirements of MHPS had been complied with. Evidently, Swift J also considered that the issues relating to Dr Jain's interpersonal and communication style were readily separated from the other three matters which were being investigated under the MHPS procedure, in contrast to the present case where the matters which are the subject of the UPSW proceedings are intertwined with the concerns about working relationships.

177. At points in his oral submissions Mr Sutton appeared to come close to arguing that *Lauffer* and *Kerslake* and *Jain* establish rules or at least rules of thumb: if contractual disciplinary process is ongoing (*Lauffer*) it will not be permissible to begin a different process relating to the same evidential material; if, on the other hand, the contractual process has been completed (*Kerslake*) it may be permissible to embark on an extracontractual process relating to linked issues; if the contractual process has effectively been stayed (*Jain*) the same may be true. If this was his argument, I do not accept it. Whilst I agree with Mr Sutton that these were important evidential features of these three cases, each turned on its particular facts. In *Lauffer* the evidential position was such that the court was unwilling to accept (at least at the interim stage) the Trust's case as to its true reasons for the disciplinary proceedings which were challenged. In *Kerslake* the evidential position was such that the court was willing to do so and it held that the terms of the particular contractual procedure, MHPS, did not apply to these reasons. In *Jain* the case turned on the question of breach of mutual trust and confidence rather than the true construction of MHPS, although the court considered that the issues in the Lockett investigation were probably not issues of capability as defined.

OUTLINE OF THE ARGUMENTS OF THE PARTIES

On behalf of the claimant.

178. Mr Sutton submits that the operative provision in the present case is clause 9.2 of the Contract. This should be given a broad and purposive meaning given that UPSW provides the practitioner with important procedural safeguards against unjustified disciplinary action as well as the opportunity for vindication and to safeguard their reputation. The terms of clause 9.2 should be applied to the objective facts about what the issues are and what is being investigated. The subjective opinions of the defendant's witnesses as to the scope and/or the application of the Procedure and/or the feasibility of investigating the relevant issues under that Procedure are irrelevant.

179. Mr Sutton also argues that the matters which are being considered in the working relationships investigation clearly relate to the conduct or behaviour of the claimant and are therefore required to be investigated under UPSW. All that the working relationships investigation does is to examine the same issues but through a different lens. It impermissibly and artificially seeks to isolate the effect or impact of the claimant's conduct or behaviour from the question whether he acted as alleged and if

so, whether he is at fault. If the defendant's approach is permissible then, paradoxically, the more serious the conduct or lack of capability of an employee, the easier it will be to sidestep the Procedure by focusing on the impact on colleagues or managers in terms of working relationships or trust and confidence. Where there are subsisting concerns about a doctor's conduct or capability, the Procedure cannot be avoided by seeking to label those concerns as a breakdown in relationships or trust and confidence. In this connection, Mr Sutton places particular emphasis on the parallels with the facts of the *Lauffer* case as I have noted.

180. In the alternative, Mr Sutton argues that the inextricable link between the conduct alleged against the claimant and its impact means that it is contrary to the implied duty of mutual trust and confidence to seek to deal with these two issues in parallel. The working relationships process threatens to sidestep the safeguards available to the claimant under UPSW and it puts him in an impossible position. If he continues to dispute the allegations against him it will be said that this confirms that the breakdown in working relationships is irretrievable; if, on the other hand, he admits what is said against him and apologises this will in effect confirm the allegations of misconduct against him in the UPSW proceedings.

On behalf of the defendant

181. Mr Powell submits that the operative provision is paragraph 189 of the Medical and Dental Staff (Wales) Handbook. UPSW is applicable where an employer is *"addressing concerns about capability, performance and conduct"*. It is a *disciplinary* procedure which is directed at cases where the practitioner is said to be at fault. By contrast, the working relationships investigation is simply concerned with whether working relationships have broken down and, if so, to what extent, and what can be done about it. These are not issues which have been or could be investigated under UPSW, still less are they required to be investigated under the Procedure. In effect, this is *a "some other substantial reason"* rather than a *"conduct"* investigation and therefore analogous to the *Perkin* and the *Ezsias* cases discussed above. Mr Powell also made comparisons between the present case and *Kerslake* and *Jain* which he said both supported his arguments.

182. Breach of mutual trust and confidence is also denied by the defendant. The claimant does not allege bad faith or challenge the sincerity of the defendant's views as to the applicability of the Procedure or as the legitimacy of the working relationships investigation. Here, there are genuine concerns about the breakdown in working relationships, as Mr Ter Haar QC acknowledged at paragraph 19 of his judgement rejecting the claimant's application for a stay. The defendant has a legitimate interest in investigating those issues as expeditiously as possible, particularly given its view that they cannot be investigated under UPSW. It is desirable for the defendant to do so for the reasons given by its witnesses, as summarised above.

DISCUSSION AND CONCLUSIONS ON THE APPLICATION OF THE EXPRESS TERMS OF THE CONTRACT

Introduction

183. As noted above, the first issue which I have to determine is one of construction of the particular contractual terms under consideration in the present case. The case law

relating to the interpretation of *"some other substantial reason"* where this term appears in section 98(1)(b) Employment Rights Act 1996 is therefore of limited assistance, albeit I accept that the case law in the field of statutory employment protection recognises that the same factual situation may give rise to different concerns as I have discussed above. Likewise, *Lauffer*, *Kerslake* and *Jain* turn on the particular contractual arrangements and facts in those cases.

Which term falls to be interpreted?

184. Although Mr Powell argued that my task was to interpret paragraph 189 of the Medical and Dental Staff (Wales) Handbook rather than clause 9.2 of the Contract, this is not an issue which arises on the statements of case. This is because paragraph 189 is not specifically pleaded in the Defence. Moreover, paragraph 13.1 of the Defence admits that clause 9.2 incorporated UPSW. Paragraph 13.2 then admits that "*in accordance with Clause 9 of the Contract issues relating to conduct, competence and behaviour which arose from or after 1 September 2015 were to be handled in accordance with UPSW"*. Paragraphs 13.3 and 13.5 then underscore this admission. When I pointed this out to Mr Powell in the course of argument, he confirmed that this was the position and did not seek permission to amend, despite the fact that, as I have noted, the claimant sought, and was given, permission to amend to bring his case, based on clause 9.2, into sharper focus.

185. In any event, I consider that the relevant provision for present purposes is clause 9.2 rather than paragraph 189. This is because in the event of any conflict between the terms of the host contract and terms which it incorporates, the former will prevail: see eg *Sabah Flour and Feedmills Sdn Bhd v Comfez Ltd* [1988] 2 Lloyds Rep 18 CA. Paragraph 189 is an incorporated term and must give way to clause 9.2 of the Contract insofar as it conflicts with that provision.

186. Moreover, neither party showed any enthusiasm for an argument that the result would be different according to whether the allegation of breach of contract turns on clause 9.2 or paragraph 189. This possibility was implicit in the stance which Mr Powell took but he did not explain the basis on which the different wording made a difference to the outcome. I do not consider that it does.

Is the approach subjective or objective?

187. In the course of submissions, there was some discussion about whether the approach to the application of the relevant contractual provisions is subjective or objective. I put to Mr Sutton, and he agreed, that it is both. The question what issues or concerns are being handled or addressed is subjective in the sense that *people* have issues and concerns but it is objective in the sense that, having identified those concerns, it is for the court to apply the terms of the Contract to the facts as found. The court is also entitled to have regard to the objective evidence of what has actually taken place in relation to the working relations investigation to decide whether, objectively, that is permissible under the terms of the Contract. Although Mr Sutton did not allege bad faith or question the sincerity of the defendant's witnesses' interpretation of the Contract or UPSW, obviously their subjective opinions on these matters are irrelevant.

What issues or concerns are being investigated in the working relationships investigation?

188. It is clear that the claimant's colleagues have raised issues or concerns about him that, they say, his behaviour or conduct towards them is unacceptable and that this makes it difficult or impossible for them to work with him. As I have noted, this type of alleged issue or concern forms virtually the entirety of the conduct related allegations against him in the UPSW proceedings and it also underlies some of the clinical concerns because his behaviour impacts on the effectiveness of the team or department in which he works.

189. Looking at the matter from the point of view of Dr Kloer, Dr Edmunds, Dr Robertson-Steel and Mr Morgan they clearly have "live" issues and concerns about the behaviour and conduct and performance of the claimant. These issues and concerns are currently the subject of the UPSW proceedings and the referral to NCAS, and they have been from the outset and at every stage of those proceedings. Moreover, the issue of working relationships has been firmly on the agenda throughout those proceedings, as I have sought to illustrate.

190. Dr Kloer describes the working relationships investigation as addressing issues or concerns which are *"separate"* or *"discrete"* but they are neither. In my judgement the issues in the working relationships investigation clearly substantially overlap with the issues in the UPSW proceedings and, particularly where they overlap, they are closely intertwined. At every stage of the UPSW proceedings, Dr Kloer and those conducting those proceedings have been concerned with both the behaviour of the claimant and its effect on working relationships with his colleagues, particularly in relation to the allegations of misconduct. Indeed, as I have pointed out, the "Other observations" section in Dr Robertson-Steel's report is relied on by the defendant before Mr Moon's Inquiry Panel. This is unsurprising given that the issues as to blameworthiness and seriousness of the claimant's alleged behaviour, and the question whether his continued employment with the defendant is feasible or whether he should be dismissed, are closely bound up with the issues as to the effect of his behaviour on colleagues and their ability to work together given what has or has not happened between them.

191. Dr Kloer and Mr Powell point out that the terms of reference which were provided to Dr Diggle and then to Mrs Clacey-Roberts are, on their face, concerned with a fact-finding exercise as to the state of working relationships with the claimant and whether they are remediable. They also point to the accompanying statements to the effect that the defendant anticipated and/or hoped that it would be unnecessary to apportion fault or blame in the course of the investigation. As I have pointed out, however, the terms of reference did not rule this out or forbid consideration of these questions, still less consideration of the reasons for any breakdown in relationships. Unlike in the *Kerslake* case, Dr Diggle and Mrs Clacey-Roberts were not instructed to treat the claimant as blameless. Nor was that the defendant's view, as Dr Diggle and Mrs Clacey-Roberts appear to have been aware. Nor were they told merely to gather *"some information on the breadth, depth and magnitude of the other consultants views"* and that they should *"not ..measure why people held that view but....assess the extent of that view and to try to get a sense of whether that view was reversible"*.

192. As I have also pointed out, without such instructions it was inevitable that Dr Diggle and Mrs Clacey-Roberts would need, at the very least, to explore the reasons why

colleagues felt that working relationships had broken down in order to assess whether they were remediable. It was also highly likely that they would wish to form a view about the extent to which the allegations against the claimant were true, so as to gauge the plausibility of a given colleague's claim that the situation was irremediable. Thus, although Mr Sutton did not challenge Dr Kloer's evidence as to his intentions or motives, or, indeed, this aspect of the evidence of any of the defendant's witnesses, that evidence fell short of establishing that those who participated in the decision to commission the working relationships investigation were solely concerned with the existence or otherwise of a breakdown in working relationships, whether or not justified, and had excluded the possibility of any consideration of the reasons for the breakdown. At best, they had not thought through the implications of what they were asking Dr Diggle, and then Mrs Clacey-Roberts to do and had left the matter open.

193. In addition to this, in my judgement the actions of Dr Diggle and Mrs Clacey-Roberts are plainly attributable to the defendant. Whatever may or may not have been the intentions of Dr Kloer, as I have pointed out, what they actually did do was examine the reasons why working relationships were said to have broken down. They also regarded the question whether conduct of the claimant was consistent with the standards required of an employee in his position as relevant to their assessment. Dr Diggle formed a view on the blameworthiness or otherwise of the claimant's behaviour as, in my view, did Mrs Clacey-Roberts. Even if she did not do so, she relied on the views of others in relation to this question. None of this is surprising, for the reasons I have explained.

Is the working relationships investigation *"handl[ing]… any issues relating to conduct, competence and behaviour"*?

194. In my view it is. That is plainly the case on a literal reading of the text of clauses 9.1 and 9.2 of the Contract which, require the defendant to "*handle*"… *"any issues relating to conduct, competence and behaviour" …"in accordance with [UPSW]"* (emphasis added). That is the nature of the issues expressed by the claimant's colleagues and which Dr Kloer is seeking to *"handle"*. It is also what in fact Dr Diggle and Mrs Clacey-Roberts have been doing.

195. Even if consideration of moral blame for any breakdown in working relationships between the claimant and his colleagues had been entirely ruled out in Dr Kloer's terms of reference, and Dr Diggle and Mrs Clacey-Roberts had not in fact considered these matters at all, in my view it would still be the case that they were investigating issues *"relating to"* the conduct or behaviour of the claimant. Clauses 9.1 and 9.2 refer to issues relating to "conduct" and "behaviour" rather than "misconduct" or "misbehaviour". As I have pointed out, the working relationships investigation is not about departmental relationships in general: it is about working relationships between the claimant, in particular, and his colleagues in the light of issues raised by them about his conduct and behaviour. But I do not need to go that far because, as I have also pointed out, the scope of the working relationships investigation made it highly likely that a deeper inquiry would be undertaken which is, indeed, what happened.

196. I accept that the words *"relating to"* in clause 9.1 cannot be stretched too far and, in particular, that they must take some colour from the heading to Section 9 of the Contract which, as noted above, is *"Disciplinary Procedures"*. But, in my judgement, the fact that that the purpose of a disciplinary procedure is to provide procedural

safeguards against unwarranted action by the employer, which may affect the employee's economic and social standing in the immediate and longer term, supports the view that clause 9.2 committed the defendant to handling any issues which related to conduct, competence and behaviour where there was the potential for an outcome which reflected adversely on the claimant and therefore damaged his reputation in a way which was material to the pursuit of his chosen profession. I also bear in mind that the logic of Mr Powell's argument is that the defendant could have chosen not to embark on the UPSW proceedings at all and simply to move directly to the question whether his colleagues were implacably unwilling to work with him because of his behaviour towards them, with a view to dismissing him if they were.

197. Clearly, a finding that working relationships between the claimant and a number of his colleagues had broken down because of his conduct or behaviour would have the potential to damage his chosen career. This would be so if the result was the termination of his employment but, even if this was not the outcome, his future promotion or employment prospects would be potentially affected. Even if the working relationships investigation had entailed no consideration whatsoever of the reasons for any breakdown in working relationships it is still the case that a bald finding that none of the claimant's colleagues could work with him for reasons which were unexplained would inevitably reflect adversely on him and would likely have adverse consequences for him professionally. But, as I have pointed out, the working relationships investigation entailed, both in principle and in practice, consideration of the reasons why relationships between the claimant and his colleagues had broken down and whether, in the light of those reasons, the situation was retrievable.

Is the working relationships investigation *"addressing concerns about capability, performance and conduct"*?

198. I have considered this question from an abundance of caution. Again, I consider that a broad and purposive approach to these words is appropriate for the reasons I have given. But, again, I do not think that a particularly broad reading is required to bring the present case within paragraph 189 of the Medical and Dental Staff (Wales) Handbook even having regard to the description of UPSW as a *"disciplinary procedure"*.

199. In my judgement the working relationships investigation is *"addressing concerns about capability, performance and conduct"*. As I have pointed out, UPSW expressly recognises that the concerns which may be addressed under its provisions may be *"Concerns raised by other NHS professionals; healthcare managers; students and non-clinical staff;"*. The concerns expressed by the claimant's colleagues which appear to have damaged working relationships are concerns about the claimant's conduct towards them as a consultant in the NHS. Dr Kloer and Mr Powell emphasised the obvious importance of team working in this context and the claimant's alleged failures in this regard are therefore eminently capable of also being regarded as matters of performance which have damaged working relationships. Obviously, any acceptance that those concerns are genuine, let alone well-founded, is likely to reflect adversely on the claimant.

200. Even if the question is addressed purely by reference to the concerns of Dr Kloer and others who were party to the decision to commission the working relationships investigation, which I do not consider to be the correct approach, they clearly were

concerned "about" the suggestion that the conduct and performance of the claimant had led to a breakdown in working relationships. This was precisely the concern which emerged in the course of the UPSW. It is a concern on which the defendant relies before Mr Moon's Inquiry Panel and it is the concern which was being addressed in the working relationships investigation. As I have pointed out, the concerns about the claimant's conduct and its impact are inextricably linked and the defendant did not rule out consideration of both sides of this particular coin by Dr Diggle and Mrs Clacey-Roberts.

<u>Is it feasible for the concerns which are being addressed in the working relationships investigation to be addressed under UPSW?</u>

201. Mr Powell's submission was that it was not feasible for the relevant concerns to be addressed under UPSW but that, even if it was feasible, this did not detract from his case. Obviously, a court would wish to avoid the conclusion that an employer had committed to addressing matters under a procedure which were not capable of being addressed under that procedure. However, this difficulty does not arise in the present case.

202. To my mind, the key point is that the relevant contractual provisions do not contemplate that the employer will prejudge the outcome of the process of addressing or handling issues or concerns in order to decide whether to follow UPSW. The gateway provision, whether it is clause 9.2 or paragraph 189, is deliberately framed in wide terms so as to require a broad range of concerns and issues to be examined under UPSW. The Procedure itself then facilitates fair decision making by the employer and it contemplates that the employer may conclude at any stage that there are, in fact, no significant concerns about the practitioner's conduct, performance or capability, or that the practitioner is not at fault, or that the situation does not warrant further action under the Procedure. Indeed, as I pointed out to Mr Powell, Part 3 of the procedure is designed to deal with cases where the concern is about the health of the practitioner rather than seeking to determine whether they are at fault.

203. Thus, for example:

i) The Medical Director may examine a concern about the capability, conduct or performance of a practitioner and conclude that it should be addressed through local mechanisms (paragraph 1.1).

ii) The Case Manager may conclude, after an initial assessment that the concern can be resolved informally, drawing on guidance and support from NCAS or other external resources as appropriate (paragraph 1.7).

iii) The Case Manager may conclude, after a formal investigation, that one or more of a range of options is appropriate. If they conclude that no question of a disciplinary nature arises they can make this clear and decide that no further action is called for under UPSW or that non-disciplinary steps are appropriate, such as dealing with the case as a health issue under Part 3 or seeking the assistance of NCAS or an equivalent body.

iv) Even if the matter proceeds down the disciplinary route, under both of Parts 4 and 5, a decision can be made at any stage that disciplinary action is not

required and that the situation may be more appropriately addressed under other procedures. Mr Powell argued that there was no scope, under the Extended Procedure, to address a situation in which working relationships had irretrievably broken down but the Inquiry Panel had found that the claimant was not at fault. In such a case, however, the Panel would plainly be able to find, in Part 1 of the report which is prepared under paragraph 5.10, that relationships had broken down and, in Part 2, that the practitioner was not at fault, however. In such a case, it would then be open to the defendant to address the situation outwith UPSW if appropriate and, in particular, to consider whether reintroduction of the employee into the workforce was feasible. Similarly, even if the Inquiry Panel concluded in Part 2 of its report that the employee was at fault and recommended disciplinary action, it would be open to the Disciplinary Panel to reject the Inquiry Panel's views or recommendations and decide that no, or non-disciplinary, action was required.

v) What, in my judgement, the defendant cannot do is to continue to accuse the claimant of serious misconduct under UPSW on the basis that it believes that he is at fault whilst, at the same time, sidestepping the procedural safeguards under UPSW by hiving off one of the aspects of the case which continues to be investigated under the Procedure. This is particularly so given that if the parallel process leads to the dismissal of the practitioner, they will be denied the opportunity to address the allegations against them and to be vindicated. On the other hand, the practitioner will have been adequately protected if, at any stage of the UPSW proceedings, the defendant formally accepts that he is not at fault, even if there are then other issues which require to be addressed, such as reintegration into the workforce.

vi) In this connection, I have noted that the concept of "fault" is not defined in the Procedure. To my mind it should be given a broad meaning. Consistently with my overall analysis of the Contract, in most cases where it is being said that the conduct of an employee towards his colleagues means that they are not prepared to work with him, and that he should therefore be dismissed, this will properly be regarded as a situation where the employee was being said to be at fault and a disciplinary hearing will be both appropriate and permissible under Part 5. One can imagine cases where the objection to working with the employee is due to traits or behaviour which are not within the employee's control, for example because of a disability, where arguably a problem may arise. The *Kerslake* type of case may be another exception. But in cases such as the present the view of the defendant is ultimately that the claimant rather than anyone else is at fault for the breakdown in working relationships in the sense that he is the cause of it, the problem is with him and the objection is to matters which are within his control. The difficulties on which Mr Powell relies to support his analysis of UPSW are therefore more apparent than real.

WAS, OR IS, THE CONTINUATION OF THE WORKING RELATIONSHIPS INVESTIGATION CONTRARY TO THE IMPLIED DUTY OF MUTUAL TRUST AND CONFIDENCE?

Introduction

204. I address this question in the alternative, in case my conclusions in relation to the express terms of the Contract are incorrect.

Law

205. In *IBM UK Holdings Ltd v Dalgleish* [2018] IRLR 4 CA the Court of Appeal drew a distinction between cases where the employer is exercising an express or implied discretionary power, and cases where the concern is simply with the conduct of the employer. In the former category of case, the discretion is required to be exercised in accordance with the duty of mutual trust and confidence but the test is as to the rationality of the employer's exercise of its contractual discretion, as was held in *Braganza v BP Shipping Ltd* [2015] ICR 449 UKSC. In cases in the latter category the test is that formulated by Browne Wilkinson J (as he then was) in *Woods v. W. M. Car Services (Peterborough) Ltd.* [1981] I.C.R. 666 EAT as further explained by the House of Lords in *Malik v BCCI SA* [1998] AC 20. Browne Wilkinson J said this:

> "*there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employee and employer"*

206. It also well established that the test for whether there has been a breach is objective albeit the court will take into account the employer's subjective reasons for the actions complained of. By definition, a breach of mutual trust and confidence amounts to a repudiatory breach (*Morrow v Safeways Stores Ltd* [2002] IRLR 9 EAT). This is an indication of the degree of seriousness of the employer's conduct which is required to be established by a claimant.

Discussion and conclusion

207. In my judgement this is a *Malik* case rather than a *Braganza* case. The working relationships investigation was not decided upon through the exercise of a discretionary power which was expressly or impliedly conferred on the defendant by the claimant's contact of employment. The defendant simply decided on a particular course of action. But, in any event, I do not consider that the outcome would be different on either approach.

208. In my view it is important to be clear as to the premise on which the question of breach of mutual trust and confidence, alternatively rationality, arises. This is that, unlike in *Jain*, UPSW is incorporated into the Contract but the concerns or issues which are being addressed or handled in the working relationships investigation are <u>not</u> ones which the defendant is <u>required</u> to consider under that Procedure. There are, however, closely related concerns or issues which are being investigated under the Procedure, which is ongoing.

209. In my view it was in breach of the implied duty of mutual trust and confidence for the defendant to embark on the working relationships investigation in the circumstances in which it did so. The question whether working relationships with the claimant have broken down has been a relevant consideration at all stages of the Procedure to date and continues to be. If there was any concern that the terms of reference of Dr Edmonds or Dr Robertson-Steel did not permit a more wide-ranging enquiry into whether the claimant's conduct or behaviour had led to an irretrievable breakdown in working relationships, those terms of reference could have been amended. If there was a concern that the Procedure was taking too long, this was a situation of the defendant's making and was capable of being addressed by giving the claimant's case greater priority. That was the reasonable and proper, or rational, course to take.

210. The argument that the working relationships investigation may facilitate a lifting of the claimant's exclusion pending the outcome of the Procedure is also wholly unconvincing. The claimant had already been excluded for nearly 2 years when the working relationships investigation was launched during which time, on the defendant's own case, the evidence as to the breakdown in working relationships which had emerged in, for example, Dr Robertson-Steel's investigation report, was even more compelling and widespread than had been appreciated at the time of the decision to exclude. Far from raising the possibility of a return to work pending the outcome of the UPSW proceedings, Dr Robertson-Steel considered that a return to work anywhere within the defendant would never be possible. His report, on which the defendant itself relies in the UPSW proceedings rather than questioning his pessimism as the working relationships investigation implicitly purports to do, therefore did not provide a rational basis for considering that the claimant might return to work on an interim basis.

211. I accept that it is possible that an outcome of the UPSW proceedings is that the claimant is not dismissed but that there is a remaining issue as to whether it is feasible to reintegrate him into the defendant's workforce. However, the Procedure contemplates that that may be the outcome in a given case whereupon the question of reintegration will be addressed. It was within the defendant's gift to reach the point at which the outcome under UPSW was known a good deal earlier. It cannot now rationally seek to pre-empt that outcome through the working relationships investigation.

212. With the two procedures continuing in parallel, the claimant is on Morton's fork. As I have pointed out, contesting the allegations in the UPSW proceedings will serve to confirm the defendant's impression that working relationships have irretrievably broken down; conversely, admitting them and apologising will serve to confirm the case against him under the Extended Procedure. This highly relevant consideration is not addressed in the defendant's evidence and does not appear to have been considered. In addition to this, the defendant does not deny that a potential outcome of the working relationships investigation is the claimant's dismissal and that he would not then be entitled to the completion of the UPSW proceedings. Although Mr Powell has indicated that they would nevertheless be completed, the experience of the defendant's approach to the Procedure to date does give rise to questions as to how that commitment would be honoured in practice.

213. I therefore do not consider that the defendant has acted rationally or with reasonable or proper cause, particularly when the impact of its approach on the claimant is

considered. That its conduct in pursuing the working relationships investigation is calculated or likely to destroy or seriously damage the relationship of confidence and trust between employee and employer seems to me to be plain.

RELIEF

214. In the light of my conclusions as to the operation of the Procedure it is not appropriate to order or declare that the question of any breakdown in working relationships between the claimant and his colleagues, and whether such breakdown is remediable, can never be considered by the defendant other than under UPSW. As I have indicated, there may come a point where the outcome of the UPSW proceedings is that the question of reintegration into the defendant's workforce requires to be addressed on the basis of whatever findings have been made as to the fault or otherwise of the claimant.

215. Accordingly, I propose to grant an injunction to restrain the continuation of the working relationships investigation. In the light of the parties' submissions after sight of the draft judgement, the Order which I propose to make will prevent the investigation of the issues about the claimant's working relationships by the defendant other than in the course of the current proceedings under Part 5 UPSW but allow the defendant to review the position at the end of those proceedings. It will not prevent NCAS from continuing its work in relation to the referral which has been made in respect of the claimant, or the defendant from assisting NCAS in this regard as required by NCAS.

216. Mr Sutton submitted that I should go further and prohibit any investigation of the working relationships issues, other than under UPSW, prior to the completion of the UPSW process as a whole, including the referral to NCAS. In the exercise of my discretion, I decline to do so given that the primary concern expressed on behalf of the claimant at the trial was as to the overlap between the Part 5 proceedings and the working relationships investigation and given that the outcome of the Part 5 proceedings is currently unknown. It would be sensible to allow for a review of the position in the light of that outcome given that, as I have pointed out, it may then be necessary to investigate the question of working relationships, for example in the context of a need to reintegrate the claimant into the defendant's workforce.

217. I emphasise, however, that the effect of my Order is not to authorise a resumption of the current working relationships investigation. "come what may" at the end of the Part 5 proceedings. I am simply allowing for an assessment of what steps are appropriate in the light of the outcome of the Part 5 proceedings. The questions whether any investigations outwith UPSW are appropriate and permissible, and if so of what issues and how such issues should be investigated, will need to be considered in the circumstances as that are at that stage and any such investigations will need to be permissible under by the terms of the claimant's contract of employment.

COSTS

218. I deal with this issue in Annex 2.

PERMISSION TO APPEAL

219. I deal with this issue in Annex 3.

ANNEX 1.

220. As noted above, prior to the commencement of the trial counsel for the defendant were informed that the claimant did not propose to give oral evidence and would simply rely on the witness statement, dated 24 June 2019, which he relied on in support of his application for interim relief.

221. Counsel for the Defendant complained about this in their skeleton argument dated 31 January 2020 and then put in a supplemental skeleton argument, dated 3 February 2020, which argued that if the claimant maintained his position his evidence should be disregarded and the claim dismissed *"by reason that they cannot be a fair trial and the claim is an abuse"*. The supplemental skeleton relied on CPR 32.2(1)(a) and 32.5(1) and *Al Rawi v Security Service and others (JUSTICE and others intervening)* [2012] AC 531, the well-known case about closed material procedures.

222. I have had regard to the passages in *Al Rawi* to which Mr Powell referred me. Fundamentally, however, that case concerned the application of the open justice principle whereas no question related to that principle arises in the present case. The trial has been conducted in public and the claimant's witness statement is available to the public should they wish to read it.

223. I accept that generally evidence will be given orally at trial. That is no more than is stated in CPR 32.2 (1):

> *"The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved-*
>
> *(a) at trial, by their oral evidence given in public;…* (emphasis added)

224. CPR 32.5(1) states:

> *"(1) If-*
>
> *(a) a party has served a witness statement; and*
>
> *(b) he wishes to rely at trial on the evidence of the witness who made the statement, he must call the witness to give oral evidence unless the court orders otherwise or he puts in the statement as hearsay evidence"*(emphasis added)

225. Decisions as to whether oral evidence is required to be given are, of course, taken by reference to relevance and the overriding objective. In the present case a key question to be considered is whether there are relevant factual disputes which the court is required to determine and whether oral evidence would assist it to do so.

226. Mr Sutton QC explained that the claimant did not propose to give oral evidence because he was concerned not to be drawn into debate about the merits of the underlying allegations against him given that those allegations are currently under consideration in the UPSW disciplinary process including by the panel chaired by Mr Angus Moon QC. He added that he did not understand there to be material disputes as

to the primary facts set out in the claimant's witness statement, that the evidential position is largely documented and that it would be open to Mr Powell to rely on any documentary evidence which he considered supported his case and to submit that, where the claimant disputed that evidence or had failed to deal with it, the documentary evidence should be preferred.

227. I asked Mr Powell to indicate the topics about which he wished to cross examine the claimant and he identified the following:

i) First, the claimant's understanding of what the disciplinary proceedings and/or the relationships investigation were about. Mr Sutton confirmed that the claimant did not suggest that his understanding was anything other than the understanding of any reasonable reader of the documented communications with and from him. In the light of this, and for the reasons given by Mr Sutton, I decided that the claimant was not required to give oral evidence in relation to this topic. The Claim is actually about the defendant's actions in conducting the working relationships investigation, rather than about the claimant's understanding of those actions but, in any event, that understanding is the same as the understanding of any person in his position who read the relevant communications.

ii) Second, the claimant's understanding as to whether there was an issue in relation to working relationships. Mr Sutton's position in relation to this topic was essentially the same as in relation to the first topic, and for essentially the same reasons I decided that the claimant was not required to give oral evidence in relation to it. Insofar as there is any relevant issue as to whether there were problems with working relationships, or the claimant understood there to be such problems, which I did not understand there was, Mr Powell was able to rely on the documentary evidence.

iii) Third, paragraphs 16 to 19 of the claimant's witness statement, which deal with the question why the claimant did not challenge the commencement of the working relationships investigation more vigorously after he was told, at the end of October 2018, that it was to take place and/or why he did not apply for injunctive relief earlier. I accepted that the claimant was required to give oral evidence on this topic if he wished to rely on paragraphs 16 to 19 given that delay/acquiescence was a live issue in relation to relief and given that the claimant's reasons for not taking action earlier were in dispute and were potentially relevant. The claimant was therefore called to give evidence in relation to these matters and was cross examined on them. In the event, however, the acquiescence/delay point was not pursued by Mr Powell.

iv) Fourth, a meetingin June 2018 about which Mr Powell pointed out the claimant had not given written evidence. I decided that the claimant was not required to give oral evidence in relation to this matter. There is no relevant dispute as to what occurred at that meeting and the position is in any event documented. In so far as the contents of that meeting are relevant, Mr Powell was able to rely on the documentary evidence.

v) Fifth, paragraphs 24 to 26 of the claimant's witness statement which question the defendant's motives, and which state his concerns about his ability to

conduct the working relationships investigation without legal representation and the impact on his career if the working relationships investigation is allowed to continue. Paragraph 24, which questions the motives of the defendant, was withdrawn by Mr Sutton on the claimant's behalf and therefore is not admitted in evidence. I did not require the claimant to give evidence in relation to paragraph 26, given that it was merely a statement of the claimant's concerns about the impact on his career of the defendant's approach. I did, however, require him to give evidence in relation to paragraph 25 which seemed to me to be linked to paragraphs 16 to 19 and the overall question whether the claimant was able to react more rapidly to the initiation of the working relationships investigation without the benefit of legal representation and advice. The claimant duly did so and was cross examined by Mr Powell.

228. In the light of my rulings on these topics, it could not sensibly be said that a fair trial was impossible and there was no basis on which the claimant's claim could be dismissed. Such a course of action would, in any event, have been wholly disproportionate.

ANNEX 2

229. There are two issues as to costs:

i) First, whether a percentage reduction should be applied to the claimant's costs of the application for interim relief and/o the trial and, if so, what percentage?

ii) Second, the question of an interim payment on account of costs.

230. As regards the first issue, the defendant argues that I should apply a 40% discount on the claimant's costs of the trial. He points out that the relief which I have granted is not as extensive as that which was sought in the Particulars of Claim. He says that the claimant abandoned his allegation of 'sidestepping' and that this had an impact on the witness evidence which the defendant was required to prepare. He points out that there were amendments to the Particulars of Claim during the trial and he says that complaints about the conduct of the claimant's appeal were ultimately not pursued by the claimant.

231. In my judgement is not appropriate to make any percentage reduction to the claimant's costs. His claim has succeeded in its essential aim, namely to prevent the working relationships investigation from proceeding in parallel with the Section 5 proceedings. The fact that he asked for wider relief than was ultimately granted did not make any material difference to the costs of the trial. The allegation of "sidestepping" was not abandoned and was, indeed, upheld in the sense that I concluded that the defendant was indeed seeking to sidestep UPSW albeit Mr Sutton was not arguing that the defendant appreciated that what it was doing was not permissible. His restraint, when there clearly was material before the court which was capable of raising questions as to the defendant's motives, actually saved costs. Mr Powell also placed reliance upon all of the witness statements which were prepared for the application for interim relief and trial notwithstanding, Mr Sutton's approach. The amendments to the Particulars of Claim during the trial did not materially affect costs and nor did the fact that complaints about the appeal process were not ultimately pursued.

232. I see no reason to apply a percentage reduction to the costs of the application for interim relief. Again, the claimant was successful and, again, there is no evidence before me that the fact that he sought wider relief than was ultimately granted had any impact on the costs which were incurred. Indeed, the witness statements which were prepared for the purposes of the application for interim relief were relied on by both parties.

233. As far as the question of an interim payment on account of costs, the defendant does not dispute that such a payment should be ordered. The issues are as to quantum and deadline for payment. As I understand it, the claimant's total costs are in the sum of £153,303.78. His budgeted costs were £126,350 and he incurred slightly lower costs than this in the event. The claimant has been ordered to pay the costs of the unsuccessful application for a stay on 22 January 2020 and he accepts that he should pay the costs of the defendant's application to admit the evidence of Mrs Clacey-Roberts. I understand that the total costs incurred under both heads are in the order of £17,000.

234. Working on the basis that the costs to which the defendant is entitled should be set off against the costs ordered in favour of the claimant, that an interim payment in the order of 90% of budgeted costs and 50% of non-budgeted costs will ordinarily be appropriate and that the defendant's costs should be subject to a similar reduction I am content to order an interim payment in the sum of £107, 312.65 which is applied for by the claimant. I will allow 28 days for payment given the current situation in relation to Covid 19. Mr Powell asked for 42 days but I am not satisfied that the processing of this payment need take as long as that given that it will involve administrative staff and can be done electronically.

ANNEX 3

235. I refuse permission to appeal. In my view, this case turns on its particular facts and the proposed appeal does not have real prospects of success. Nor is there any other compelling reason why it should be heard.