



Neutral Citation Number: [2019] EWHC 3507 QB

Case No: QB-2019-004204

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 December 2019

Before:

Margaret Obi
(sitting as a Deputy High Court Judge)

Between:

Caroline Harrison

Claimant

- and -

Barking, Havering and Redbridge University Hospitals
NHS Trust

Defendant

Daniel Tatton Brown QC (instructed by Bishop and Sewell LLP) for the **Claimant**
Hannah Slarks (instructed by Bevan Brittan LLP) for the **Defendant**

Hearing date: 9 December 2019

Approved Judgment

Margaret Obi:

Introduction

1. This is an application for an interim injunction. The Claimant's current role is as Deputy Head of Legal Service. The Defendant is an NHS Trust and is the Claimant's employer. The Claimant is seeking an interim mandatory injunction, permitting her to perform autonomously, the majority of her normal duties including providing advice and representation at contentious inquest hearings and providing legal advice to the Defendant and/or its officers. She has voluntarily agreed not to undertake clinical negligence casework.
2. The Claimant is an experienced solicitor. She qualified in 1992 and has spent her entire legal career acting for, or advising NHS bodies, or advising doctors employed in the NHS. She took up her current role in September 2017. Her line manager is the Head of Legal. The Claimant's role comprises managing clinical negligence and personal injury claims against the Defendant, advising and representing the Defendant at inquests, and advising the Defendant on medico-legal issues such as consent, confidentiality and safeguarding as well as advising on relevant legislation. The split of her work is 60% inquest work, 35% claims work and 5% advisory work and legal teaching.
3. At the time of the application the Claimant was on sick leave. However, she had been suspended from work due to concerns about the quality of her casework on two separate occasions; 2 August 2019 and then again on 12 November 2019. The Claimant has never previously received criticism of her casework. The injunction application was issued on 26 November 2019. The Claimant alleges that her suspension from work was in breach of her contract of employment and that it is significantly harming her health. The current position is that the Claimant may return to work as soon as she is fit to do so. However, the Defendant has made it clear that the Claimant will not be permitted to undertake casework, unless supervised by an external third-party supervisor, pending the outcome of an internal investigation. The Claimant expressed concern that she is likely to be suspended for a third time, once she is no longer on sick leave, if she continues to challenge the appropriateness and reasonableness of the restriction of her duties. The Claimant is due to be interviewed as part of the investigation process this week and the Defendant anticipates that the investigation will be concluded by the last working day in December 2019.
4. The Claimant's line manager, the Head of Legal Services, has also been subject to suspension.

Background

5. The background circumstances are as follows.
6. In May 2019, Mr Avery, the Director of Nursing, asked the Claimant to carry out an internal staff investigation. The Claimant, having discussed the request with her line manager, concluded that it would be inappropriate for her to undertake the investigation. In an email to Mr Avery she explained that her concerns were as follows: (i) it would breach the Defendant's Disciplinary Policy; (ii) she was not sufficiently independent; (iii) she had not received relevant training; and (iv) the role might impair her ability to advise the Defendant in relation to the process. Mr Avery did not reply to the Claimant's concerns. However, a disciplinary meeting took place on 30 May 2019. Following that meeting the Claimant was issued with a verbal warning. The verbal warning was subsequently confirmed in a letter from Mr Avery dated 10 June 2019. In that letter Mr Avery stated that it was necessary to issue the warning due to the Claimant's conduct '*in recent months*' and he referred to two matters. The first matter was an occasion when Mr Avery overheard a conversation between the Claimant and a panel law firm during which the Claimant stated, '*my daughter could do a better job*'. Mr Avery stated that in his opinion this was "...*unkind, lacking in professional courtesy and respect and inconsistent with [T]rust values.*" The second matter was the Claimant's unwillingness to follow a reasonable management instruction to undertake the staff investigation. The Claimant had no right of appeal against the warning. However, she wrote to Mr Avery on 20 June 2019, setting out her objections to the warning.

Initial Suspension

7. Mr Avery had become increasingly concerned, in the first half of 2019, that the Claimant and her line manager were refusing to engage constructively with him and that the behaviours of the Team and conduct of their cases posed a risk to the Trust. Therefore, he arranged for a senior lawyer from Capsticks to carry out an initial review of a large number of the Trust files and interview members of the Team about how they managed the claims. The Capsticks Review is dated 1 August 2019. It referred in general terms to the Team "*micromanaging*" cases, making decisions "*autonomously*" without seeking instructions from senior management of the Trust and that their interventions were sometimes "*resulting in additional cost and delay.*" Two specific examples of additional costs and delay were provided. There was no mention of the Claimant in the first example. In the second example a concern was expressed about the way the Claimant had handled a clinical negligence case after the Trust had lost at trial (the NR case).

8. On 2 August 2019 the Claimant attended a meeting with Alan Wishart, Deputy Director of Workforce. The Claimant was informed at that meeting that she was being suspended by Kathryn Halford, Chief Nurse, due to concerns regarding her handling of the NR case. The Claimant was escorted from the premises, had her email access suspended and told that the law firm Capsticks would be carrying out the Defendant's claims management role. The letter of suspension, dated 2 August 2019, referred to the NR case and other unspecified concerns. The letter also indicated that the period of suspension was anticipated to last no longer than two weeks, "*...but if a longer period is required to conduct a thorough investigation then the suspension may be extended for a further period or series of periods.*" The Claimant asked for a copy of the NR file on the day of her suspension and on 3 August 2019. Mr Wishart advised her on 6 August 2019 that the file would be sent through as soon as possible. The first time the Claimant was able to review the file was on 6 December 2019 when she attended the Defendant's legal office.
9. On 9 August 2019, the Claimant was diagnosed with stress and prescribed anti-depressant medication. She had not previously been afflicted by mental health issues.
10. Following the Claimant's suspension she heard nothing further from the Defendant until 5 September 2019. On that date she received an email in which she was informed that the Defendant was considering lifting the suspension provided the Claimant was restricted in her duties to legal teaching. The Claimant explained, in an email dated 6 September 2019, why returning to work on these terms was unacceptable to her. She stated that neither her inquest work nor her medico-legal advisory work had been the subject of criticism and therefore she challenged the justification of excluding these areas of work from her role. The Claimant did not receive a reply.
11. On 2 October 2019 the Claimant sent a further email to Mr Wishart. She noted that the suspension had now lasted two months and stated, "*...I have received no update and no response to my email of 5 September 2019. This is having a very detrimental effect on my health which has now progressed to depression.*" The Claimant indicated that unless she heard back within seven days with confirmation that her suspension would be lifted and that she could return to work on full duties to include claims and inquest work, her solicitors were instructed to make an application for an injunction.
12. On 3 October 2019 Mr Wishart replied. He stated that once the Claimant had been advised of her fitness to work, the suspension would be lifted. However, the Claimant would not be able to return to full duties and would only be able to undertake legal teaching. The reason for the restriction of her duties was said to be "*...part of a rehabilitation plan to aid [the Claimant's] return.*"

13. On 8 October 2019 the Claimant saw an occupational health physician, Dr Torrance. He works for the Defendant. He concluded that the Claimant had experienced significant reactive anxiety symptoms as a result of her unexpected suspension and that these symptoms would settle when the dispute had been resolved, following which the Claimant would be fit to return to unrestricted duties.
14. On 17 October 2019, the Claimant was invited to attend meetings with the Defendant on 21 October 2019 to discuss the investigation. On 18 October 2019, the Claimant's solicitors wrote to the Defendant indicating that although the Claimant was keen to engage with the Defendant and return to work, she was unable to attend the meetings as she was not well. The solicitors suggested a postponement of the meetings until the Claimant was well enough to attend and had been provided with sufficient information to understand the agendas and had sufficient time to prepare for the meetings. The solicitors questioned the justification for the original decision to suspend, the basis for continuing the suspension and the prolonged length of the suspension. The solicitors also made clear that the Claimant had not been provided with any detail in relation to the allegations against her, any terms of reference or any investigation report.
15. On 24 October 2019 the Defendant confirmed that the meetings were postponed, and that the Claimant had previously been informed that her suspension "*will be lifted.*" The Claimant was informed that she would be invited to a meeting by a newly appointed investigator and she was provided with Terms of Reference for the investigation.

Return to Work

16. The Claimant's solicitors wrote to the Defendant on 30 October 2019, welcoming the lifting of the suspension and proposing a phased return to work on full duties, other than claims work which had been outsourced to Capsticks. In response, by email on the same day, the Defendant's Human Resources Department stated that any return to work would be to undertake the work set out in the email of 5 September 2019 (i.e. legal teaching) and if the Claimant did not agree then suspension would be considered again.
17. On 31 October 2019 the Claimant attended work to join a group consultation meeting regarding a proposed restructure.
18. On 1 November 2019 the Claimant's solicitors wrote to the Defendant. The email reminded the Defendant of Dr Torrance's advice against the Claimant returning to work on reduced duties.

19. The Claimant returned to work on 5 November 2019. She was informed by Mr Avery that she should attend mandatory training and have an occupational health appointment before taking up restricted duties. The following day the Claimant attended work to complete the mandatory training. Mr Avery telephoned the Claimant and informed her that she should not attend the legal services office until she had been seen by occupational health. A different off-site occupational health physician had been arranged. The Claimant had not been informed of this arrangement in advance and did not consider it to be a reasonable request. The appointment did not take place.
20. The Claimant's solicitors wrote to the Defendant on 7 November 2019 requesting all outstanding issues be resolved to permit the Claimant to return to work with full duties on 12 November 2019.
21. On 12 November 2019 the Claimant returned to work. The Claimant's '*back to work*' meeting with Mr Avery was postponed until after her pre-arranged second appointment with Dr Torrance. Dr Torrance concluded "*I don't think she will be fully back to normal until she has resumed work. She has naturally missed the routine of attending work, the challenge of addressing professional issues and the satisfaction of undertaking her professional work.*" He stated that in his opinion the Claimant was "*...well and should be able to cope with an investigation process without significant adverse effects on her health.*" He also stated, "*As I indicated earlier in the report, I think that resuming work will enable [the Claimant] to regain fully normal health...*".
22. The resumed meeting with Mr Avery took place in the afternoon. He informed the Claimant that she could return to work on restricted duties on a phased return. He instructed the Claimant to carry out an audit of files with a view to improving the Defendant's learning on consent, but this could not be carried out in the legal office. The Claimant refused to do this on the basis that it amounted to a demotion and was contrary to Dr Torrance's advice that returning to work would improve her health. The Claimant was informed that she was refusing to comply with a management instruction, and she was suspended. She was asked to leave, and security was called to escort her from the premises.

Second Suspension

23. The letter confirming the second suspension was sent to the Claimant on 13 November 2019. The letter stated: (i) Mr Avery had a programme of work '*as part of the agreed return to work*' which related to review and leadership of consent to surgery workstream; (ii) Confirmed that the Claimant would not be permitted to return to inquest work or to provide medico-legal advice more

generally; (iii) The Claimant's refusal to accept the limitation of her duties was a refusal to obey a reasonable management instruction and justified suspension; and (iv) The purpose of the suspension was to protect her and the Defendant from the possibility of any accusations of wrongdoing while a disciplinary matter was under investigation.

24. The Claimant's solicitors wrote to the Defendant on 22 November 2019 inviting them to lift the suspension and to permit the Claimant to return to work on full duties failing which they were instructed to apply for an injunction. Later that day the Claimant was sent a Case Review produced by the law firm Bevan Brittan. The Case Review set out alleged concerns about the way that the Head of Legal and the Claimant had handled a number of clinical negligence cases on behalf of the Defendant. It also set out concerns about the Claimant's handling of the NR case and standards of communication with external stakeholders. It referred to "*widened terms of reference*" and "*further extended*" terms of reference. It also referred to the "*work which the Trust currently has real and substantial reasons to be concerned about, namely inquest and advisory work.*"

Lifting of the Second Suspension

25. The Claimant was invited to attend a meeting with Mr Avery on 26 November 2019 to review whether it was necessary to continue her suspension. The Claimant was unable to attend for health reasons.
26. On 27 November 2019 the Human Resources Department sent an email to the Claimant which stated, "*as you are now on sick leave, please note that the suspension is lifted.*" The letter indicated that a return to work interview would be necessary and that Mr Avery's 'initial view' was that he did not consider it appropriate for the Claimant to carry out inquest or advisory work, "*pending the resolution of serious concerns about your conduct and capability to perform that work.*"

Impact of the Suspensions and Restricted Duties

Impact on the Claimant

27. The Claimant provided two witness statements in which she set out her account of the events which took place from the management instruction by Mr Avery to undertake an internal investigation right through to the current position.

28. The Claimant, in her first witness statement, dated 25 November 2019, stated:

“In recent months I have suffered the indignity and trauma of being suspended from work on grounds that I consider to be unwholly justified. I leave the legal arguments to my lawyers, but I consider that my suspensions, and in particular my most recent suspension, to amount to a breach of my contract of employment. I have found being removed from my place of work and being prevented from performing my professional duties traumatic and stressful. It has had a serious adverse effect on my mental health and well-being.”

29. In her second witness statement, dated 9 December 2019, the Claimant stated:

“As is clear from the evidence referred to in my first statement, my health has unfortunately suffered as a result of my suspension and my being prevented from performing the job I love. I have found the fact that I have been suspended (for the first time in my professional life) humiliating and distressing. I have become tearful, I am not sleeping or eating properly, and I am having panic attacks when I think about not being able to return to the work I love...

I am proud of the fact that I am a solicitor and I am proud of the work that I have done in the NHS and for the Defendant in particular. I enjoy work and my interaction with my colleagues. I find it upsetting that questions have been raised about my professional competence. It is implicit in my being suspended from inquest work and giving medico-legal advice that I cannot be trusted to do either of these things. That makes me feel distraught. I consider it deeply unfair and wrong. I have no doubt that this fact contributes to my ill health.”

30. The Claimant acknowledged in her second witness statement that her relationship with Mr Avery is currently difficult. However, she stated that although Mr Avery took ‘*umbrage*’ when she challenged the verbal warning, her objection to it was reasonable, and she anticipated that these issues would be considered as part of the investigation. The Claimant also stated that if the difference of opinion with regard to the reasonableness of the restriction on her duties is resolved ‘*that bone of contention will fall away*’ and she is confident that the relationship is likely to improve.

Impact on the Defendant

31. Mr Avery provided a witness statement, dated 6 December 2019, in which he set out in detail the nature of the concerns relating to the Team as a whole, the rationale for the suspension of the Claimant, the attempts to return her to work and the current position.

32. In his witness statement Mr Avery addressed the issue of the balance of convenience. He stated that the Claimant pursued an appeal against the advice of leading counsel and NHS Resolution and without informing the Defendant of her decision to depart from this advice. He stated that this exposed the Defendant to costs and reputational risks. He informed the Court that he has serious concerns about the risk the Claimant would pose if she were to return to full duties and went on to state that if she is permitted to resume casework unsupervised there is:

“...an obviously foreseeable chance that she could handle a case in this way again. The potential risks arising from this are exacerbated by the fact that the Claimant has so far refused to acknowledge any of our concerns.”

Relevant Contractual Terms and Job Description

33. The Claimant’s contract of employment contains the following express terms:
- (i) Clause 15 – *“This contract of employment is subject to the Disciplinary Procedures/Rules and Standards stipulated by the Trust incorporating appeal mechanisms as within its ‘Disciplinary Procedure’...”*.
 - (ii) Clause 17 – *“Your duties will include all work normally covered by your job title including, without limitation, the duties set out in the attached job description. You may be required to undertake duties not specified in the job description but which the Trust may reasonably require you to do and which, in the opinion of the Trust, you should be capable of performing...”*
34. There was no dispute between the parties that as a consequence of the employer/employee relationship the following implied terms apply:
- (i) The Defendant would not without reasonable and proper cause act in a manner that would destroy or seriously damage the relationship of trust and confidence between the Claimant and the Defendant (the implied duty of trust and confidence);
 - (ii) Any decision to suspend the Claimant from her normal duties would not be exercised on unreasonable grounds.
35. The Claimant’s job description states that one of the aims of the role is to work *“autonomously”* by providing authoritative legal advice. It also stipulates that the key areas of work are clinical negligence, inquests, reducing risk, legal advice and legal training.

The Disciplinary Procedure and Associated Guidance

36. The Defendant's Disciplinary Procedure contains the following express provisions:

(i) Paragraph 4

“Investigating Officers must have an appropriate level of professional knowledge and be trained to undertake investigations. ...”

(ii) Paragraph 4.1.18

“Suspension and temporary deployment do not constitute disciplinary action. Suspension should be applied if it would be inappropriate or unsafe for the Trust and/or the member of staff to remain at work in their substantive role.

Where appropriate these will be carried out in accordance with Appendix C. ...

Prior to any suspension or temporary redeployment staff will be advised of the nature of the complaint and may comment if they so wish before a final decision on implementing these actions is made.”

(iii) Appendix C – Suspension/Temporary Redeployment Principle

“Temporary redeployment should be considered as an alternative to suspension; if this is possible it should be discussed and agreed with the member of staff. ...

Staff are entitled to be represented or accompanied at a suspension meeting and should be given time to arrange this. ...

Suspension should be for as short a time as possible. ...

Divisional Directors/Managers/Nurses will review all cases where a member of staff within their sphere of responsibility is suspended on full pay for a period exceeding 10 working days to ensure that due process is being followed and will take such action as necessary to mitigate any delays in the investigation process.

Divisional Directors/Managers/Nurses will ensure any member of staff on suspension for more than 3 weeks is kept regularly informed, in writing, of the reason(s) for continued suspension and

the status of the investigation, together with how much longer the period of suspension is expected to last. ...”

37. On 23 May 2019 Baroness Harding, Chair of NHS Improvement, sent a letter to all NHS Trusts and Chief Executives. The letter summarised “...*the outcomes of an important piece of work recently undertaken in response to a very tragic event that occurred at a London NHS trust...*”. An employee of the Trust who had been summarily dismissed had committed suicide. Attached to the letter was an enclosure entitled ‘Additional guidance relating to the management and oversight of local investigation and disciplinary procedures’ (the NHS Improvement Guidance).

38. The NHS Improvement Guidance contains the following provisions:

- (i) Paragraph 5 – Decisions relating to the implementation of suspensions/exclusions

“Any decision to suspend/exclude an individual should not be taken by one person alone, or by anyone who has an identified or perceived conflict of interest. Except where immediate safety or security issues prevail, any decision to suspend/exclude should be a measure of last resort that is proportionate, timebound and only applied when there is full justification for doing so. The continued suspension/exclusion of any individual should be subject to appropriate senior-level oversight and sanction.”

- (ii) Paragraph 6 – Safeguarding people’s health and wellbeing

“(a) Concern for the health and welfare of people involved in investigation and disciplinary procedures should be paramount...

(b) A communication plan should be established with people who are the subject of an investigation or disciplinary procedure, with the plan forming part of the associated terms of reference. The underlying principle should be that all communication, in whatever form it takes, is timely; comprehensive; unambiguous; sensitive; and compassionate. ...”

Legal Principles

39. It is common ground that the test which the Court is required to apply in order to determine whether or not to grant interim relief is the well-known test in *American Cyanamid v Ethicon Ltd (No1)* [1975] 1 A.C. 396 namely:

- a) is there a real prospect of succeeding in a claim for a permanent injunction at trial (serious issue to be tried)?
 - b) would damages be an adequate remedy?
 - c) does the balance of convenience favour the grant of an injunction?
40. There is no dispute that an employer's right to suspend an employee must be exercised on reasonable grounds: see for example *McClory v The Post Office* [1993] 1 All ER. Suspension without reasonable grounds may amount to a breach of the implied term of trust and confidence if the conduct, by itself or in combination with other acts or omissions, seriously destroys or damages the relationship between employer and employee: see *Gogay v Hertfordshire County Council* [2000] IRLR 703. A series of incidents, each of which may be relatively minor, can cumulatively amount to a breach of the implied duty of trust and confidence. See *London Borough of Waltham Forest v Omilaju* [2005] ICR 481 where Dyson LJ stated, "A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents."
41. In *Jahangiri v St Georges University Hospitals NHS Foundation Trust* [2018] EWHC 2278 Nicklin J in reference to the judgment in *Mezey v South West London and St George's Mental Health Trust* [2006] EWHC 34 stated:

"when the effect of the injunction is to require reinstatement of an employee, the Court must have proper regard to the fact that the decision to exclude requires an assessment of evidence and an exercise of judgment which is likely to require the balancing of several difficult factors and that decision was for the employer to make: Mezey [28]. Correspondingly, to succeed in 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: Mezey [11].

as to whether damages will be an adequate remedy, in employment cases where the complaint is over suspension, a suspension that is found to be unlawful may well not be capable of being fully healed by an award of damages: Mezey [26]; Watson [1],[24]"

Submissions

Serious issue to be tried

42. Mr Tatton Brown QC, on behalf of the Claimant, submitted that there is a triable issue regarding whether, individually or cumulatively, the Defendant's acts or omissions amounted to a breach of the implied duty of trust and

confidence and/or the implied duty to exercise any right to suspend on reasonable grounds. He refined his written skeleton argument during his oral submissions. He submitted that the relevant acts or omissions relate to (i) the Defendant's decision to suspend the Claimant on 2 August 2019 and to reimpose a suspension on 12 November 2019; and/or (ii) the manner in which the Claimant was treated during the suspension; and/or (iii) the decision to impose restricted duties as a condition of lifting the suspension. Mr Tatton Brown highlighted a number of issues based on the '*purported*' rationale provided by the Defendant and the Claimant's view that the real reason for the disciplinary action was that Mr Avery felt aggrieved that his verbal warning had been challenged. He also drew the Court's attention to a number of procedural flaws.

43. Ms Slark contended that there is no serious issue to be tried. She stated that the Claimant is not suspended and may return to work as soon as she is fit for work. She submitted that the investigation is due to conclude by the end of the month and that during the short intervening period the Claimant will be permitted to undertake casework duties, subject to supervision. The Claimant has been given the choice of doing policy work unsupervised or supervised casework. Ms Slark contended that Defendant is not willing to permit the Claimant to undertake unsupervised casework while the investigation remains outstanding as there is clear evidence that the Claimant has seriously mishandled cases in the recent past. She submitted that there are obvious and serious risks to the Defendant if the Claimant were permitted to return to her full duties. She further submitted that the temporary restriction of the Claimant's duties is reasonable, the duties she will be permitted to undertake all fall within her job description and cannot amount to a breach of contract.

Damages adequate remedy

44. Mr Tatton Brown submitted that damages would not be an adequate remedy. He submitted that the Defendant's decision to suspend the Claimant from work and then permit her return but only on restricted duties caused her ill health. He submitted that resuming her normal duties will enable her to regain her health. He further submitted that being deprived of the opportunity to practice her profession is personally upsetting and is likely to damage the Claimant professionally. He contended that these adverse consequences are not capable of being compensated by damages.
45. Ms Slark did not attempt to persuade the Court that damages would be an adequate remedy.

Balance of Convenience

46. Mr Tatton Brown invited the Court to conclude that the balance of convenience clearly favours the granting of the injunction. He informed the Court that the Claimant does not seek an order that she be permitted to undertake clinical negligence work, not because she accepts the criticisms are justified, but for pragmatic reasons. He also stated that the Claimant intends to fully cooperate with the investigation. However, he submitted that during the intervening period she should be permitted to undertake inquest and medico-legal work as there have been no criticisms of her work in these areas. He submitted that the proposed '*review and leadership of consent to surgery workstream*' is in effect a significant demotion as it is not normally undertaken by lawyers and as a consequence is deeply humiliating. He further submitted that there is clear evidence that permitting the Claimant to return to her normal duties would enable her to improve her health.
47. Ms Slark submitted that the balance of convenience lies strongly against granting the injunction. She invited the Court to consider dealing with this issue first. Ms Slark submitted that the Claimant is not at risk of prejudice by being asked to choose between undertaking policy work or casework with supervision. She submitted that the choices offered to the Claimant are reasonable, fall within her job description and are for a short, defined period. She further submitted that this management decision does not give rise to any additional damage to her reputation and should not have any serious additional detrimental impact on her health. By contrast the Defendant would be exposed to costs and reputational risks if the Claimant is permitted to undertake casework unsupervised. It was Ms Slark's contention that these risks are exacerbated by the Claimant's refusal to acknowledge the Defendant's concerns. Ms Slark accepted that a restriction of duties was not required to address the Claimant's alleged rude or unprofessional communication with panel solicitors.

Decision

Breach of implied duty of trust and confidence: Are there arguable grounds?

Relevance of Duty Not to Suspend Unreasonably

48. At the outset, it is important to make clear, that at this stage I am only deciding whether the Claimant has established that she has an arguable case. It is not for me to determine whether the Claimant could reasonably be thought to be a costs and reputational risk to the Defendant. The real question is why the Defendant decided to suspend the Claimant from *all* casework. This question

is inextricably linked to the only dispute between the parties which concerns the work the Claimant will be permitted to undertake between the date of her return to work (as yet unknown) and the conclusion of the disciplinary investigation (as yet unknown).

49. In this judgment I have not addressed every point that has been raised; only such matters that have enabled me to conclude whether the claim has a realistic prospect of success. For example, the Claimant asserted that the principal (or at least material) reason for her suspension and/or the principal reason for the Defendant's insistence that she should not be permitted to carry out inquest work or provide medic-legal advice was that Mr Avery was aggrieved that she had challenged the verbal warning. That is one possible explanation but there are several others. In the event that this matter proceeds to trial the issue of motive can be properly explored and determined, if required. It is not a finding that I am willing or able to make.
50. As the effect of an injunction, in the terms sought, would be reinstatement of the Claimant with permission to undertake all normal duties of her role (save for clinical negligence claims), I have applied a higher hurdle than '*serious issue to be tried*' for the reasons explained in *Jahangiri* [see paragraph 39 above]. Therefore, the issue is whether the Claimant has demonstrated that she has strong grounds upon which to contend that the Defendant's actions individually or cumulatively amounted to a breach of the implied duty of trust and confidence.
51. Mr Tatton Brown submitted that it is strongly arguable that the decisions to suspend the Claimant on 2 August 2019 and 12 November 2019 were unreasonable. He further submitted that if there was no proper cause to suspend the Claimant there can be no proper justification for preventing her from returning to her normal duties (save for clinical negligence). I accepted this submission for the following interrelated reasons:
- (i) The purported rationale for the initial suspension on 2 August 2019 was to protect the Claimant and the Defendant from the possibility of any accusations of wrongdoing while a disciplinary matter was under investigation. The letter of suspension makes reference to '*concerns*' but the main concern raised by the Capsticks Review and highlighted by the Defendant in the letter is the Claimant's handling of the NR case. The measure adopted by the Defendant to address the identified risk had to be proportionate to that risk. In the context of the Claimant's undisputed professional integrity and an independent review of her caseload, the concerns raised, even if well-founded, were insufficient, individually or cumulatively, to justify total exclusion in the form of suspension from all normal duties.

- (ii) Although there is no indication from the initial letter of suspension that the Defendant considered alternatives measures Mr Avery states in his witness statement that alternatives were carefully considered. These alternative measures are not identified. Mr Avery stated that it was his view at the time that the concerns raised by the NR case may not be “...*isolated concerns about a specific area of her litigation or advisory practices or that the same concerns about her judgment would not be equally risky in relation to work other than the management of clinical negligence cases.*” Such a broad-brush approach may have led to the conclusion that there were no alternatives to suspension, but the approach was flawed. Neither the Capsticks Review nor the subsequent Case Review provided an adequate justification for suspension from all normal duties.
- (iii) The need to investigate the concerns did not provide a reasonable or proper cause to suspend the Claimant from *all* duties as it would not have been ‘*inappropriate or unsafe*’, for the Claimant to remain at work in her substantive role with a restriction relating to the conduct of clinical negligence cases.
- (iv) The suspension decisions departed from the NHS Improvement Guidance as they were not proportionate, were not fully justified and there is no evidence that the Claimant’s health and welfare was of paramount importance.
- (v) Mr Avery stated in his witness statement that once arrangements had been made for external providers to deal with the clinical negligence and inquest work the Defendant was able to consider whether suspension remained necessary. However, that assessment of the position appears to ignore that fact that these measures were required as a direct consequence of the Defendant’s decision to suspend the Claimant and her line manager. It is unlikely that the inquest work would have had to be referred to a panel firm if a proportionate response had been taken by the Defendant at the outset.

Duty of implied trust and confidence

52. It is strongly arguable that the manner in which the Claimant was treated by the Defendant amounted to a breach of the implied duty of trust and confidence for the following interrelated reasons:

- (i) There was arguably no reasonable and proper cause for the suspensions (for the reasons set out above) and as a consequence no justification for subsequently restricting the Claimant's duties to legal teaching, policy work and supervised casework.
- (ii) The criticisms of the Claimant's inquest and medico-legal work, purporting to justify a restriction of her duties, have been made after the decision to suspend. There was no evidence in Mr Avery's witness statement or in the contemporaneous documentation that there were any concerns about the Claimant's handling of the Defendant's inquest work or her medico-legal advice more generally at the time. On the contrary, the Claimant's evidence is that her inquest work has been highly effective. There is no evidence of mismanagement of the inquest work or erroneous medico-legal advice in the warning letter, the first suspension letter, in the first Terms of Reference or in the expanded Terms of Reference. There was also no challenge to the Claimant's assertion that the allegation that she is rude and unprofessional to panel solicitors had not been raised with her during her appraisals. Therefore, restriction of the Claimant's ability to undertake inquest and medico-legal work without supervision is not justified.

Adequacy of Damages as a Remedy

53. This is a case in which damages are plainly not an adequate remedy.

Balance of Convenience

54. Although the outcome of the Defendant's investigation is expected to be concluded by the last working day of December 2019, unexpected events may arise. The Defendant's previous time estimates have proved to be incorrect and the possibility that the Claimant's interview will raise matters which require further exploration cannot be ruled out.
55. In any event, based on the evidence currently available, the restriction of the Claimant's duties (save for clinical negligence) is not justified. As these measures are not justified there is no basis for their imposition even for a very short period. The evidence does not indicate that harm would be caused to the Defendant in permitting the Claimant to resume her inquest and medico-legal

work. However, there is clear evidence that excluding the Claimant from her place of work has caused significant personal upset and is professionally to her detriment. Furthermore, there is clear evidence that permitting the Claimant to return to her normal duties would enable her to regain her health. The balance of convenience overwhelmingly favours the grant of an injunction.

Conclusion

56. The application for an interim mandatory injunction is granted. The precise form of the order will require further consideration: (i) in light of the Claimant's voluntary agreement not to undertake clinical negligence casework; and (ii) the effect of my order is not to require the Claimant to be allowed to undertake clinical negligence casework. The parties should agree an order reflecting my judgment including costs.