



Neutral Citation Number: [2019] EWCA Civ 387

Case No: A2/2018/0662

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE QUEEN'S BENCH DIVISION**  
**Justine Thornton QC (sitting as a Deputy High Court Judge)**  
**HQ17X04116**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 19/03/2019

Before :

**LORD JUSTICE LEWISON**  
**LORD JUSTICE PETER JACKSON**  
and  
**LORD JUSTICE COULSON**

Between :

**North West Anglia NHS Foundation Trust**  
**- and -**  
**Dr Andrew Gregg**

**Appellant**

**Respondent**

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**Mr Mark Sutton QC & Ms Nadia Motraghi (instructed by Mills & Reeve LLP) for the**  
**Appellant**  
**Mr Jeremy Hyam QC (instructed by RadcliffesLeBrasseur) for the Respondent**

Hearing dates: Wednesday 20th & Thursday 21st February 2019

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**Approved Judgment**

## **Lord Justice Coulson :**

### **1. Introduction**

1. This is an appeal by North West Anglia NHS Foundation Trust (“the Trust”) against the decision of Ms Justine Thornton QC, sitting as a Deputy High Court Judge (“the judge”), by which she found that the Trust was or would be in breach of contract:
  - a) for failing to pay Dr Gregg’s salary during the period when he was the subject of an interim suspension;
  - b) for proposing to hold a hearing to discuss the termination of Dr Gregg’s contract on the grounds of his failure to hold the requisite registration during the period of suspension; and
  - c) for pursuing their own internal disciplinary process in parallel with an investigation by the police, rather than delaying it until the police investigation was completed and a decision made by the CPS as to whether or not to charge Dr Gregg with any criminal offences.

Permission to appeal was granted on 30 May 2018.

2. At the outset of the hearing, it was suggested on behalf of Dr Gregg that the appeal was academic as a result of the events (detailed in *Section 3* below) which have occurred since the trial. However, whilst it is right that several of the issues between the parties have fallen away, there remain a number of disputes, not least those relating to costs. Furthermore, it was agreed that the points which have been raised about the rights and obligations of an employer and an employee in the NHS when the employee is the subject of an interim, non-terminatory suspension such that his or her licence or registration is automatically suspended, are of widespread application. For those reasons, the appeal was heard in full. The court was greatly assisted by the written and oral submissions of Mr Sutton QC and Ms Motraghi, on behalf of the Trust, and Mr Hyam QC, on behalf of Dr Gregg.
3. I propose to deal with the issues in this way. In *Section 2*, I set out the relevant terms of the contract between the Trust and Dr Gregg. In *Section 3*, I set out the relevant facts, including the events following the judgment. In *Section 4*, I deal with what I shall call Issue 1, namely whether Dr Gregg was entitled to be paid during the period of his interim suspension. In *Section 5*, I deal with Issue 2, namely whether the Trust was entitled, notwithstanding the internal investigation/disciplinary proceedings in respect of misconduct, to have a hearing with Dr Gregg to consider terminating his contract on the alternative basis that he did not hold the requisite registration. And in *Section 6*, I deal with Issue 3, namely whether the Trust was in breach of the implied term of trust and confidence by progressing their own internal disciplinary proceedings without waiting for the completion of the police investigation. There is a short summary of my conclusions at *Section 7*.

### **2. The Contract**

4. The contract of employment between the Trust and Dr Gregg was dated 15 January 2007 (“the contract”). There are four relevant parts: the contract of employment itself;

the terms and conditions; Parts I and II of the Department of Health's document entitled 'Maintaining High Professional Standards in the Modern NHS' ("MHPS"); and the Trust's own Disciplinary Policy. I summarise the relevant parts of each in turn.

5. *The Contract of Employment*

5.1. Clause 3 provided:

**"3 General Mutual Obligations**

Whilst it is necessary to set out formal employment arrangements in this contract, we also recognise that you are a senior and professional employee who will usually work unsupervised and frequently have the responsibility for making important judgements and decisions. It is essential therefore that you and we work in a spirit of mutual trust and confidence. You and we agree to the following mutual obligations in order to achieve the best for patients and to ensure the efficient running of the service:

- to co-operate with each other;
- to maintain goodwill;
- to carry out our respective obligations in accordance with appraisal arrangements;
- to carry out our respective obligations in devising, reviewing, revising and following the organisation's policies, objectives, rules, working practices and protocols."

5.2. Clause 10 provided:

**"10 Registration Requirements**

It is a condition of your employment that you are, and remain, a fully registered medical practitioner and are included on the Specialist Register held by the General Medical Council (GMC), and continue to hold a licence to practice."

5.3. Clause 12 provided:

**"12 Deductions From Pay**

We will not make deductions from or variations to your salary other than those required by law without your express written consent."

5.4. Clause 17 provided:

**"17 Disciplinary Matters**

Wherever possible, any issues relating to conduct, competence and behaviour should be identified and resolved without recourse to formal procedures. However, should we consider that your conduct or behaviour may be in breach of Trust Policies, or that your professional competence has been called into question, we will resolve the matter through our disciplinary or capability procedures, subject to the appeal arrangements set out in those procedures.”

5.5. Clause 32 provided:

**“TERMINATION OF EMPLOYMENT**

**32** Provisions governing termination of employment are set out in Schedule 19 of the Terms and Conditions.”

5.6. Clause 20 stated that Dr Gregg’s basic salary was £66,065.00. Although the contract did not expressly say so, it was agreed that this was an annual amount. It was payable monthly.

6. *The Terms and Conditions*

6.1. For the purposes of the appeal, the only part of the Terms and Conditions to which the court was taken was Schedule 19, entitled “Termination of Employment”.

6.2. The relevant parts of Schedule 19 were as follows:

**“Period of Notice**

1. Where termination of employment is necessary, an employing organisation will give a consultant three months notice, in writing.

2. Consultants are required to give their employing organisation three months written notice if they wish to terminate their employment.

3. Shorter or longer notice may apply where agreed between both parties in writing and signed by both.

**Grounds for Termination of Employment**

4. A consultant’s employment may be terminated for the following reasons:

- Conduct;
- Capability;
- Redundancy;
- Failure to hold or maintain a requisite qualification, registration or licence to practice;

- In order to comply with statute or other statutory regulations;
- Where there is some other substantial reason to do so in a particular case.

5. Should the application of any disciplinary or capability procedures result in the decision to terminate a consultant's contract of employment, he or she will be entitled to an appeal..."

It is the first and fourth bullet points which are relevant to this appeal.

7. *MHPS (Parts I and II)*

7.1. For the reasons explained in her judgment at [100] - [103], the judge found that Parts I and II of MHPS were incorporated into the contract but that Parts III - V were not. There is no appeal against that finding.

7.2. Part II is entitled 'Restriction of Practice and Exclusion of Work'. In the Introduction section, under the heading 'Managing the Risk to Patients', there were the following paragraphs:

"4. When serious concerns are raised about a practitioner, the employer must urgently consider whether it is necessary to place temporary restrictions on their practice. This might be to amend or restrict their clinical duties, obtain undertakings or provide for the exclusion of the practitioner from the workplace..."

*5. Exclusion of clinical staff from the workplace is a temporary expedient. Under this framework, this exclusion is a precautionary measure and not a disciplinary sanction. Exclusion from work ("suspension") should be reserved for only the most exceptional circumstances."* (Emphasis added)

7.3. There is then a lengthy section, from paragraphs 9 to 31 inclusive, under the heading 'The Exclusion Process'. Under the heading 'Keeping in Contact and Availability for Work', paragraph 25 provided:

*"25. An exclusion under this framework should usually be on full pay, the practitioner must remain available for work with their employer during their normal contracted hours. The practitioner must inform the case manager of any other organisation(s) with whom they undertake either voluntary or paid work and seek their case manager's consent to continuing to undertake such work or to take annual leave or study leave. The practitioner should be reminded of these contractual obligations but would be given 24 hours' notice to return to work. In exceptional circumstances, the case manager may decide that payment is not justified because the practitioner is*

*no longer available for work (e.g. abroad without agreement).”*  
(Emphasis added)

7.4. Part III (which as already noted, the judge found was not incorporated into the contract), deals with the conduct of hearings and disciplinary matters, including the situation where investigations identified possible criminal acts.

8. *The Trust’s Disciplinary Policy*

8.1. This document was generally incorporated into the contract by the reference to it in Clause 17 (paragraph 5.4 above). Section 5 was headed ‘Duties and Responsibilities’.

8.2. Dr Gregg’s express obligation, relevant to the present appeal, was at paragraph 5.1.1: “to openly and properly participate in investigations, provide statements and attend disciplinary/appeal meetings, as required”.

8.3 Paragraph 10 was entitled Suspension. Amongst other things, it provided:

“The manager will aim to inform the employee of the following:

- The nature of the complaint/allegation;
- That they have taken a decision to suspend the employee from duty, pending the outcome of an investigation into the complaint/allegation;
- The reason(s) why the employee is being suspended;
- That suspension in itself is not a form of disciplinary action, it is a neutral act and does not imply guilt;
- That suspension will be without detriment to normal, full pay entitlement in accordance with any planned working arrangement...”

**3. The Relevant Facts**

9. Dr Gregg was appointed as a consultant in anaesthetics by the Trust on 29 September 2003. As already noted, his contract in its current form was dated 15 January 2007.

10. On 5 June 2013, Patient B, who was in the care of Dr Gregg, died. No concerns were raised at the time about the circumstances of Patient B’s death.

11. On 4 January 2016, Patient A, who was also in the care of Dr Gregg, died in the Trust’s intensive care unit. On this occasion, concerns were expressed as to the circumstances of the patient’s death and, on 2 February 2016, a Ms McIntosh was appointed as the case investigator. On 18 February, Dr Gregg attended an interview with Ms McIntosh. He was accompanied by a MHPS representative.

12. On 13 April 2016, Ms McIntosh’s investigation report into the death of Patient A was produced. This report recommended that disciplinary proceedings be taken against Dr Gregg. In consequence of this, five days later, on 18 April 2016, the Trust excluded

Dr Gregg from duty on full pay. Just under a month later, on 15 May 2016, the Trust's Medical Director, Dr Rege, referred Dr Gregg's case to the GMC.

13. On 27 May 2016, the police informed the GMC that Dr Gregg was under investigation for the unlawful killing of Patient A. That investigation lasted well into 2017. As part of it, on 13 December 2016, Dr Gregg attended a police interview and provided an explanation (by means of a signed statement) dealing with the circumstances of the death of Patient A.
14. The police had no objection to the continuation of the Trust's disciplinary process in relation to Patient A, and they confirmed as much in a letter dated 7 February 2017. As part of the ongoing police investigation, on 31 March 2017, Dr Gregg was arrested and released on bail.
15. At about the same time, in February 2017, a Dr Booth undertook a desktop review of Patient B's case. Following that, on 20 April 2017, a Mrs Chris Wilkinson was appointed as case investigator into Patient B's death. On 8 May 2017, the police interviewed Dr Gregg in respect of Patient B. Dr Gregg again provided an explanation by means of a signed statement.
16. On 12 May 2017, the Interim Orders Tribunal ("IOT") of the Medical Practitioners Tribunal Service met to consider whether it was necessary for the protection of members of the public to suspend Dr Gregg. The written notification of their decision was dated 15 May 2017. This notice recorded the views expressed by a Dr Wimbush in an expert's report into the death of Patient A, which referred to what he said was an excessive level of drug use. The notice also summarised the written submissions provided by Dr Gregg's solicitors. It then went on:

"In accordance with Section 41A of the Medical Act 1983, as amended, the Tribunal has determined, based on the information before it today, that it is necessary to impose an interim order for the protection of members of the public and in the public interest. It is determined to impose an order of suspension for a period of 18 months.

The Tribunal has determined that, based on the information before it today, there may be impairment of Dr Gregg's fitness to practice which poses a real risk to members of the public and may adversely affect the public interest. After balancing Dr Gregg's interests and the interests of the public, the Tribunal has decided that an interim order is necessary to guard against such a risk....

This means that your registration will be suspended for a period of 18 months beginning on 12 May 2017. This order will be subject to review within in 6 months in accordance with Section 41A(2) of the Act.

Under Section 41C of the Medical Act, your licence will be withdrawn for the period of the suspension of your registration.

This means that:

- It is not open to you to hold any appointment as a medical practitioner for which registration and a licence are required.
- Other privileges which attach to the licence to practice are not open to you whilst your registration is suspended.
- You should not undertake activities, such as prescribing or signing statutory certificates whilst you are suspended.
- It is your responsibility to check with the GMC the appropriateness and legality of any activity proposed whilst your registration is suspended...”

17. On 15 June 2017, the police informed the Trust’s Medical Director that there was no objection to the Trust proceeding with its internal investigation into the cases of both Patients A and B. However, on 14 July 2017, Dr Gregg’s solicitors wrote to the Trust objecting to his attendance at an interview in relation to Patient B while subject to potential criminal proceedings arising out of the circumstances of Patient’s B death. They requested that the Trust’s internal investigation into Patient B’s death be put on hold.
18. On 31 August 2017, the Trust lifted Dr Gregg’s exclusion. This was not as a result of any fundamental change in their position; it was apparently because, as a result of the IOT’s interim suspension (paragraph 16 above), it was felt to be unnecessary. At the same time, the Trust informed Dr Gregg that his pay would be suspended as from 1 September 2017.
19. The letter setting out this information was dated 7 September 2017. Under the heading ‘Your Exclusion’, the Trust said:

“Your formal exclusion under the provisions of Part II of the Maintaining High Professional Standards In The Modern NHS Framework (“**MHPS**”) is lifted with effect from 31 August 2017.

Given the effect of the Interim Suspension Order (“**the Order**”) made by the Medical Practitioner Service (“**MPTS**”) Interim Orders Tribunal on 12 May 2017 (which is that you are not permitted to hold any appointment as a medical practitioner for which registration is required whilst your registration is suspended) the Trust does not consider it necessary to continue to formally exclude you under the provisions of MHPS for so long as the Order is in force.

The Trust believes that the imposition of the MPTS interim suspension eclipses the procedures in place for your exclusion under the terms of MHPS Part II, and the mechanisms for review which are therein provided.”



20. Under the heading ‘Payment of Your Salary’ the letter went on:

“The Trust has decided to suspend payment of your salary with effect from 1 September 2017.

It is a condition of your contract of employment with the Trust that you are, and remain, a fully registered medical practitioner, are included on the Specialist Register held by the General Medical Council, and that you continue to hold a licence to practise. The effect of your interim suspension, and specifically the prohibition on your holding an appointment as a medical practitioner for which registration is required, clearly prevents you from complying with this fundamental contractual obligation. In addition, the Police bail conditions to which the Trust understands that you are currently subject, as set out above, also mean that you are prohibited from attending the Trust’s premises to perform your duties as an employee of the Trust. The consequence is that you are not currently able, or available, to discharge your contracted role.

Given the length of your exclusion to date, the indeterminate and potentially lengthy period of time during which you may remain subject to MPTTS interim suspension and your inability and unavailability to discharge your duties under your employment contract, the Trust considers that this matter falls within circumstances, such as those contemplated in Part II §25 of MHPS, where payment is not justified because a practitioner is no longer available for work.

In addition, under common law principles an employee’s contractual entitlement to pay is contingent upon their being ready, willing and able to perform the work they are employed to undertake. In all the circumstances set out above you are not able to perform the work required by your contract of employment.

In stating this, you will appreciate that the Trust owes a duty, as a public authority, to ensure that its financial resources are appropriately and responsibly directed.”

21. On 14 September 2017, Dr Gregg’s solicitors again objected to the continuation by the Trust of its internal investigation into Patient B’s case whilst the police investigation was ongoing. On 28 September, they sent a pre-action letter dealing with that and the other disputes which had arisen and the Trust responded on 16 October. In the Trust’s response, it undertook to make monthly payments equivalent to Dr Gregg’s salary from 1 October 2017, subject to a cross-undertaking in damages. That meant that the only outstanding sum at the time of trial was the salary for September 2017.
22. On 3 November 2017, the IOT carried out a review hearing and the interim suspension order was continued. It noted that there was an ongoing investigation into

a further sixteen cases involving Dr Gregg which met the threshold for GMC investigation. The court has no other information about that investigation.

23. On 10 November 2017, Mrs Wilkinson concluded her last interview in respect of the death of Patient B, which meant that the only outstanding matter was the interview which Dr Gregg had refused to attend.
24. On the same day, 10 November 2017, a claim was issued in the High Court by Dr Gregg seeking an injunction in respect of the ongoing investigations by the Trust into the death of Patient B and declarations in relation to the non-payment of his salary. Remarkably, the QBD was able to hear that claim just two months later, between 15 and 17 January 2018 and, following a reserved judgment ([2018] EWHC 390 (QB)), the judge made an order dealing with the various issues dated 27 February 2018. As previously noted, she found for Dr Gregg on all the substantive issues. She granted an injunction preventing the Trust from continuing its investigation into the death of Patient B until after the police had completed their investigation and a decision had been taken by the CPS as to whether or not to charge Dr Gregg in connection with the deaths of Patients A and/or B.
25. On 23 April 2018 the IOT conducted a review hearing and varied the interim conditions applying to Dr Gregg. His registration ceased to be suspended, although he was still prohibited from having clinical contact with patients.
26. On 4 May 2018, as a consequence of the lifting of the suspension of Dr Gregg's registration, the Trust reinstated their exclusion of him under MHPS Part II. This was on the basis that Dr Gregg would continue to be paid in full (although such payment would be without prejudice to the Trust's dispute as to his entitlement to his salary). Thus, the Trust was endeavouring to act consistently, by paying Dr Gregg when he was the subject of their own exclusion, but disputing his entitlement to pay when he was the subject of the IOT's suspension of his registration.
27. On 11 June 2018, the police decided that no further action would be taken in respect of the death of Patient B, so that the matter would not be referred to the CPS. In consequence, the injunction granted by the judge expired 14 days later, on 25 June 2018. On 27 June 2018, the Trust informed Dr Gregg that they were going to resume their internal disciplinary process in respect of Patients A and B.
28. On 19 July 2018, the IOT review hearing maintained the conditions relating to Dr Gregg imposed in April (paragraph 25 above).
29. On 19 September 2018, Dr Gregg sent Mrs Wilkinson a written statement in respect of Patient B. It appears that this was the same statement that he had provided to the police sixteen months earlier (paragraph 15 above). The following day, 20 September 2018, Dr Gregg attended a disciplinary interview with Mrs Wilkinson in respect of Patient B. On 5 December 2018, Mrs Wilkinson produced her report.
30. On 16 January 2019, there was a further IOT review hearing. Dr Gregg's conditions were varied again. He was permitted to carry out more of his duties, although close supervision was required in all posts by a clinical supervisor and direct supervision was required when prescribing or administering drugs.

31. On 18 January 2019, the Trust provided Dr Gregg with a copy of Mrs Wilkinson’s report in relation to Patient B. A month later, on 18 February 2019, the Trust wrote to Dr Gregg setting out the specific allegations which would be considered at the forthcoming disciplinary hearing to be held between 20 – 22 March 2019. The letter said that the disciplinary hearing would relate only to Patient A and not Patient B. The allegations were detailed but culminated in the assertion that Dr Gregg had “wilfully and deliberately” hastened the death of Patient A and was in breach of the fundamental principle that decisions about clinical care “must be directed to achieving the prolongation rather than termination of the patient’s life”. It was said that Dr Gregg’s acts and omissions “whether viewed singly or in combination, constitute gross misconduct”.
32. Speaking for myself, having summarised the complex factual background, I regard it as unfortunate (to say the least of it) that, at a time when Dr Gregg is facing very serious allegations of misconduct, he was also obliged to take part in this appeal. However, that seems to me to be the result of the original decision to invoke the jurisdiction of the High Court in relation to these matters, and in particular the stance that he took (on advice) about the Trust’s ongoing investigation into the death of Patient B, and the Trust’s assertion of the right to deduct his pay.
33. With that background in mind, I turn to the three issues which arise on this appeal. I shall address them in the order with which they were dealt by leading counsel, namely taking first the question of pay during the suspension (Issue 1); then the arguments about the alternative grounds for termination (Issue 2); and finally the interplay between the trust and confidence term, on the one hand, and the fact of parallel investigations, on the other (Issue 3).

#### **4. Issue 1: Entitlement to Deduct Pay**

##### **4.1 The Judgment**

34. The judge dealt shortly with Issue 1 between [133] and [139]. She said at [135] that paragraph 25 of Part II of the MHPS (paragraph 7.3 above) provided the Trust with a discretion to suspend Dr Gregg’s salary on the basis that he was unavailable for work. However, she also said [136] – [137] that the natural and ordinary meaning of paragraph 25 was that “unavailability” was to be construed as self-induced action by the employee. She concluded [137] – [138] that, on a proper construction of paragraph 25, it related to self-induced availability, not an involuntary action. In the present case, where an interim suspension order had been imposed on Dr Gregg by the IOT, and everything had flowed from that, his unavailability was against his wishes and manifestly not self-induced.
35. The judge’s analysis was based entirely on paragraph 25 of Part II of MHPS. At [139] she said that, as a result, she did not need to deal with the common law doctrine of “ready and willing to work” although she did say that it was not clear to her that she could come to a different view under the common law, given the decision by the House of Lords in *Miles v Wakefield District Council* [1987] ICR 368. In the present appeal, Mr Hyam QC’s respondent’s notice argued that, if this court concluded that the judge was wrong in her construction of paragraph 25, it should consider the issue of cessation of pay by reference to the common law doctrine. He said that, in accordance with the authorities, Dr Gregg was ready, willing and able to work. Mr

Sutton QC was more than happy to deal with this argument, which he said gave him an alternative route to upholding the judge's conclusion to the contrary.

36. For the reasons set out below, I have concluded that, although Issue 1 is rather more complex than the judge indicated, she reached the right conclusion: the Trust were not entitled to withhold Dr Gregg's pay during the period of his interim suspension.

#### **4.2. The Relevant Authorities**

37. I start with the statutory context, and the nature of the suspension which was imposed on Dr Gregg. Section 41A of the Medical Act 1983 (added by way of amendment in 2000) deals with Interim Orders. The relevant parts of that section are as follows:

“(1) Where an Interim Orders Tribunal or a Medical Practitioners Tribunal in arrangements made under subsection (A1), or a Medical Practitioners Tribunal on their consideration of a matter, are satisfied that it is necessary for the protection of members of the public or is otherwise in the public interest, or is in the interests of a fully registered person, for the registration of that person to be suspended or to be made subject to conditions, [the Tribunal] may make an order—

(a) that his registration in the register shall be suspended (that is to say, shall not have effect) during such period not exceeding eighteen months as may be specified in the order (an “interim suspension order”); or

(b) that his registration shall be conditional on his compliance, during such period not exceeding eighteen months as may be specified in the order, with such requirements so specified as [the Tribunal] think fit to impose (an “order for interim conditional registration”).

(2) Subject to subsection (9) below, where [an Interim Orders Tribunal or a Medical Practitioners Tribunal] have made an order under subsection (1) above, [an Interim Orders Tribunal or a Medical Practitioners Tribunal]

(a) shall review it within the period of six months beginning on the date on which the order was made, and shall thereafter, for so long as the order continues in force, further review it—

(i) before the end of the period of six months beginning on the date of the decision of the immediately preceding review; or

(ii) if after the end of the period of three months beginning on the date of the decision of the immediately preceding review the person concerned requests an earlier review, as soon as practicable after that request; and

(b) may review it where new evidence relevant to the order has become available after the making of the order.

...

(6) The General Council may apply to the relevant court for an order made by [an Interim Orders Tribunal or a Medical Practitioners Tribunal] under subsection (1) or (3) above to be extended, and may apply again for further extensions.

...

(11) Except as provided in subsection (12) below, while a person's registration in the register is suspended by virtue of an interim suspension order under this section he shall be treated as not being registered in the register notwithstanding that his name still appears in the register.”

38. Section 41C(2) provides:

“(2) Where a medical practitioner's registration has been suspended and—

(a) that suspension expires without being further extended;

(b) the suspension is brought to an end without any direction for erasure or further suspension being made, the practitioner's licence to practise shall be restored with effect from the date on which the suspension comes to an end.”

In other words, the registration is restored, but only from the date of restoration: it is not retrospective.

39. Section 47 is entitled ‘Appointments not to be held except by fully registered medical practitioners who hold licences to practice’. The relevant subsections are as follows:

“(1) Subject to subsection (2) below, only a person who is fully registered and who holds a licence to practise may hold an appointment as physician, surgeon or other medical officer —

(a) in the naval, military or air service,

(b) in any hospital or other place for the reception of persons suffering from mental disorder, or in any other hospital, infirmary or dispensary not supported wholly by voluntary contributions,

(c) in any prison, or

(d) in any other public establishment, body or institution,

or to any friendly or other society for providing mutual relief in sickness, infirmity or old age.

...

(3) None of the suspension events mentioned in subsection (4) below shall terminate any appointment such as is mentioned in subsection (1) above, but the person suspended shall not perform the duties of such an appointment during the suspension.

(4) The suspension events are—

(a) the suspension of registration of a person by a [Medical Practitioners Tribunal] —

(i) following a finding of impairment of fitness to practise by reason of deficient professional performance or adverse physical or mental health under section 35D above, or

(ii) under paragraph 5A(3D) or 5C(4) of Schedule 4] to this Act;

(b) an order for immediate suspension by a [Medical Practitioners Tribunal] under section 38(1) above; or

(c) an interim suspension order by an [Interim Orders Tribunal] or a [Medical Practitioners Tribunal] under section 41A above (or such an order as extended under that section).”

40. In the present case, Dr Gregg was originally the subject of an interim suspension order issued by the IOT (paragraph 16 above). That interim suspension was therefore caught by s.47(4)(c), which in turn meant that, pursuant to s.47(3), the suspension did not terminate the contract. Those provisions were added to reverse the result in *Tarnesby v Kensington & Chelsea Westminster Area Health Authority* [1981] I.C.R. 615.
41. Thus, the suspension with which we are concerned in this case was, in accordance with the Medical Act, an interim, non-terminatory suspension. It was designed simply to preserve the position until more was known about the allegations made, and to allay any public concerns before such allegations could be resolved. The Trust itself described suspension as “a neutral act” (paragraph 8.3 above)<sup>1</sup>. It was akin to an exclusion, described in the MHPS document (paragraph 7.2 above) as a “temporary expedient” and a “precautionary measure”. It was, on any view, quite different from a suspension imposed by way of sanction.
42. Turning to the caselaw, the earliest authority cited to the court during this appeal was *Wallwork v Fielding & Others* [1922] 2 KB 66, where a policeman was suspended by the defendants for two weeks for an offence against discipline (ie it was a sanction). He sought to recover his pay for that period, but the defendant argued that he had been properly suspended and was therefore not entitled to pay. It appears that the claimant’s principal contention was that there was no power to suspend, which argument was rejected.

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<sup>1</sup> Of course, depending on the circumstances, a suspension may not in fact be neutral; see *London Borough of Lambeth v Agoreyo* [2019] EWCA Civ 322 at paragraphs 85-94.

43. On the question of the plaintiff's entitlement to pay, which appeared to arise very much as a secondary issue, Lord Sterndale MR said:

"I should have thought that the power to suspend the operation of a contract necessarily suspended its whole operation including not only the performance of duty but also the right to pay during the period of suspension... all these learned judges treat it, it seems to me, as indisputable that if there is a power of suspension which is exercised, the whole contract is suspended, the obligation on both sides are suspended. It seems to me that in the inevitable meaning of suspension, and if there be any power necessary, there was express statutory power here to suspend a man from duty and that involves a suspension of payment for the discharge of a duty. The contract is suspended with regard to its performance by both sides, not only by one; therefore I think point also fails."

Warrington LJ rejected the fallback argument for similar reasons. He said:

"The relations of those of employer and employed. If the employed is suspended from his functions as an employed person, it seems to me the effect of that is to suspend the relation of employer and employed for the time being: to excuse the servant or the employed person from performing his part of the contract, and at the same time to relieve the employer from performing his part of the contract. It would be a most extraordinary thing of suspension (assuming that there is power to effect suspension) or to be so one-sided that the servant were to be excused from performing his part of the contract while the employer was to remain liable to perform his. It seems to me that suspension suspends for the time being the contractual relation between the parties on both sides."

44. On one view, therefore, *Wallworth* is authority for the simple proposition that an employee who is lawfully suspended for disciplinary reasons is not entitled to be paid for the period of that suspension; if he were, the suspension would no longer be a sanction and would instead be rendered meaningless; indeed, it would operate to damage only the employer, who had lawfully imposed the sanction in the first place.
45. What the employer can do when an employee is accused of a criminal offence was considered in *Harris (Ipswich) Limited v Harrison* [1978] I.C.R. 1256. Giving the judgment of the EAT, Philips J said:

"...What needs to be discussed is not so much the alleged offence as the action which the employer is proposing to take.

It is often difficult for an employer to know what is best to do in a case of this kind, particularly where the employee elects to go for trial. Unfortunately it may be many months before the trial takes place, and it is often impractical for the employer to wait until the trial takes place before making some decision as to the future of the employee so far as his employment is

concerned. At first sight those not familiar with the problem tend to say that it is wrong to dismiss the employee until his guilt has been established. Further experience shows that this is impractical. In the first place, quite apart from guilt, involvement in the alleged criminal offence often involves a serious breach of duty or discipline. The cashier charged with a till offence, guilty or not, is often undoubtedly in breach of company rules in the way in which the till has been operated. The employee who removes goods from the premises, „, guilty or not, is often in breach of company rules in taking his employer's goods from the premises without express permission; and it is irrelevant to that matter that a jury may be in doubt whether he intended to steal them. Such examples could be multiplied. What it is right to do will depend on the exact circumstances, including the employer's disciplinary code. Sometimes it may be right to dismiss the employee, sometimes to retain him, sometimes to suspend him on full pay, and sometimes to suspend him without pay. The size of the employer's business, the nature of that business and the number of employees are also relevant factors. It is impossible to lay down any hard and fast rule. It is all a matter for the judgment of the industrial tribunal.”

46. Given the increasing complexity of contracts of employment, not least those in the NHS, I would be tempted to modify that last sentence, and to say that it is, at least in the first instance, a matter to be resolved by reference to the terms of the contract in question. In that regard, I note the decision of Stanley Burnton J in *R (Walker) v GMC* [2003] EWHC 2308 (Admin), a case with some similarities to this, but where the issue was resolved by reference to the express terms of the contract (which was very different to Dr Gregg's). By reference to the decision in *Madan v GMC* [2001] Lloyd's Law Reports 539, Burnton J said at paragraph 35 that, whilst the interim suspension meant that Mr Walker could not work, his contract meant that he would continue to be entitled to be paid. Neither judgment explains in detail how that conclusion was reached<sup>2</sup>.
47. The development of the related common law doctrine of 'ready, willing and able' to work can be traced back to *Petrie v McFisheries Limited* [1940] 1 KB 258, where this court held that there was no general principle that a servant was entitled to wages during his absence through sickness. In his concurring judgment, Atkinson J said that it had to be ascertained from the contract whether the consideration for the payment of wages was the actual performance of the work, or whether "the mere readiness and willingness, if of ability to do so, is the consideration". This gave rise to the subsequent line of cases as to whether deductions could be made from the wages of those who, for a variety of reasons, were not actually performing work.
48. The best known is *Miles v Wakefield Metropolitan District Council* [1987] 1 AC 539. There, a registrar was refusing to conduct Saturday weddings as part of an industrial dispute. His pay was reduced to reflect the fact that he did not work on Saturdays. The House of Lords said that an employee's right to remuneration depended on his doing

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<sup>2</sup> Mr Hyam QC rightly noted that this case pre-dated the amendments to the Medical Act with which we are concerned.



or being willing to do the work that he was employed to do, and that if he declined to do that work, the employer need not pay him. They therefore upheld the validity of the deduction. The legal basis for that conclusion (an implied term? a failure of consideration?) is not clearly spelt out. Lord Templeman said at page 561A – C:

“It cannot be right that an employer should be compelled to pay something for nothing whether he dismisses or retains a worker. In a contract of employment wages and work go together. The employer pays for work and the worker works for his wages. If the employer declines to pay, the worker need not work. If the worker declines to work, the employer need not pay. In an action by a worker to recover his pay, he must allege and be ready to prove that he worked or was willing to work. Different considerations apply to a failure to work by sickness or other circumstances which may be governed by express or implied terms or by custom. In the present case, the plaintiff disentitled himself for his salary of Saturday morning because he declined to work on Saturday morning in accordance with his duty.”

49. Lord Oliver referred to the decision in *Cuckson v Stones* (1858) 1 E&E 248, where Lord Campbell CJ said:

“We think the gist of the plea is that the plaintiff, during the time in question, was not ready and willing to render, and did not render, any service, in the sense that he voluntarily and wilfully refused or omitted to serve... Looking to the nature of the contract sued upon in this action, we think that want of ability to serve for a week would not, of necessity, be an answer to a claim for a week’s wages, if in truth the plaintiff was ready and willing to serve had he been able to do so, and was only prevented from serving during the week by the visitation of God, the contractor served never being determined.”

Lord Oliver said, by reference to the older cases, that “the distinction between voluntary and involuntary inability is clearly brought out”. Lord Brightman, in a short concurring speech, referred to leaving out of account “failure to work or work efficiently as a result of illness or other unavoidable impediment, to which special considerations apply”. In subsequent cases, it is his “unavoidable impediment” rubric that has been taken as the kernel of the decision in *Miles v Wakefield*.

50. We were taken to a number of more recent examples where the “ready, willing and able” test has been applied, not always consistently<sup>3</sup>. Two which seemed similar on the facts, but which led to different results, were:
- i) *Burns v Santander UK PLC* [2011] IRLR 639, where the EAT held that an employee who was remanded in custody and thus could not work was not entitled to claim wages, because the impediment was avoidable. Giving the

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<sup>3</sup> It is unnecessary to set them all out, but they also included *Ekwelwm v Excel Passenger Service Ltd* [2013] 10 WLUK 395.

judgment of the EAT, Judge Peter Clark upheld the decision of the tribunal that “as a result of being charged with criminal offences and being remanded into custody, he had disabled himself from attending work, his consideration for the payment of wages under the contract (which continued until dismissal; it was not frustrated or otherwise ended earlier). There was no unlawful deduction.” There was no explanation of how the claimant had “disabled himself”. The suggestion at paragraph 9 of the judgment was that the result might have been different if the claimant had been granted bail.

- ii) *Kent County Council v Mr R D Knowles* UKEAT/0547/11, where the EAT (Judge Burke QC) refused permission to appeal in a case where the claimant was arrested for misappropriating monies but was not remanded in custody. His employer suspended him without pay. Judge Burke held that that was unlawful because there was no contractual right to do so. and at paragraph 14 he went on:

“The fact that an employee who is suspended has been arrested and even charged does not remove from him, in my judgment, any legal right to pay which otherwise he would have had, so long as he was able and willing to work.”

51. Finally, there was the decision in *Paterson v Heart of England NHS Foundation Trust* (Case Number 1308845/2013), in which a consultant was suspended without pay following extensive complaints about unnecessary breast surgery. The Employment Tribunal said at paragraph 46 that Dr Paterson had to establish that during the material time he was ready, willing and able to work under the contract and that he was clearly not able to work once his registration had been suspended. It said that the authorities construed ‘unavoidability’ narrowly and concluded that Dr Paterson’s inability to perform his part of the contract “was clearly avoidable”. However, that finding was not further explained. Moreover, the decision was again based primarily on the particular terms of the contract in question (which do not arise here). The ET’s comments on the common law principle were very brief. At paragraph 55, they said that Dr Paterson was ‘avoidably’ in the position of having been temporarily disqualified from holding the contract at all, which meant that the Trust were excused from their half of the bargain to pay his wages.
52. It is, not always easy to discern a clear set of principles from these authorities. However, the following seem to me to be uncontroversial:
- a) If an employee does not work, he or she has to show that they were ready, willing and able to perform that work if they wish to avoid a deduction to their pay (*Petrie*).
  - b) If he or she was ready and willing to work, and the inability to work was the result of a third-party decision or external constraint, any deduction of pay may be unlawful. It will depend on the circumstances.
  - c) An inability to work due to a lawful suspension imposed by way of sanction will permit the lawful deduction of pay (*Wallwork v Fielding*).

- d) By contrast, an inability to work due to an “unavoidable impediment” (Lord Brightman in *Miles v Wakefield*) or which was “involuntary” (Lord Oliver in *Miles v Wakefield*) may render the deduction of pay unlawful.
- e) Where the employee is accused of criminal offences, the issue cannot be determined by reference to the employee’s ultimate guilt or innocence (*Harris, Burns*), nor simply by reference to whether he or she was granted bail or not (see the comments in *Knowles* about the decision in *Burns*, with which I agree).
53. More difficult is the correctness of the repeated assertion, most recently seen in *Paterson*, that ‘unavoidability’ (and therefore the unavoidable or involuntary nature of the third-party decision or external event) is ‘to be construed narrowly’ and should be taken to mean an Act of God, or some other form of ‘accident’. The basis for this is unclear. In some of the cases it seems to have led to the conclusion that, if the employee’s actions have led to a suspension from work or the bringing of criminal charges, then the suspension or the consequences of the criminal charges are automatically ‘avoidable’ or ‘voluntary’. This is uncomfortably close to an assumption of guilt and seems to me to be wrong in principle. This case is perhaps a good example of the problem. Can it really be said that Dr Gregg’s suspension was ‘avoidable’ without, of necessity, assuming that he was guilty of the allegations made?
54. I consider that the starting point for any analysis of the Trust’s attempt to deduct Dr Gregg’s pay must be the contract itself (*Walker, Knowles, Paterson*). Was a decision to deduct pay for the period of suspension in accordance with the express or the implied terms of the contract? If the contract did not permit deduction, then, as envisaged by Lord Templeman in *Miles v Wakefield*, the related question is whether the decision to deduct pay for the period of suspension was in accordance with custom and practice. If the answer to both these questions is in the negative, then the common law principle – the ‘ready, willing and able’ analysis summarised at paragraphs 52 – 53 above – falls to be considered. But, in my judgment, a considerable degree of caution is necessary before concluding that someone like Dr Gregg, who was and remains the subject of an interim suspension imposed in the public interest, is not ‘ready, willing and able’ to work, or is to be characterised as avoidably or voluntarily unable to work.

### **4.3 The Terms of the Contract**

55. I am in no doubt that the express terms of Dr Gregg’s contract in this case do not permit the deduction of pay during an interim, non-terminatory suspension. There are a number of reasons for that.
56. First, Clause 12 prohibits any deduction from or variation to the annual salary paid, in monthly instalments, to Dr Gregg. On the face of it, that would not only not permit this attempted deduction, it would expressly prohibit it.
57. Secondly, there is no other express term in the contract which permits such deduction. Given that this form of interim, non-terminatory suspension is now a feature of the professional life of a medical practitioner, it seems to me that, if it was intended that salary would not be paid on the imposition of such a suspension, the contract would have said so.

58. Thirdly, although I do not consider that paragraph 25 of Part II of the MHPS (paragraph 7.3 above) is of any direct application to this case – because it only applies where there is an exclusion by the Trust and, in this case, Dr Gregg’s pay was deducted at a time when the Trust’s exclusion had been brought to an end and it was the IOT suspension which was material (paragraph 16 above) – I consider that it is of some assistance in showing the overall assumptions made about deductions of pay during temporary suspensions or exclusions. As such, contrary to Mr Sutton QC’s submissions, it works against the Trust, because it provides that exclusion will “usually be on full pay”. The same is also true of paragraph 10 of the Trust’s own Disciplinary Policy (paragraph 8.3 above). Whilst I accept that paragraph 10 appears to be dealing with a suspension decision by the Trust, as opposed to the suspension of registration by the IOT, it is relevant to note the repetition there of the concept of suspension as “a neutral act”, and the express promise that suspension “will be without detriment to normal, full pay entitlement”.
59. In my view, there could be no basis on which to imply a term into the contract allowing the Trust to deduct pay in the circumstances of an interim suspension. Such a term is not necessary in order to make the contract work: see *Liverpool City Council v Irwin* [1977] A.C.239 and *Marks and Spencer v BNP Paribas Ltd* [2015] UKSC 72. Nor is it so obvious that it ‘goes without saying’, in the way explained in *Marks and Spencer*. Furthermore, as I have said, any such term would be contrary to Clause 12: at best, it could only be discretionary and, as Mr Sutton QC accepted, such a discretionary term could not supplant the mandatory provision in Clause 12.
60. As to custom and practice, there was no evidence in this case that there was any custom and practice that the imposition of a temporary, non-terminatory suspension permitted the Trust to deduct Dr Gregg’s pay. As I have said, the only provisions in the contract that might show a more general position, namely paragraph 25 of Part II of MHPS, and paragraph 10 of the Disciplinary Policy, indicate that pay will *not* be deducted during an interim suspension/exclusion. In this way, both MHPS and the Trust’s own Disciplinary Policy support the contention that, by reference to the evidence as a whole, there was no basis on which Dr Gregg’s pay could be deducted.
61. Accordingly, whilst there is rather more to it than just paragraph 25, I consider that the judge reached the right conclusion: there was nothing in Dr Gregg’s contract which permitted the deduction of pay during the interim, non-terminatory suspension.

#### **4.4 Alternative Routes**

62. There were, I think, two alternative routes on which Mr Sutton QC relied in order to support the deduction of Dr Gregg’s pay. One was what I shall call the co-dependency argument; the other was the “ready, willing and able” strand of authority noted above. In my judgment, they have much in common, but on analysis, neither of them assist the Trust’s case here.
63. As to the co-dependency argument, *Wallwork v Fielding* is authority for the basic proposition that the right to be paid is co-dependent on the obligation to work. But in that case the employer accepted that the employee would not work for the two weeks in question because the employer had suspended the employee in the first place. That was a deliberate sanction lawfully imposed by the employer. That was not a case about an interim suspension imposed by a third party.

64. In my view, developments in both employment and regulatory law mean that, in the present day, the co-dependency argument needs to be treated with considerable caution. Taken to its logical conclusion, it would permit an employer to deduct pay when an employee was ill, which would be a surprising result. That is why I consider that the contractual analysis is fundamental: if the employer cannot show that, pursuant to the express or implied terms of the contract, or by reference to custom and practice, he is entitled to deduct pay in these circumstances, then it seems to me that a general co-dependency argument cannot give him the remedy that the contractual terms themselves do not.
65. Similarly, I do not consider that the 'ready, willing and able' concept fits easily into complex modern-day employment contracts such as this. In addition, as the cases show, there has been an inconsistent approach to the application of this principle. But in the circumstances of this case, I consider – as the judge did – that, applying the principles noted at paragraphs 52-53 above, Dr Gregg was ready able and willing to work.
66. What we are concerned with here is the happening of an independent event (the temporary suspension of Dr Gregg's registration and the concomitant withdrawal of his licence) which meant that he could not perform the services envisaged by his contract. This was not because he was not ready to work or not willing to work (thereby distinguishing him from the claimant in *Miles v Wakefield*); it was because the decision of a third-party tribunal had – against his will – removed his registration/licence to do so.
67. That decision was designed to protect the public and to retain public confidence in the running of the NHS: no more and no less. It was very similar to, and had the same effect as, the "temporary expedient" of exclusion and the "precautionary measure" of suspension, as expressly set out in the contract. In the ordinary run of such cases, therefore, I am clear that the imposition of such a suspension, which is not voluntary and might be regarded as the unavoidable consequence of s.47, should not lead to a finding that a doctor who is subject to the suspension is not 'ready willing or able to work', and/or to justify the deduction of the doctor's pay for the period of the interim suspension.
68. In most cases, as here, the circumstances giving rise to the allegations will be challenged by the doctor concerned. Dr Gregg has had to accept that he will be the subject of an interim suspension, with all the personal anxiety and concern that such a process undoubtedly carries with it, because that is what the Act requires. But it is involuntary. He doubtless retains the belief that, ultimately, when the issues are addressed, he will be fairly heard and exonerated. In those circumstances, it requires something more, something out of the ordinary, to justify the additional burden of deduction of pay for the period of the temporary suspension.
69. Thus, although wary of giving a black and white answer to this last element of the question raised in Issue 1, I consider that, in a situation where the contract does not address the issue of pay deduction during suspension, the default position should be that, in the ordinary case, an interim, non-terminatory suspension should not attract the deduction of pay. There may be exceptional circumstances (such as a complete or part admission of guilt) which might justify such a deduction, but they would not ordinarily arise.

## 4.5 Summary

70. For the reasons that I have given, I do not consider that there is any express or implied term which would justify the deduction of pay during the period of Dr Gregg's interim, non-terminatory suspension. Although paragraph 25 of the MHPS is of no direct application on the particular facts of this case I consider that (along with paragraph 10 of the Trust's Disciplinary Policy) it supports that analysis.
71. I do not consider that the 'ready, willing and able' concept is easily slotted into the machinery of internal disciplinary procedures, where the terms of the contract do not permit deductions of this kind. However, I consider that, in the ordinary case, the imposition of an interim non-terminatory suspension, where the underlying allegations are disputed, should not lead to a deduction of pay. Although there may be exceptional circumstances which might justify such deduction, Mr Hyam QC was right to say that there are no such circumstances in the present case.
72. For these reasons, I would reject Ground 5 of this appeal and uphold paragraphs 2 and 3 of the order of the judge.

## **5. Issue 2: Termination of Employment on Different Grounds**

### **5.1 The Judgment**

73. At the trial, it was the Trust's case that, pursuant to Schedule 19 (paragraph 6.2 above) they had alternative grounds for termination. Although they had focused on misconduct in their dealings with Dr Gregg, they maintained that they could also terminate his contract on the ground that, because of the temporary withdrawal of his licence, he had failed to maintain the requisite licence to practice, contrary to a separate provision in Schedule 19. They argued that, in the light of that entitlement, they wished to invite Dr Gregg to a hearing at which they would consider the termination of his contract on this ground. In other words, the point at issue before the judge was not whether the contract could be terminated because of the suspension of his licence, but merely whether the Trust were entitled to hold a further meeting with Dr Gregg in order to pursue this basis of termination.
74. The judge seemed to be in no doubt that the Trust could terminate on the alternative grounds of failing to maintain the requisite licence to practise. At [122] she said that:

“Under Schedule 19 the Trust can simply terminate Dr Gregg's contract on three months' notice for his registration failure.”

In addition, at [129], the judge was even more forthright, saying:

“...on the facts, the relationship between Dr Gregg and the Trust may have some way still to run. By proposing a hearing under Schedule 19, *instead of simply terminating Dr Gregg's contract as it is entitled to do*, the Trust has elected to treat the contact as continuing, *despite Dr Gregg's repudiatory action* in relation to registration failures.” (Emphasis added)

75. Despite those findings, the judge said at [123] that, because the Trust was proposing to set up what she saw as some form of alternative disciplinary process, whereby there would be a hearing to consider this alternative route to termination, the Trust was

“seeking to sidestep a disciplinary process which it is contractually committed to and about which it has a detailed policy and procedures, in order to set up some form of nebulous alternative”.

76. Accordingly, at [131] the judge said that to have a hearing “to address the Trust’s concerns about Dr Gregg’s conduct, under the guise of terminating his contract for registration failures, is not being *fair* to Dr Gregg”. This was a finding of unfairness, a point reiterated in the next sentence:

“The Trust cannot *fairly* switch from its formal disciplinary process, mid-way through that process, because it has become inconvenient for the Trust’s purposes, to some form of nebulous alternative disciplinary process under Schedule 19.”  
(Emphasis added)

## 5.2 The Parties’ Submissions on Appeal

77. Mr Sutton QC’s submissions were straightforward. He said that the Trust believed it had an alternative basis for terminating Dr Gregg’s contract which had been endorsed by the judge’s express finding of a repudiatory breach of contract on Dr Gregg’s part and their entitlement to terminate on this basis. He said that it was a perplexing conclusion that, despite these findings, the judge found that they could not hold a hearing to discuss that possibility with him. When asked by my Lord, Lord Justice Lewison, during the course of argument why the Trust needed a hearing at all, Mr Sutton said that it was simply something they thought they should offer as a part of a fair process, although it was not something they were obliged to do.
78. Mr Hyam QC said that there were properly two issues. The first was whether or not the “side-stepping” of the original disciplinary process was a breach of the implied term of trust and confidence; the second was whether, if the Trust did terminate on that ground, they would then be met with an argument that the termination was itself a breach of the term of trust and confidence or unlawful in some other way. He submitted that this second issue did not arise before the judge and was therefore irrelevant to the appeal, although subsequently he appeared to suggest that, because any attempt to terminate on this basis would be doomed to fail, the judge was right to prohibit the proposed hearing in any event.
79. The only authority that Mr Hyam QC relied on in relation to Issue 2 was the case of *Lakshmi v Mid Cheshire Hospitals NHS Trust* [2008] EWHC 878 (QB), in which the claimant successfully demonstrated that the defendant was in breach of the implied term for going ahead with a disciplinary hearing which should have been delayed. One of the points that arose was whether the defendant in that case could rely on an antecedent breach of contract. The deputy judge said they could not. At paragraph 32 he said:

“However, the Trust had a contractual obligation to determine whether the employee had committed an act of misconduct, and if so whether it was gross misconduct, and if so whether it would summarily dismiss, in accordance with its disciplinary process. It had an obligation to proceed fairly and it had an obligation to comply with clauses 3.7 and 3.9 unless it had good reason not to do so. It contractually bound itself not to

determine whether there had been misconduct and if so what to do about it other than by way of its disciplinary process. Consequently, any antecedent breach of contract by Dr L did not entitle the Trust to act outside of or contrary to its own disciplinary process. I reject Mr Hillier's submission that *Boston Deep Sea and Ice Company v Ansell* [1888] L.R. 39 Ch.D. 339 is authority for the contrary proposition. In my judgment an employer is only able to rely upon antecedent misconduct of which it was not aware at the time of dismissal as a reason to justify the original dismissal where there is no disciplinary process in existence. In all other cases it must dismiss only consequent to its disciplinary process. To argue otherwise would be to accept that the whole disciplinary process could be side-stepped simply because an employer regarded the alleged breach by the employee, and the action to be taken by the employer, as obvious. Of course, *Boston* remains relevant even in cases where there is a disciplinary process because the remedy that may be obtained by an employee for breach of a disciplinary process will depend on the facts determined at the time the remedy is sought; not the facts known to the employer at the time of its breach.”

80. *Lakshmi* was the source of Mr Hyam QC’s assertion that what the Trust wanted to do was to “side-step” the process already in train. However, it seems to me that *Lakshmi* was concerned with a completely different issue. There, the argument concerned an allegation of antecedent breach which had not previously been relied on by the employer in the disciplinary process, in circumstances where the subsequent attempt to rely on it was outside that process and therefore illegitimate. But that has no application in the present case where, far from relying on something which had not previously been identified without giving him a proper opportunity to respond, the Trust was endeavouring to allow Dr Gregg a hearing to address an issue – whether the suspension of his licence should lead to the termination of his contract – on which the Trust was not obliged to hear him at all.

### **5.3. Analysis**

81. In my view, Mr Hyam QC was right to identify the two separate issues (paragraph 78 above), and also right to say that the second issue (the validity or otherwise of any hypothetical, future termination on the grounds of a temporary absence of registration) was not a matter for the judge at this stage. But, perhaps because of Mr Hyam QC’s ‘doomed to fail’ argument, she was encouraged to elide the two issues in her Judgment. In my view, she went wrong as a consequence.
82. As to the process issue, I consider that the judge was wrong to find that the proposal to have a hearing to address the Trust’s possible termination of Dr Gregg’s contract because of his failure to maintain his licence was unfair. On the contrary, the Trust was not obliged to hold such a hearing at all. The Trust could simply have terminated his contract forthwith. There may subsequently have been a significant argument about whether they were entitled in law to do so (as to which, see paragraphs 86 – 88 below) but I cannot see any basis for saying that the holding of a hearing in advance of the taking of such a decision was or could be unfair.



83. Underlying this aspect of Dr Gregg's case appears to be an argument based on the making of an election: namely that, because the Trust had thus far pursued their investigations based on misconduct, it was in some way too late for them to base any termination on his failure to maintain his licence. I do not accept that premise. Schedule 19 set out the possible grounds for terminating the contract. It was open to the Trust to terminate Dr Gregg's employment on any of those grounds if they felt that they were made out. There was no question of election, nor any question of one process having to be completed before another was started. They were set out as alternative grounds for termination in the contract and they remained such.
84. Accordingly, I consider that the judge was wrong to find that it would not be fair to Dr Gregg to hold the hearing the Trust proposed. On the contrary, it was undoubtedly fair, if only because it was more than the Trust was obliged to do under the strict terms of the contract.
85. Although in the light of that conclusion, the next point is academic, I should say that, in my view, the judge was also wrong to equate the implied term of trust and confidence with a general duty to act fairly. As explained in *Section 6.2* below, the authorities demonstrate that the two are not the same, and that the test in order to show a breach of the trust and confidence term is a "severe" one. In my view, the proposal to hold a hearing with Dr Gregg to discuss this alternative route to termination could not be a breach of the term of trust and confidence and gets nowhere close to meeting the applicable test.
86. As to the second issue (whether or not any such termination would be unlawful), I consider that it was entirely hypothetical; it was not for the judge and is not for this court to decide. It would have been inappropriate to decide such a matter on an application for a pre-emptive injunction.
87. That view is reinforced by the confusion that appears to have been created in the present case by the 'doomed to fail' argument. As I have noted, the judge found that Dr Gregg was in breach of contract because of his registration failures; that such failures were "repudiatory"; and that the Trust was "entitled" to terminate his contract in consequence. Although there is no appeal against those findings, I consider that, with respect, they may well be wrong. In accordance with my analysis of the position under Issue 1, all that has happened is that Dr Gregg has been the subject of an interim, non-terminatory suspension. Thus far, none of the allegations against him have been made out (regardless of the applicable standard of proof). All that we know is that the circumstances in relation to both Patients A and B have not given rise to any criminal charges, and the circumstances surrounding Patient B are not being taken forward by the Trust to the disciplinary hearing in a fortnight's time. In relation to the ongoing inquiry into the death of Patient A, Dr Gregg has always cooperated fully with the Trust and the other authorities, and has consistently denied the allegations that have been made.
88. In those circumstances, it seems to me that, notwithstanding the judge's use of language, there must be a real risk that any future termination of Dr Gregg's contract because of the effect of the suspension on his licence/registration would subsequently be found to be either a breach of contract on the part of the Trust, or to constitute unfair dismissal. Beyond that, it is not appropriate to go. It cannot be said that such a course is doomed to fail; but it can safely be said that it is far from straightforward.

## 5.4. Summary

89. For the reasons set out above, I consider that the judge was wrong to find that the Trust would be acting unfairly in inviting Dr Gregg to a hearing to discuss the possibility of terminating his contract because of his failure to maintain his licence. I would allow Ground 4 of the appeal and would rescind the declaration at paragraph 4 of the judge's order. I would, however, reiterate the warning at paragraphs 86 – 88 above.

## **6. Issue 3: The Postponement of the Trust's Disciplinary Process**

### **6.1. The Judgment**

90. The judge heard oral evidence from Dr Gregg and Dr Rege, the Trust's Medical Director. A summary of their evidence is at paragraphs 68 – 73. She was complimentary about both witnesses.

91. On the question of whether or not the Trust was in breach of the implied term of trust and confidence by wanting to progress their own internal disciplinary process before the police concluded their own investigations, the Judgment is relatively brief. At [106], the judge said:

“In my judgment, the Trust has failed to engage with Dr Gregg's concerns about participating in the disciplinary processes or the fact of the legal advice he has been given, not to participate, pending a decision by the CPS.”

92. Accordingly, it appears that there were two factors which led the judge to reach the conclusion that she did: Dr Gregg's concerns about participating in the disciplinary process, and “the fact of the legal advice”. Although Dr Gregg put forward a third concern, namely witnesses having a ‘dry run’ and improving their performance in any criminal trial, the judge expressly rejected that concern: see [116].

93. Also at [116], the judge accepted that the court “should examine the nature of the alleged prejudice, as part of its enquiry into whether Dr Gregg has been dealt with fairly”. The next four paragraphs appear to contain the entirety of the judge's examination of this issue, and so provide the sole basis for her earlier conclusion that the Trust was in breach of the implied term:

“117. However, the authorities relied on by Mr Sutton demonstrate that the decision to proceed is a sensitive one and the employer must proceed with care. In my judgment, the extent to which the Trust, and the Court, can scrutinise Dr Gregg's legal advice is limited, given its privileged nature. It seems to me that, using the language of the Court in Lakshmi, it places both doctors (Dr Rege and Dr Gregg) in the intolerable position of having to second guess advice offered by lawyers. Nor does the legal advice appear to me to be over cautious, given the CPS has indicated it does not have enough information to prosecute in relation to Patient A.

118. At the end of Dr Rege's evidence, in response to a question from the Court, Dr Rege said that the Trust would not release any information generated during the disciplinary proceedings to the police. This appeared to come as a surprise to Dr Gregg's Counsel who responded in closing by pointing to the correspondence before the Court showing a close collaborative relationship between the Trust and the police and at least three examples of information sharing. I accept Mr Sutton's response that, on closer examination, it appears that the information sharing has been the police passing information to the Trust and not the other way round. I also accept Dr Rege's evidence that, to date, the Trust has not passed information to the police, without the consent of Dr Gregg.

119. However, whilst this goes some way to meeting Dr Gregg's concerns, it does not, in my judgment, go far enough to be fair to Dr Gregg. The Trust's reassurance, during the hearing, is at odds with a Memorandum of Understanding between the Association of Chief Police Officers, the Department of Health and the Health & Safety Executive about investigations into unexpected patient deaths, which makes clear that NHS organisations are expected to cooperate fully with police requests for information. Further, the Trust may find itself compelled to hand over evidence to the police. Moreover, Mr Sutton acknowledged that the Trust would still be required to pass information to the GMC.

120. Accordingly, I am of the view that, on the facts of this case, the Trust's refusal to adjourn its disciplinary processes pending a decision by the CPS, breaches the implied term of trust and confidence in its contract with Dr Gregg. It is unfortunate that the police investigation has been lengthened by the additional cases referred to it but operational delay by investigating authorities is not a reason to penalise Dr Gregg."

94. Before dealing with the parties' submissions in respect of Issue 3, it is necessary to outline some of the relevant authorities concerned with the implied term of trust and confidence (*Section 6.2*); some of the authorities concerned with parallel proceedings (*Section 6.3*); and some of the authorities concerned with the granting of injunctive relief in these circumstances (*Section 6.4*). I then address three questions: Should the judge have intervened at all (*Section 6.5*)? If so, did she apply the right test (*Section 6.6*)? If she did not apply the right test, how should the discretion be re-exercised? Alternatively, if she did apply the right test, did she reach a conclusion that was open to her on the evidence (*Section 6.7*)?

## **6.2. The Relevant Authorities: Trust and Confidence**

95. The decision of the House of Lords in *Malik v BCCI* [1998] A.C. 20 is regarded as the foundation for this principle. Lord Nicholls at 33H – 34B noted:

“In the Court of Appeal and in your Lordships' House the parties were agreed that the contracts of employment of these

two former employees each contained an implied term to the effect that the bank would not without reasonable and proper cause, conduct itself in a manner likely to destroy and seriously damage the relationship of confidence and trust between employer and employee.”

Lord Steyn noted at 45D – E that this was a standardised term implied by law and added that “such implied terms operate as default rules”. He concluded at 53B-C:

*“The effect of my conclusions*

Earlier, I drew attention to the fact that the implied mutual obligation of trust and confidence applies only where there is "no reasonable and proper cause" for the employers' conduct, and then only if the conduct is calculated to destroy or *seriously* damage the relationship of trust and confidence. That circumscribes the potential reach and scope of the implied obligation.”

96. In *Gogay v Hertfordshire County Council* [2000] IRLR 703, the employers were found to be in breach of the implied term of trust and confidence because they had suspended the claimant without reasonable grounds for doing so and had failed to carry out a proper investigation of the relevant circumstances. Their appeal against those findings was dismissed. Hale LJ (as she then was) referred back to what Lord Steyn had said in *Malik*, and emphasised the height of the hurdle which a claimant must clear in order to establish a breach of the implied term. At [55] she said:

“Did the authority's conduct in this case amount to a breach of this implied term? The test is a severe one. The conduct must be such as to destroy or seriously damage the relationship. The conduct in this case was not only to suspend the claimant, but to do so by means of a letter which stated that 'the issue to be investigated is an allegation of sexual abuse made by a young person in our care.' Sexual abuse is a very serious matter, doing untold damage to those who suffer it. To be accused of it is also a serious matter. To be told by one's employer that one has been so accused is clearly calculated seriously to damage the relationship between employer and employee. The question is therefore whether there was 'reasonable and proper cause' to do this.”

97. There has been a certain amount of debate in the cases as to whether there is a separate obligation on the part of an employer to act fairly. The authorities suggest that there is no freestanding obligation to act fairly which is separate from the term of trust and confidence: see *Chakrabarty v Ipswich NHS Trust* [2014] EWHC 2735 (QB). And in *Braganza v BP Shipping Limited & Another* [2015] 1 WLR 1661, Baroness Hale referred to the approach in judicial review cases, and explained ([24]) that there are two limbs of the *Wednesbury* test, the first part focusing on the decision-making process and whether the right matters had been taken into account in reaching the decision, and the second, whether the outcome was so unreasonable that no reasonable authority could ever have come to it.

98. Baroness Hale went on to note at [28] that there were signs that the contractual implied term was drawing closer and closer to the principles applicable in judicial review and went on to say:

“29. If it is part of a rational decision-making process to exclude extraneous considerations, it is in my view also part of a rational decision-making process to take into account those considerations which are obviously relevant to the decision in question. It is of the essence of "*Wednesbury* reasonableness" (or "*GCHQ* rationality") review to consider the rationality of the decision-making process rather than to concentrate upon the outcome. Concentrating on the outcome runs the risk that the court will substitute its own decision for that of the primary decision-maker.

30. It is clear, however, that unless the court can imply a term that the outcome be objectively reasonable – for example, a reasonable price or a reasonable term – the court will only imply a term that the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose. For my part, I would include both limbs of the *Wednesbury* formulation in the rationality test. Indeed, I understand Lord Neuberger (at para 103 of his judgment) and I to be agreed as to the nature of the test.”

99. The decision of Andrews J in *Stevens v University of Birmingham* [2015] EWHC 2300 (QB) was concerned with the university’s decision to refuse to allow the claimant (a clinical academic and chair of medicine) to be accompanied at a disciplinary investigation meeting by a representative of a medical defence organisation. Despite the fact that this refusal was in accordance with an express term of the claimant’s contract, the judge concluded that that decision was “patently unfair” (see [92]) and that therefore there was a breach of the term of trust and confidence. Mr Sutton QC submitted, with some force, that the decision was open to the criticism that it allowed the implied term to modify the express terms of the contract, and may have confused the implied term of trust and confidence with a general duty to act fairly. But the judgment in *Stevens* is of assistance on another point. Andrews J rightly divided the issues into two: whether the employer’s actions would seriously undermine the relationship of trust and confidence and, even if so, whether there was reasonable and proper cause for their conduct. Neither party in the present case suggested that this two-stage approach was adopted by the judge.

### **6.3. The Relevant Authorities: Parallel Proceedings**

100. There is no issue that it is quite legitimate for a doctor to face parallel proceedings instigated by his employer, on the one hand, and the GMC on the other. That was found to be unobjectionable in *Chakrabarty*. Does it make a difference if the parallel investigations/proceedings are criminal?
101. I have already noted *Harris v Harrison* (paragraph 45 above) where the EAT made plain that, where an employee faced criminal charges, “it is often impractical for the

employer to wait until the trial takes place before making some decision as to the future of the employee as far as his employment is concerned”.

102. In similar vein, in *Harrison & Another v Courage (Eastern) Limited* [1981] ICR 496, the EAT said there was no absolute rule that once an employee had been charged with an offence and advised to say nothing until his criminal trial, an employer could not dismiss him for the alleged offence. If the employer was justified on the evidence before him and believed that the employee was guilty of the alleged offence, the fact that the employee refused to make a statement before the conclusion of the criminal trial did not prevent the dismissal from being fair. At 501D – F, Slynn J said:

“It does not seem to the majority of this appeal tribunal that there is a hard and fast rule that, once a man has been charged, an employer cannot dismiss him for an alleged theft if the employee is advised to say nothing until the trial in the criminal proceedings. There may be cases where fairness requires that the employer should wait. In the judgment of the majority members of the appeal tribunal, all the circumstances have to be looked at. It is essential that the employer should afford the employee the opportunity of giving his explanation and he should be made to realise that the employer is contemplating dismissal on the basis of the matters which are explained to the employee. If the employee chooses not to give a statement at that stage, it seems to the majority that the employer is entitled to consider whether the material which he has is strong enough to justify his dismissal without waiting. If there are doubts, then no doubt it would be fair to wait. On the other hand, if the evidence produced is, in the absence of an explanation, sufficiently indicative of guilt, then the employer may be entitled to act.”

This court expressly endorsed that reasoning at [1982] ICR 530.

103. In *Jefferson v Bhetcha* [1979] 1 WLR 898, Megaw LJ addressed the submission that there ought to be a stay of proceedings in a civil action until such time as the criminal proceedings had come to a conclusion. He said that each case had to be judged on its own facts and that the burden was on the defendant in the civil action to show that it was just and convenient that the plaintiff’s ordinary rights of having his claim processed, heard and decided should be interfered with. Megaw LJ went on:

“Of course, one factor to be taken into account, and it may well be a very important factor, is whether there is a real danger of the causing of injustice in the criminal proceedings. There may be cases – no doubt there are – where that discretion should be exercised. In my view it would be wrong and undesirable to attempt to define any abstract what are the relevant factors. By way of example, a relevant factor telling in favour of a defendant might well be the fact the civil action, or step in it, would be likely to obtain such publicity as might sensibly be expected to reach, and influence, persons who would or might jurors in criminal proceedings...”

104. In *R v BBC ex parte Lavelle* [1983] ICR 99 Woolf J dealt head-on with the interplay between internal disciplinary processes and the criminal law. He referred to *Jefferson* and said that everything that Megaw LJ had said there about civil proceedings applied to the disciplinary proceedings in issue in *Lavelle*. Having then referred to *Harris v Harrison*, Woolf J went on:

“Bearing in mind that if the court does not intervene, the employee still has the choice as to co-operate with the disciplinary proceedings or not. And the employee will still be entitled to contend that his dismissal was wrongful or unfair in the subsequent proceedings before the court or an industrial tribunal, it seems to me that while the court must have jurisdiction to intervene to prevent a serious injustice occurring, it will only do so in very clear cases in which the applicant can show that there is a real danger and not merely a notional danger that there would be a miscarriage of justice in the criminal proceedings if the court did not intervene.”

105. Reference has already been made to *Lakshmi*. On the facts of that case, the judge found that the defendant employer was in breach of contract in failing to adjourn the disciplinary process until the CPS had reached a conclusion as to prosecution (and thus until the police investigation was concluded). However, that was on any view a strong case on the facts. For one thing, it appears that the decision to proceed with the internal investigation came in the face of the police “imploring” the Trust not to go ahead. Furthermore, it appears that the delay if they did not do so was estimated to be no more than a fortnight. In such circumstances it is not difficult to see why the court concluded that the employer was in breach of the implied term.
106. In *Secretary of State for Justice v Mansfield* (UKEAT/0539/09/RN), the EAT noted at [25]:

“We consider that a decision-maker forming a view on whether disciplinary proceedings should be continued alongside a criminal investigation has a wide discretion. It is unusual for a decision to postpone the disciplinary proceedings while continuing to pay the employee to be criticised on the grounds of delay.”

In that case, on the particular facts, the employer had postponed the internal disciplinary hearing while the police were gathering evidence, a decision which the EAT said was “entirely proper”.

107. The principles to be derived from these cases are therefore as follows:
- a) An employer considering dismissing an employee does not usually need to wait for the conclusion of any criminal proceedings before doing so (*Harris, Harrison*).
  - b) *A fortiori*, an employer does not usually need to wait for the conclusion of criminal proceedings before commencing/continuing internal disciplinary proceedings, although such a decision is clearly open to the employer (*Mansfield*).

- c) The court will usually only intervene if the employee can show that the continuation of the disciplinary proceedings will give rise to a real danger (and not merely a notional danger) that there would be a miscarriage of justice in the criminal proceedings if the court did not intervene (*Jefferson, Lavelle*).
108. Mr Hyam QC suggested that *Lavelle* is no longer good law<sup>4</sup> because it was decided before the cases dealing with the implied term of trust and confidence. I do not accept that submission. On the contrary, I consider that this case demonstrates that the principles in *Lavelle* are of direct application, because of the focus on the outcome of the criminal proceedings and the need to demonstrate a real danger (as opposed to a notional danger) of a miscarriage of justice before an injunction is granted. I accept that it may overstate the position to say that this is the *only* consideration to be borne in mind when considering the interplay of parallel proceedings, and I also accept that the changes in the criminal law (and in particular the advent of the defence case statement) may also serve to modify slightly the approach of Woolf J. But all that said, I consider that *Lavelle* not only remains good law, but provides good guidance to the approach to be taken to parallel proceedings when one is a criminal investigation.

#### 6.4. The Relevant Authorities: Injunctive Relief

109. In *Chhabra v West London Mental Health NHS Trust* [2013] UKSC 80, the Supreme Court upheld the granting of an injunction which prevented a Trust from investigating various confidentiality concerns against the claimant as matters of gross misconduct. The Supreme Court found that the findings of fact and evidence, even when taken at their highest, were not capable of supporting a charge of gross misconduct. In addition, a named individual continued to take part in the investigatory process in breach of an undertaking which the Trust's solicitors had given in writing. These and other irregularities, when taken together, justified the grant of an injunction.
110. *Chhabra* illustrates that the court will ordinarily require strong justification before it considers granting injunctive relief in these circumstances. That can also be seen in *Al-Mishlab v Milton Keynes Hospital NHS Foundation Trust* [2015] EWHC 3096 (QB), in which Green J (as he then was) refused to grant an injunction restraining a forthcoming disciplinary hearing. He said:

“16. First, in an employment context there is a power vested in the employer to manage employees, which includes establishing relevant facts and deciding how these facts affect future relations. Even where internal procedures are detailed the purpose of those procedures is to facilitate the employer's managerial power. Where detailed procedures are silent on the matter then the fallback is that it is a managerial discretion for the employer to decide upon in relation to that gap. In this regard see *MacMillan* [2014] EWCA 1031, paragraph 51 and the judgments cited therein.

17. Secondly, it is accepted that there are implied terms in the Applicant's contract that neither party will without reasonable and proper cause act in a manner that is calculated or likely to

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<sup>4</sup> He made no reference to *Jefferson* but, since *Lavelle* was based foursquare upon it, it must follow that he was inviting the court to reach the same conclusion about that case too.



destroy or seriously damage the relationship of trust and confidence and that the defendant will in any event act fairly in the conduct of an internal disciplinary or similar process. It is therefore accepted that implied terms constrain the exercise of the employer's discretion. But it is also submitted that the discretion remains broad: See in this regard *Braganza* [2015] UK SC 17 at 30 and *Yapp* [2014] EWCA Civ 1512 at paragraphs 59-61. In those judgments there is reference to the discretion being akin to a *Wednesbury* rationality test in that an employer may properly be able to exercise a discretion over a range of possible reasonable options.

18. Thirdly, it is submitted that the court should not engage in micro-management of employment procedures. Illustrations of matters which the courts have treated as micro-management may be found in the judgment of the Court of Appeal in *Kulkarni* [2009] EWCA Civ 789. In that case the High Court and Court of Appeal refused to interfere in a panel where the issue concerned the alleged wrongful admission of prejudicial evidence; see also *Chhabra v West London Mental Health Trust* [2013] UKSC 80, at paragraphs 36-40.

19. Fourth, there is a public interest in allowing internal processes to run their course and courts should be slow to interfere if disputed issues can be sorted out and resolved within the framework of the internal procedure itself. See for example, *Makhdam* [2012] EWHC 4015 per Beatson J. at paragraph 51 where the judge indicated that it would in effect require serious irregularities before the court would consider interfering. He also intimated (see paragraph 52) that where the parties have agreed upon a process the court should prima facie respect the contractual intention of the parties and allow the process to occur. Similar observations were made by Mann J. in *Hendy v MOJ* [2014] EWHC 2539 at paragraph 49 and see also *Sarker* [2015] EWHC 165 to similar effect.

20. Fifthly, there is a public interest that matters which needs to be taken of a substantive nature, (which would in my view include a decision upon the capability of a practitioner to work within the NHS) should be taken by the mandated expert panel: See by way of illustration *Dr A v HTX* [2012] EWHC 857 (QB) at paragraph 203.”

## **6.5. Should the Judge Have Granted the Injunction?**

111. Speaking for myself, I would not have granted an injunction to delay the Trust's disciplinary hearing until after the police had concluded their own investigation. Applying the reasoning of Green J in *Al-Mishlab*, I do not consider that the facts in this case justified the court's interference with the Trust's management of its own employees. The facts are nowhere near as strong as those in *Chhabra*. In my view, the decision to prevent the ongoing disciplinary process and to await the outcome of the

police investigation amounted to micro-management by the court of the Trust's employment procedures.

112. However, whilst I would not have granted the injunction, that is not the relevant question on this appeal. Instead, this court needs to ask whether, in exercising her discretion to grant the injunction, the judge applied the right test. If she did not apply the right test, the court must re-exercise the discretion. And if she did apply the right test, did she reach a conclusion that was reasonably open to her?

#### **6.6. Did the Judge Apply the Right Test When Concluding that the Trust was in Breach of The Implied Term?**

113. In my view, the judge applied the wrong test. There are two separate reasons for that conclusion.
114. First, the judge repeatedly equated the implied term of trust and confidence with a more generalised obligation to act fairly. I acknowledge that at [82] the judge addressed the question of whether there was a separate implied term to act fairly and seems to have concluded that there was not, but that was on the basis that such a freestanding term was unnecessary, rather than on the basis of the legal analysis in the authorities to which I have referred at paragraph 97 – 98 above. At [96] the judge said that the effect of the implied term of trust and confidence was that the Trust “must act fairly”, a point she repeated in the critical paragraph of her judgment ([116]). That is not the law. Moreover, at [96] she said that the Trust had to exercise its discretion “lawfully and reasonably”. As Mr Sutton QC pointed out, that too was incorrect: the touchstone is rationality.
115. This is not simply a technical point or a linguistic quibble. I have referred at paragraphs 95 – 96 to *Malik* and *Gogay* and what Hale LJ called the “severe test” required to demonstrate any breach of this implied term. I do not accept that there was (or can have been) any proper analysis of that severe test (and whether it had been met here) in circumstances where the judge appeared to water it down to a simple obligation to act fairly.
116. Secondly, it is plain that the judge did not ask herself the two questions that were identified in *Stevens*, namely whether the conduct “is calculated to destroy or seriously damage the relationship” and then, even if it was, whether there was “reasonable and proper cause” for that conduct.
117. I do not consider that (except for the allegations of prejudice) any part of the judge's analysis went to either of those questions. I consider that if she had asked herself those two questions, the judge would have reached a very different conclusion.

#### **6.7. Re-Exercising the Discretion**

118. For these reasons, it is necessary to re-exercise the court's discretion. I do so on the basis of the findings of fact made by the judge. For the reasons set out below, I conclude that there was no breach of the implied term of trust and confidence. I should also say that if, contrary to my view, the judge applied the right test, she reached a conclusion that was not reasonably open to her. My reasoning is the same in both instances.

119. The first question is whether the Trust's conduct was calculated to destroy or seriously damage the relationship. This was not an issue which the judge expressly addressed, and (save for the allegations of prejudice) I can find no evidence which would support any such conclusion. It seems to me that the Trust was working hard to ameliorate a difficult situation which was not of its own making. How could the pursuit of its contractually-binding disciplinary process be said to be *calculated* by the Trust to destroy or seriously damage the required trust and confidence? That is not a question that the judge attempted to answer.
120. I do accept that the alleged prejudice said to flow from the Trust's desire to pursue its own internal disciplinary investigation is a factor that the court must consider. The problem is, on the findings of fact by the judge on this topic (see paragraph 93 above) there is nothing that could justify the assertion that the Trust's conduct was calculated to destroy or seriously damage its relationship with Dr Gregg. As I have noted, there were only two elements of prejudice accepted by the judge: the Trust's failure to address his concerns about the impact of the internal process on the criminal investigation, and the fact that Dr Gregg had received legal advice not to be involved in the disciplinary process.
121. Neither of these points stand up to scrutiny. As to the likely effect of the internal disciplinary process, there was no evidence at all that it would have any effect on the criminal investigation, let alone give rise to a real danger of a miscarriage of justice. Whilst, as I have said, the test identified in *Lavelle* might need to be modified slightly in view of the changes since then in the criminal law, a real danger of injustice in the criminal proceedings remains an important ingredient of any sustainable allegation of prejudice. On the evidence, there is no such risk of injustice here.
122. Instead, Dr Gregg's complaints about the internal process were generic. There was nothing specific to the particular circumstances of his case. Indeed, I consider that it would have been impossible to make any specific complaints about potential prejudice in circumstances where, on the agreed facts, Dr Gregg had already provided the police with statements in respect of the deaths of both Patient A and Patient B. Subsequently, as we know, when the internal investigation in relation to Patient B did restart, Dr Gregg provided the Trust with a copy of the statement that he had already provided to the police. He could have done that 16 months before. It is therefore impossible to see how there was any prejudice at all.
123. The judge makes much of the concerns about the provision of information/documentation arising out of the internal process that might be passed to the police. But that was again a generic complaint because, on the particular facts of this case, Dr Gregg had already provided a written statement to the police about both Patients A and B, and there was no suggestion that there was anything new or different that could arise out of the internal process. Putting the point another way, this was a notional, not a real, concern.
124. I note that the one element of the evidence, which might have been relied on by Dr Gregg in support of an argument that there was a real risk of a miscarriage of justice in the criminal proceedings, was the assertion that the continuation of the disciplinary proceedings would allow the Trust's witnesses a 'dry run' before the criminal trial, and thus improve their performance at that criminal trial. However, the judge expressly rejected this part of Dr Gregg's case and there is no cross-appeal against that decision.

125. The second point relied on by the judge is the fact of the legal advice. I accept that this is a factor to be taken into account in the balancing exercise, but it can rarely be decisive: otherwise, the mere fact that a solicitor provides advice to a doctor to say that he should not be involved in the internal disciplinary proceedings whilst another process is ongoing, would always be enough to justify an injunction if the employer wished to progress its own internal process. If that were the law, solicitors could buy time for their clients in every one of these cases by advising the doctor not to co-operate with the internal investigation. That cannot be the correct approach.
126. I agree with the judge ([117]) that, because the legal advice is privileged (and that privilege has not been waived in this case), it cannot sensibly be scrutinised any further. On that basis, even her own observation that the legal advice does not appear to be ‘over-cautious’ is speculative and possibly unhelpful. All that can be fed into the balance therefore is the fact of the legal advice not to participate.
127. Finally, on the topic of alleged prejudice, I consider that the judge failed to address the obvious countervailing argument, namely that, as noted at paragraph 8.2 above, Dr Gregg was contractually obliged to participate in the disciplinary process which he was trying to delay and in which he was refusing to participate. Like a number of the other positive points advanced by the Trust in support of their position, this obligation was not addressed in the Judgment.
128. Extensively in his written submissions, and more selectively in his oral submissions, Mr Hyam QC identified a large range of factors which he said were relevant to the issue of parallel proceedings. These included the size of the employer’s business, the kind of employment in question, the contractual context, the length of the employee’s service and whether it is unblemished, the nature of the allegations being investigated by the police, the length of time of the postponement, other periods of delay, whether the fairness of the investigative process would be jeopardised by proceeding rather than postponing, the resources available to the employer, and the reasons why the employer contended that the internal process should proceed.
129. I do not doubt that, in the right case and depending on the facts, some of these factors might be relevant to the necessary balancing exercise. But I do not consider that it is helpful for this court to draw up a long shopping list of all the factors which a judge may be required to go through before arriving at an answer to the simple question of whether or not, on the particular facts of any given case, internal disciplinary proceedings should be delayed. Of course, the judge did not address the issue in this way in any event, and, speaking for myself, I consider that, if a court ever settled down to consider this lengthy list of factors before reaching a conclusion on such a self-contained issue, it is more likely than not to be guilty of micro-managing.
130. Standing back for a moment, the final point to make is to highlight the obvious fact that the focus of the internal disciplinary process is very different to the focus of the criminal proceedings. The latter is concerned with guilt beyond reasonable doubt; moreover, in a case of this sort, where the charge would be manslaughter by gross negligence, the evidential threshold is necessarily of the highest<sup>5</sup>. In the disciplinary process, the question is whether the Trust has a genuine belief on reasonable grounds that Dr Gregg conducted himself in the manner alleged. The authorities demonstrate

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<sup>5</sup> For a case of gross negligence manslaughter involving an anaesthetist which failed to get close to the necessary criminal standard, see Appendix 1 to the judgment in *R v Cornish* [2016] EWHC 779 (QB).

that this is lower even than the standard of proof in a civil case, although in case like this, with such serious allegations in play, particular rigour will be required in identifying the correct test and seeing if it has been made out.

131. Accordingly, on the findings made by the judge, I do not consider that the Trust's conduct, in wanting to progress its own internal disciplinary investigation without waiting for the conclusion of the separate police investigation, was calculated to destroy or seriously damage its relationship with Dr Gregg.
132. The second question (with which the judge did not deal) is whether there was in any event reasonable or proper cause for the Trust's conduct in wishing to progress its own internal disciplinary process. In my view there was. The disciplinary process which the Trust wished to pursue was the one set out in Dr Gregg's contract. There was plainly reasonable and proper cause for the Trust to want to operate the process in accordance with their contract with Dr Gregg.
133. More widely, all the Trust was saying was that they did not want to wait for the conclusion of the police investigation. It seems to me that that was an entirely reasonable decision to have reached. It is in accordance with the principles set out at paragraph 107 above. There was nothing in the contract which tied the internal disciplinary process to the conclusion of any police investigation. The Trust had control of that disciplinary process, but had no control over the police investigation. Why should the Trust, and those who fund it or use its services, wait for a separate organisation to conclude its separate enquiries, which might be months or years in the future?
134. In my view, there was no rational basis for tying the contractual, internal investigation in this case to the conclusion of the ongoing police investigation. That was the Trust's position. I consider that that was a reasonable and proper view for them to have reached.

## **6.8 Summary**

135. For the reasons set out above, I conclude that the judge applied the wrong test. Applying the right test, I would exercise the court's discretion in favour of the Trust. For the same reasons, even if the judge applied the right test, I consider that there was no reasonable basis on which the judge could have found that the Trust was in breach of the implied term of trust and confidence.
136. It follows that, in my view, the injunction was wrongly granted. If my Lords agree, I would allow Grounds 1-3 of this appeal and rescind paragraph 1 of the judge's order.

## **7 Conclusions**

137. For the reasons set out above, and by way of overall summary, I would dismiss the appeal on Issue 1 (pay), and allow the appeal on Issue 2 (the alternative hearing, subject to the reservation at paragraphs 86-88 above) and Issue 3 (proceeding with the internal disciplinary process).

## **Lord Justice Peter Jackson :**

138. I agree.

**Lord Justice Lewison :**

139. I also agree.