

Criminal & Employer Investigations, Interim Injunctions & Mutual Trust and Confidence

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North West Anglia NHS Foundation Trust v Andrew Gregg [2019] EWCA Civ 387

(Court of Appeal – LJJs Lewison, Jackson, Coulson - 19th March 2019)

The Facts

1. C, a consultant in anaesthetics, was appointed by the Trust in 2003. In June 2013 a patient in the care of C died. No concerns were raised at that time. In January 2016 another patient in his care died and concerns were expressed about the circumstances of that patient's death. Following an investigation, R opened disciplinary proceedings against C and initiated the process in Maintaining High Professional Standards in the NHS ('MHPS'). It also notified the police. C was suspended on full pay. The CPS decided that there was insufficient information to charge C in relation to one patient's death, but its investigation into the second patient's death was ongoing. The GMC suspended C's registration to practice and R stopped his salary.
2. C's lawyer advised him not to participate in a disciplinary hearing as he would risk prejudicing himself in the criminal investigation. R refused to adjourn the hearing. In addition, it considered convening a separate hearing under schedule 19 to C's employment contract, by which R could dismiss C for his lack of registration. The police had no objection to the continuation of R's disciplinary process.
3. C applied for an interim injunction preventing the Trust from continuing with its investigation until the police investigation was complete.

The High Court Decision

4. The High Court found that the Trust was or would be in breach of contract:
 - (a) For failing to pay C'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 C's contract of employment 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 C with any criminal offences.
5. Accordingly, it granted C an injunction and R appealed against the judgment that it had breached C's contract of employment.

The Court of Appeal Decision

6. The principles to be derived from the cases on parallel proceedings are 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 (Ipswich) Ltd v Harrison [1978] ICR 1256; Harrison & Another v Courage (Eastern) Ltd [1981] ICR 496**
 - (b) 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: **Secretary of State for Justice v Mansfield (UKEAT/0539/09/RN)**
 - (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 v Bhetcha [1979] 1 WLR 898; R v BBC ex parte Lavelle [1983] ICR 99

7. 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 injunction¹.
8. 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 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..."

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 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..."

¹ Paragraph 109 of the Judgment.

18. *Thirdly, it is submitted that the court should not engage in micro-management of employment procedures...*

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.*

20. *Fifthly, there is a public interest that matters which need 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...".*

9. Coulson LJ giving the judgment of the Court said that he would not have granted an injunction to delay R's disciplinary hearing until after the police had concluded their own investigation. He did not consider that the facts justified the court's interference with R's management of its own employees. In his 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 R's employment procedures².
10. The CA held that the High Court Judge had applied the wrong test and that she repeatedly equated the implied term of trust and confidence with a more generalised obligation to act fairly.
11. Firstly, there was no proper analysis of the 'severe test' required to demonstrate any breach of the implied term of trust and confidence.
12. Secondly, the Judge did not ask herself the 2 questions that were identified in **Stevens v University of Birmingham [2015] EWHC 2300 (QB)**, 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 conduct³.
13. Accordingly, R had not breached the implied term of trust and confidence, and its conduct had not been calculated to destroy or seriously damage its relationship with C. There was no evidence that the internal disciplinary process would have any effect on the criminal investigation, let alone give rise to a real danger of a

² Paragraph 111 of the Judgment.

³ Paragraph 116 of the Judgment.

miscarriage of justice. The injunction had therefore been wrongly granted (save for in respect of R's decision to deduct pay).



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