Neutral Citation Number: [2021] EWHC 965 (QB)

Case No: QB-2021-001187

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 21st April 2021

Before :

MRS JUSTICE YIP

- -

Between :

Dr Kamalnayan Gupta	**Claimant**
- and -	
Northampton Hospital NHS Trust	**Defendant**

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- -

Simon Butler (instructed through the Bar Direct Access Scheme) for the **Claimant**
Mark Sutton QC and Alex Shellum (instructed by **Capsticks Solicitors LLP**) for the **Defendant**

Hearing dates: 14 April 2021

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Approved Judgment

Mrs Justice Yip :

1. This is an application for an interim injunction brought by the claimant, a consultant oncologist, against the NHS trust which employs him following his exclusion from work pending the outcome of an investigation into allegations of misconduct. The claimant seeks an order requiring the defendant to reinstate him and prohibiting the defendant from contacting or sharing information with the claimant's private work providers or other employers. The defendant opposes the application.

2. I have considered the written evidence of the claimant and of the defendant's medical director, Matthew Metcalfe and the written and oral submissions on behalf of both parties.

Factual background

3. The claimant qualified as a doctor in 1999. He has a previously unblemished disciplinary history and it appears from his evidence that he has a strong professional reputation in the field of oncology. No concerns have been raised about his clinical competence. He has been employed by the trust since 2018, based at Northampton General Hospital. His special interest is in urological cancer. Many of his patients present with advanced prostate cancer. In addition to his NHS work, the claimant has maintained a private practice and has practising privileges with a number of private providers, including the BMI Three Shires Hospital in Northampton. His evidence is that he works extremely hard for the good of his patients. By way of illustration of that, he indicates that he did not take a single day off during the first 10 months of the Covid-19 pandemic. In his statement, Mr Metcalfe recognises the significance the decision to exclude the claimant has for him personally and professionally.

4. In January 2021, the claimant was notified that an investigation had commenced into concerns falling into three areas, namely irregularities around payments for additional hours, the abuse of position to procure private patients from his NHS practice and conducting private work during paid NHS time. The claimant was not excluded at this stage.

5. The decision to exclude the claimant from work, on full pay, was notified to him at a meeting on 24 March 2021. Mr Metcalfe was unavoidably away from work that day and so the meeting was conducted by the defendant's deputy medical director, Mr Hemant Nemade. That evening, Mr Nemade sent a letter confirming what was discussed. The letter stated:

> "Further evidence has been collated during the investigation process to date, specifically highlighting safeguarding concerns."

It went on to say:

> "The exclusion is a precautionary measure and does not constitute a disciplinary sanction. It will allow for the investigation to be carried out thoroughly and safeguard patients and relatives."

6. Following his exclusion, Mr Butler, who was instructed by the claimant, wrote to the defendant challenging the claimant's exclusion. Correspondence ensued between Mr Butler and the defendant's solicitors. This application was then issued on 30 March 2021.

7. In his statement dated 8 April 2021, Mr Metcalfe explains that concerns about the claimant were first raised in early 2020. The concerns at that time were that he was promoting and offering private services to patients attending his NHS clinic. Mr Metcalfe says that this was addressed with him by the defendant's Divisional Director, Mr Owen Cooper. Further concerns came to light during 2020, including that the claimant had received significant sums for additional duty hours which were not properly authorised. From January to September 2020, he had received payments totalling an estimated £80,000. This was referred to the Local Counter Fraud Services ("LCFS") for investigation, with a view to the possibility of criminal proceedings, and the Trust agreed to refrain from undertaking its own investigation whilst the fraud investigation was completed.

8. Although the LCFS initially requested that the claimant be excluded from work while they investigated, Mr Metcalfe, after consulting with the Director of Human Resources, decided that adequate safeguards could be put in place without the need for exclusion. The claimant was not alerted to the fraud investigation but measures were put in place to ensure he could not continue to sign off his own additional hours. This involved placing restrictions across the department rather than specifically targeting the claimant. The counter-fraud investigation took longer than was anticipated. It appears that this was due, at least in part, to the impact of the pandemic. Mr Metcalfe's evidence is that he was increasingly concerned about the delay and the fact that if the allegations were true the Trust had a doctor working in a senior role whose probity in the performance of his professional role was in question.

9. In December 2020, one of the defendant's nurses had a discussion with the wife of one of the claimant's patients (referred to as GG) during which concerns emerged that the claimant was billing the patient privately for short, weekly telephone calls. I have seen the investigator's notes of the interview with the nurse. It is plain that she was troubled about what had been going on. The family of GG have expressed some distress about some of the claimant's actions. These additional concerns having been raised and the counter-fraud investigation remaining outstanding, Mr Metcalfe decided that an investigation under the Medical Staff Concerns Policy should be commenced.

10. Mr Butler sought to present the concerns raised by the family of GG as simply a dispute about charges, which should more properly be dealt with through the private provider's complaints procedure. I do not accept that. I am not at this stage weighing the evidence and seeking to make any determination as to the truth of any allegation. However, the concerns which have emerged about the claimant's treatment of GG are very serious. In essence, what is being investigated amounts to an allegation that the claimant improperly billed GG for private services amounting to no more than short weekly telephone calls and of no real clinical value, including when the patient was on an end of life pathway and when palliative care and support would have been readily available via the NHS. It is alleged that calls took place during NHS clinic time and were recorded as NHS appointments on the Trust's record system. The concern is that GG was being charged by the claimant for things he should not have

been charged for. GG and his family were billed a total in excess of £20,000. To put it bluntly, the allegation is of financial abuse of a terminally ill patient. The counter-fraud investigation, which continues to run alongside but independently of the defendant's internal investigation, has also discovered that two other patients may have been invoiced for private care while being treated on the NHS.

11. It is important to stress that, at this stage, the allegations are just that. The claimant vigorously denies any wrongdoing. He has served a lengthy statement responding to the allegations surrounding GG. During the course of the hearing, he produced documents demonstrating that GG was first referred to him as a private patient and not through the NHS. Further, the claimant maintains that he has a significant amount of other documentary evidence that will support what he says but which he has not yet had the opportunity to present.

12. On any basis, the evidence is incomplete and there has been no opportunity to test the evidence obtained on each side. It is no part of the court's function at this stage to attempt to resolve contested factual issues. In those circumstances, I do not propose to go further into the details of the evidence which has been obtained to date. I would summarise the position by saying that the evidence on the defendant's side gives rise to legitimate cause for concern and suggests there is substance to the allegations, albeit they remain unproven. There is also a legitimate concern that the allegations may extend beyond GG (who is sadly now deceased) to other patients. The claimant's evidence presents a very different picture of the amount of care he provided for GG outside NHS time. However, the recent statement certainly does not answer all the questions which have been raised on the defendant's side. I do not wish to prejudice the investigation or any future proceedings by expressing my own views on the factual issues that are likely to arise. I will say that, having carefully considered the material presently before me, I have concluded that there remains cause for concern and that there are matters which will call at least for further investigation and/or explanation.

13. Mr Metcalfe also identifies concerns that the claimant may be seeking to interfere with the investigation. Again, this is something the claimant denies. He points to the fact that it was not considered necessary to exclude him when he was notified of the investigation in January 2021 and that the investigation proceeded for over 2 months while he remained in post.

14. There is evidence that the claimant contacted the wife of GG and asked whether the family had made a complaint against him. It is right to note that, while he was advised not to contact the family during NHS time, he was not instructed that he should not contact them at all. However, this contact apparently occurred very shortly before GG died and caused upset to the family. An approach of that nature could be viewed as inappropriate. There is further evidence from two witnesses, which on one interpretation suggests that the claimant has sought to influence their evidence within the investigation.

15. There is an additional concern that once the decision to exclude the claimant had been taken and arrangements for the meeting for that purpose were being made, he may have claimed not to have been on site when he in fact was. Further, on that day, he had locked himself in his office which is where he keeps his private patient files. Again, the claimant denies any impropriety and the evidence about this would be

subject to testing at a later stage. I do not purport to make any determination as to what occurred or the reasons for it. However, one possible interpretation of the evidence is that the claimant was seeking to evade and/or interfere with the investigation at this time.

The contractual position

16. The claimant is employed under a contract of employment which incorporates and is subject to the National Terms and Conditions of Service for Consultants (England) 2003 ("the Consultant Contract").

17. The Consultant Contract understandably makes provision for the relationship between NHS work, private practice and fee paying services. It is readily apparent that there is potential for conflicts of interest to arise. As such, safeguards and governance exist to maintain the demarcation between NHS and private practice and to ensure that private work does not impact detrimentally on NHS patients or services. There is clear guidance that NHS patients should never be charged for their NHS care. Doctors are reminded of the importance of maintaining separation between NHS and private care, of exhausting all NHS funded options before providing private care and of effective communication with patients about treatment options.

18. The Trust's disciplinary and capability procedures are contained in its Medical Staff Concerns Policy which is the locally agreed policy implementing the "Maintaining High Standards in the Modern NHS" (MHPS) national framework. It is an express term of the Consultant Contract that the disciplinary and capability procedures "will be consistent with" MHPS. The policy itself is stated to have been developed based on the principles set out in MHPS. The purpose of the policy is expressed to be:

> "to implement the processes for dealing with concerns related to medical and dental staff to ensure a fair and consistent approach."

19. It is common ground that the Trust has a discretionary power to exclude medical staff. That power is contained in section 7.2 of the policy and is subject to the procedures explained at Appendix 2. Consideration of the power to exclude arises when serious concerns are raised about a practitioner. The guidance in Appendix 2 states that exclusion should be reserved for exceptional circumstances. The MHPS guidance expresses this with even more force, stating that exclusion "should be reserved for only the most exceptional circumstances". It stresses that exclusion should not be misused or seen as the only course of action which could be taken and gives guidance as to how the exceptional right to suspend is to be used. The defendant's policy broadly adopts this guidance, although I note some difference in wording. However, as the contract expressly states, the policy is intended to be consistent with MHPS.

20. Before a practitioner is to be excluded, Appendix 2 requires that consideration is given to whether they could return to work in a limited capacity, or perhaps a non-clinical role. Excluding a doctor from work does not automatically involve excluding him from the premises. Under the heading "Informing Other Organisations", the policy states that in cases "where there is concern that the practitioner may be a danger to patients and the practitioner is practising elsewhere" the excluding officer may consider reporting to the relevant body so that a Health Professional Alert Notice

may be considered. There is no specific reference to informing other organisations where the practitioner may be working.

21. The decision to exclude for the Medical Director in conjunction with the Director of Workforce and Transformation and the Clinical/Divisional Director. Clause 7.2 of the policy provides:

> "During the course of the investigation and its conclusion the Case Manager will review whether exclusion is necessary or if already in place whether it should be revoked."

22. The purpose of exclusion is set out in Appendix 2 as follows:

- To protect the interests of patients or other staff; and/or
- To assist the investigative process where there is a clear risk that the practitioner's presence would impede the gathering of evidence.

23. The policy provides that contact should generally be made with the Practitioner Performance Advice service (PPA) for advice prior to a decision to exclude being made. That is a specialist body, part of the function of which is to provide expert independent guidance as to how concerns about a practitioner should be responded to.

The decision to exclude the claimant

24. In his statement dated 9 April 2021, Mr Metcalfe explains the process adopted and his reasoning in arriving at the decision to suspend the claimant on 24 March 2021.

25. Concerns having been escalated by the case manager responsible for the internal investigation, Mr Metcalfe reviewed the position with Bronwen Curtis, Director of HR, on 12 March 2021. In his statement. Mr Metcalfe indicates that he was extremely concerned. However, he felt that the allegations were relatively new and untested and decided not to move to exclusion at that point but to see how the evidence developed and to review again if anything further came to light. Mr Metcalfe states that, with hindsight, he considers that the evidence available at that time did generate sufficient concern to justify exclusion. However, he recognised the significance of a decision to exclude and was cautious about taking that step. Mr Metcalfe indicates that he has not previously excluded a doctor in his years as a Medical Director.

26. On 22 March 2021, Mr Metcalfe received further information about the invoices received by GG and his family. He was aware that evidence was being obtained from the family and the general nature of their concerns was communicated to him. He was also made aware that there were concerns about other patients. Mr Metcalfe also considered the evidence about possible interference with the investigation. His view was that if the evidence was correct, it appeared that the claimant was attempting to "cover his tracks".

27. Having reviewed the additional information, Mr Metcalfe sought advice from PPA. I have seen a letter dated 24 March 2021 from that body to Mr Metcalfe which

summarises the conversation between them the day before. The letter indicates that as well as serious conduct concerns, the issues identified raised significant safeguarding concerns for vulnerable patients and relatives.

28. Having obtained the PPA advice, Mr Metcalfe's decision was to move immediately to exclusion. The concern that triggered the decision to exclude was the concern that the claimant may present a risk of financial abuse to vulnerable patients. That was a different risk to the concern that the defendant was being defrauded in relation to payments for additional hours which had been the focus of concern in January. Mr Metcalfe would have conducted the meeting to inform the claimant of his suspension himself but had to attend a funeral, hence the involvement of Mr Nemade.

29. Mr Metcalfe's evidence identifies the governance surrounding the notification of a practitioner's exclusion to other organisations. As he points out, this has been strengthened following the Paterson enquiry. Mr Metcalfe considered that he was required to notify the claimant's private providers of his suspension and the fact that he was being investigated for fraud. The Director of Clinical Service at the BMI Three Shires Hospital contacted Mr Metcalfe on 25 March 2021 indicating that concerns about the claimant had been raised by the clinical team there. It is notable that there were apparently already concerns at that hospital that the claimant may have been billing patients inappropriately. The terms of the claimant's practising privileges at that hospital required him to notify them of his exclusion. Therefore, his exclusion ought to have come to their attention even if Mr Metcalfe had not communicated with them.

The law

30. Despite the fact that the applicable legal principles were not really contentious, I was provided with a substantial bundle of authorities. This appears to be something of a trend but is not necessary or appropriate for resolving an application for an interlocutory injunction.

31. Adopting the well-known three-stage test from *American Cyanamid v Ethicon Ltd* [1975] AC 396, I must consider:

    i) Is there a serious issue to be tried?

    ii) Would damages be an adequate remedy?

    iii) Does the balance of convenience favour the grant of an injunction?

32. I remind myself that it is no part of the court's function at this stage to resolve conflicts of evidence as to the facts or to decide difficult questions of law which call for detailed arguments and mature consideration.

33. The judgment of Nicklin J in *Jahangiri v St George's University Hospitals NHS Foundation Trust* [2018] Med LR 625 at paragraph 57 provides a helpful summary of the court's approach in a case such as this. At para 57(ii)(c) Nicklin J said*:*

> *"* …to succeed on a claim for breach of contract, the claimant would have to demonstrate that the decision to suspend was

> unreasonable or irrational. That may mean that the Court should give rather more weight to a provisional assessment of the merits than would be necessary on a pure application of the 'serious issue to be tried' test."

34. As was acknowledged in *Jahangiri* and other cases, in the employment context where the complaint is over suspension, damages may well not be an adequate remedy where the suspension is found to be unlawful. That is perhaps particularly so in the case of a medical consultant for whom professional reputation is important. The defendant does not seek to argue that damages would be an adequate remedy in this case. Therefore, I am concerned with whether there is a serious issue to be tried and, if so, the balance of convenience. Those issues overlap but the defendant's primary submission is that the claimant has not established that there is a serious issue to be tried.

35. As is now well established, suspension without reasonable grounds may amount to a breach of contract or breach of the implied term of trust and confidence. The starting point is the principle identified by Lady Hale in *Braganza v BP Shipping Ltd* [2015] UKSC 17; [2015] 4 All ER 639; [2015] ICR 449 that where a contract gives one party to it the power to exercise a discretion which affects the rights of both parties, creating a conflict of interest, the courts will in appropriate cases imply a term that the power should be exercised in good faith and rationally. That applies particularly where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. Both limbs of the administrative law test apply so that the decision maker must take account of all relevant consideration and exclude irrelevant considerations and must not reach a decision which no rational decision maker could make. It must though always be remembered that it is not for the court to substitute its own decision for that of the contractually agreed decision maker.

36. Mr Butler relied upon *Yapp v Foreign and Commonwealth Office* [2013] EWHC 1098 (QB); [2013] IRLR 616 as authority for the proposition that the implied term of trust and confidence includes a duty to treat the employee fairly. As Cranston J said in that case [82]:

> "Fair treatment as a requirement is fact sensitive and its requirements turn very much on context …"

37. In relation to the second part of the application, that seeking a prohibitory injunction requiring the defendant not to contact or share information concerning the claimant with private providers, Mr Butler relies upon Article 1, Protocol 1 to the European Convention on Human Rights. For the defendant, Mr Sutton QC submits that the A1P1 challenge is academic and does not improve the claimant's position. Even if there has been an interference with the claimant's A1P1 rights, such interference will be lawful if justified as a proportionate means of achieving a legitimate aim. For the purpose of this interlocutory application and bearing in mind this is not the time to fully explore any complex issues of law, I agree with Mr Sutton QC that the test of justification is unlikely to materially differ from a contractual analysis following *Braganza*. For these purposes, the defendant accepts that an unjustified interference with the claimant's private practice would fall within the scope of the implied term of trust and confidence and is therefore covered by the private law obligations. At this stage, it is unnecessary to look beyond that.

Is there a serious issue to be tried?

38. This is where the real dispute between the parties lies. The claimant contends that the decision to exclude the claimant was unlawful and amounted to a breach of the contract and/or a breach of the implied term of trust and confidence. Mr Butler argues that the defendant gave no reasons for the exclusion other than to say that evidence collated during the investigation highlighted safeguarding concerns. No detail was given as to what those concerns were. Further, the claimant was not given an opportunity to respond before he was excluded. Mr Butler argues that the failure to obtain the claimant's side of the story first rendered the process unfair. He contends that the new evidence did not amount to reasonable grounds for excluding the claimant and that exclusion was not proportionate. He suggests that the defendant failed to consider the proportionality of the consequences of exclusion, not only to the claimant but to third parties, including his patients.

39. In relation to the second limb of the application, Mr Butler argues that there was no right to inform private providers that the claimant had been suspended and was being investigated for fraud. He contends that the terms of the contract meant that other providers could be notified only where there was concern a practitioner presented a danger to patients. Here, it is argued, the evidence did not support such a view.

40. The defendant argues that the decision to exclude the claimant involved the lawful exercise of discretion and, as such, does not give rise to any arguable claim for breach of contract and/or breach of the implied term of trust and confidence. The defendant points to the gravity of the alleged misconduct. In essence, it is alleged that the claimant defrauded both the Trust and vulnerable patients. The defendant maintains that there is a cogent evidential basis for the allegations.

41. It is common ground that the risk of the financial abuse of vulnerable persons is something that is to be viewed as potentially giving rise to safeguarding issues. Mr Sutton QC drew attention to the fact that Mr Metcalfe did not initially move to exclude the claimant when the investigation commenced in January. At that stage, the focus was on concern that the claimant was defrauding the Trust. It was considered that measures could be put in place to manage those concerns. It was the new concern that there was a risk to patients' interests that led to the decision to exclude. At the same time, there was a sufficient evidential basis to conclude that there was a risk of the claimant interfering with the investigation. Mr Sutton QC asks the court to accept that Mr Metcalfe's evidence plainly demonstrates a cautious approach. There was no rushing to judgment and no knee-jerk reaction as is sometimes seen. Rather, it is argued, Mr Metcalfe acted appropriately only reaching the decision to suspend when it became clear that there was a risk to patients and when he considered exclusion "absolutely necessary".

42. In considering the claims of procedural unfairness, the defendant points out that the investigation is ongoing and the situation is dynamic. Appendix 2 of the Trust's policy requires that the practitioner is made aware of the allegations or concerns that have been raised and advised of the exclusion. Further steps in the process provide the opportunity for the practitioner to propose alternatives to exclusion. There are also requirements for the exclusion to be kept under review. This is an ongoing obligation. Mr Sutton QC made the point that this case comes before the court in a different context and at a different stage from *Yapp*. The investigation is ongoing and the

opportunity for the claimant to provide his account of events is built into the process in a structured way. At each stage, the right to exclude is to be considered. The defendant does accept that the claimant might reasonably have been given a fuller explanation of the reasons for his exclusion on 24 March. It may be that the unavoidable absence of Mr Metcalfe on that date played a part in the lack of detail then given. However, the defendant does not accept that this rendered the exclusion unfair. Had the claimant asked for further reasons they would have been provided to him. As it was, the claimant instructed Mr Butler and has been fully informed of the reasons for his exclusion through the legal channels. Even if there was some procedural deficiency in relation to the notification of the exclusion and the reasons for it, it is not accepted that such was sufficiently serious as to be capable of amounting to a breach of contract justifying the relief sought.

43. Having considered all the material before me and the parties' competing submissions, I am not satisfied that there is a serious issue to be tried that the defendant was in breach of its contractual obligations in excluding the claimant.

44. It cannot be properly argued that the exclusion was unlawful in the *Braganza* sense. Mr Metcalfe acted cautiously and in a considered way. He was not quick to exclude the claimant but did so only when it became apparent that there was evidence giving rise to concerns about financial abuse of patients. He plainly recognised the significance of the decision to exclude the claimant. The advice of the PPA was sought before the decision was made. Mr Metcalfe was entitled to take the view that it was necessary to exclude the claimant at that stage to safeguard patients and their relatives and to guard against the risk of the claimant impeding the investigation.

45. I recognise that the claimant should probably have been given more detail of the reasons for his exclusion when he was notified of the decision on 24 March. However, I do not accept that this rendered the exclusion itself unfair or that it forms a proper basis for granting the relief sought.

46. The concerns identified in the course of the investigation are grave. The Trust has a duty to protect patients. That duty extends beyond managing their physical safety and includes a duty not to expose them to other risks, including financial abuse. It cannot sensibly be suggested otherwise. In the circumstances, the defendant was entitled to move to immediate exclusion. I am not satisfied that the process can be said to have been flawed.

47. I stress again that I am not seeking to make any determination on contested factual matters at this stage. However, I consider that there is a proper evidential basis for the allegations raised by the defendant. I accept that the claimant's second statement puts matters in a different light. However, it does not, in my judgment, answer all the concerns. Further investigation is required. As additional evidence is produced and considered, it may well be that a different view is taken. The defendant will be required to keep the claimant's exclusion under review. Given the careful approach adopted by Mr Metcalfe to date, there is no reason to consider this will not happen.

48. I also accept that there is evidence which justifies the concern that the claimant may have been seeking to interfere with the investigation. Again, a different view may emerge as further evidence becomes available. However, the defendant is entitled to

take the view that there is a risk that the claimant's presence would impede the investigative process.

49. It appears from the evidence before me that Mr Metcalfe's decision was one open to him in the exercise of his discretion. It appears from his evidence that he appropriately weighed the relevant considerations and did not take account of irrelevant matters. It cannot realistically be argued that the decision was irrational. In all the circumstances, I am not persuaded that the claimant has demonstrated, even applying the unmodified *American Cynamid* test, that there is a serious issue to be tried that his exclusion was unlawful.

50. As to the application for the prohibitory injunction in relation to contacting and sharing information with private providers, I am not persuaded that there is any proper basis for making such an order. I have already indicated why I do not consider the argument based upon Article 1, Protocol 1 adds anything to the contractual position. As I have indicated, Appendix 2 of the defendant's policy covers the situation where there is a concern that a practitioner may be a danger to patients where a report may be made so that a Health Professional Alert Notice may be considered. Relying upon this, Mr Butler sought to argue that the defendant's concerns did not amount to concern that the claimant was a danger to patients and therefore the defendant was not entitled to notify its concerns to others.

51. I do not accept this argument. It is right to state that there is no concern about the claimant's clinical competence or that he would in any way present a risk of physical harm to any patient. It is unnecessary for me to decide whether the term "a danger to patients" may include a risk of financial harm. A more fundamental point arises. The provision in Appendix 2 to which I have referred covers one situation. However, it does not act as a fetter or restraint on the defendant communicating relevant information to other organisations. As Mr Metcalfe's evidence makes clear, transparency is important in the medical context and the sharing of information, provided it is done in good faith, is to be encouraged. There is evidence that one of the private providers independently had concerns about the claimant. Further, the terms of the claimant's practising privileges with that organisation required him to notify them of his exclusion by his NHS trust in any event. As I understand it, that is a common term in a contract for practising privileges in the private sector, the reasons for which are readily apparent.

52. I am satisfied that the defendant was acting in good faith and rationally in notifying other providers of the claimant's exclusion and the reasons for it. There is no contractual or other reason why they were not entitled to communicate in that way. Having found that the claimant has not established that there is a serious issue to be tried in relation to his exclusion, I do not consider there can be any basis for finding a serious issue to be tried on this second part to his application.

The balance of convenience

53. It follows from my conclusion that the claimant has not established a serious issue to be tried that I must refuse the relief sought. It is therefore unnecessary for me to consider the balance of convenience.

54. Had I reached this balancing stage, I would have had in mind the serious consequences the exclusion will no doubt have for the claimant. I also acknowledge the concerns he expresses in his second statement about the impact his absence may have for the care of cancer patients in the region. That is a serious matter, particularly given the well-known concerns about the impact of the pandemic on cancer care. It is clear from Mr Metcalfe's statement (see paragraph 27) that this was something considered by the defendant.

55. Set against this would be the risk to patients and the risk that the investigation of serious allegations would be impeded.

56. Ultimately, the balance of convenience test requires consideration of the course which is likely to involve the least risk of injustice and/or harm if the decision to grant or to refuse an interlocutory injunction turns out to be wrong. The balance of convenience cannot be divorced from the merits of the claim. Had I found that there was a serious issue to be tried, I am likely to have looked for a high degree of assurance that patients' interests could be guarded before making the order sought. Where that precise balance lay would have depended on the basis upon which I had found there was a serious issue to be tried. In the event, this does not arise. I am satisfied that the necessary balancing of competing interests was in fact done by Mr Metcalfe and that he reached a decision which was open to him. I have found that there is no serious issue to be tried. That is sufficient to dispose of the application.

Conclusion

57. It follows that the claimant's application is refused.

Costs

58. Having circulated this judgment in draft, I have received written submissions on costs. The defendant seeks its costs on the usual basis that it has been the successful party. The claimant resists this application, maintaining that it was necessary for him to bring his application to get the defendant to provide information about the reasons for his exclusion. The claimant says that the defendant should not be entitled to recover any costs in the circumstances. In the alternative, the claimant invites the court to restrict the costs that may be recovered by the defendant to those related to the hearing itself. The claimant also challenges the reasonableness of the defendant instructing leading and junior counsel.

59. The starting point is the general rule set out in CPR 44.2 that the unsuccessful party should pay the successful party's costs. I have considered whether there is any reason to depart from that general rule. In particular, I have considered the question of conduct and the provisions of CPR 44.2(4) and (5). At paragraph 45 above, I recognised that the claimant should probably have been given more detail of the reasons for his exclusion when notified of the decision. However, as I have indicated, there were understandable reasons for that not occurring. After that point, I am satisfied that the defendant has acted reasonably and has responded suitably promptly. I am unable to accept that it was necessary for the claimant to bring proceedings to secure the information he was entitled to. Although Mr Butler submits that the claimant would not have proceeded with his application had he been provided with all relevant information earlier, I note that the claimant did proceed even having seen Mr

Metcalfe's evidence. In exercising my discretion as to costs, I am not persuaded that there is anything in the conduct of the defendant either before or after the proceedings were commenced that justifies a departure from the general rule. I shall therefore make an order that the claimant shall pay the defendant's costs.

60. I am then required to summarily assess the defendant's costs. Having rejected the argument that the costs should be restricted in principle, I am assessing costs on the standard basis. That requires me to consider whether the costs claimed have been reasonably and proportionately incurred and are reasonable and proportionate in amount. The claimant does not challenge the defendant's solicitor's rates, which I agree are reasonable. No complaint is made about the total solicitor costs incurred. As to whether it was reasonable and proportionate to use both leading and junior counsel, that is perhaps a more finely balanced issue. Mr Sutton QC indicates that there was a need to rely upon junior counsel for some of the preparation, particularly as work was required at short notice. I accept that and also accept that there was a division of work between leading and junior counsel which is likely to have operated to keep costs down. I am less certain that it was necessary for junior counsel to attend the hearing, bearing in mind that all submissions were made by leading counsel and that no evidence was called. However, I am aware that Mr Shellum did offer active assistance during the hearing. I have no doubt that the defendant had the best possible representation. The only question is whether the claimant should be required to pay all the costs incurred. I certainly do not believe it would be appropriate for me to disallow all junior counsel's fees.

61. I bear in mind this is a summary assessment and that I am required to resolve any doubt as to whether costs were reasonably and proportionately incurred in favour of the paying party. It would not be proportionate to arrange a further hearing to deal with arguments about costs. In the circumstances, I propose to make a modest reduction to the costs claimed to reflect the doubt I have expressed about counsel's fees. I make it very clear that I am not specifically assessing Mr Shellum's fees downwards. Rather, I am looking at the total sums claimed by the solicitors and for both counsel and making a relatively small reduction overall. It seems to me that this broad approach best allows me to deal with costs in a proportionate way and will not result in any significant injustice to either party. I will accordingly summarily assess the defendant's costs in the total sum of £30,000.