

Court of Appeal opens the door for the development of an implied term that employers should act fairly when conducting disciplinary proceedings

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Burn v Alder Hey Children’s NHS Foundation Trust [2021] EWCA Civ 1971

Background facts

1. The Claimant was employed as a consultant paediatric neurosurgeon by the Respondent. She had responsibility for child A between 1 and 4 December 2017. On the evening of 3 December 2017, a colleague of the Claimant’s performed an operation to drain fluid from Child A’s brain, and a further operation was also required. A few days later Child A died.
2. In early 2020 the Respondent commenced an investigation into the Claimant’s clinical decision making in relation to Child A’s care. The investigation was conducted in accordance with the *Handling Concerns about Conduct, Performance & Health of Medical & Dental Staff Policy* (“the Policy”). A dispute arose as to which documents the Claimant was entitled to have copies of at the initial stage of the investigation, at which point a decision would be made as to whether there was a case to answer. The Claimant issued proceedings in the High Court seeking an injunction to restrain the Respondent from concluding the investigation until she had been provided with certain documentation and thereafter interviewed. A speedy trial was directed, the main issue being the interpretation of clause 1.16 of the Policy, which set out that at the investigation stage, the employee should be provided with “*correspondence relating to the case*”. The Claimant argued that meant that she was entitled to see *all* of the documents related to the investigation, whereas the Respondent’s position was that this was limited to correspondence which they had sent for the purpose of the investigation. By way of example, the Respondent had sent letters to Child A’s parents *prior* to the investigation being commenced, which they argued did not fall under this clause. The Respondent did however agree to disclose

any documentation if the relevant consents were obtained from third parties. However consent was not obtained in respect of all of the documents and they were thus withheld from the Claimant.

3. The High Court dismissed the claim and the Claimant appealed to the Court of Appeal. One of the Claimant's arguments was that the effect of the implied term of trust and confidence was that she should be able to see all of the documents. Whilst permission was not given on this ground, Lord Justice Underhill and Lord Justice Singh made some interesting obiter comments which could provide support for the paving of the way for implying a term that employers should conduct disciplinary procedures fairly.
4. Lord Justice Underhill referred to the case of Chakrabarty v Ipswich Hospital NHS Trust [2014] EWHC 2735 as being authority for the proposition that an implied term to act fairly in the context of disciplinary proceedings could be "*readily implied*" into the employment contract [paragraph 35]. In that case, a Consultant Cardiologist sought to restrain his employer from referring his case to a capability hearing panel on the basis that there had been no assessment of the prospects of success of remediation in the case by the National Clinical Assessment Service. It was argued on behalf of the claimant that there was a free-standing, discrete implied term of fairness in an employment contract. The High Court disagreed, but went on to say that "*where the authorities contemplate questions of fairness, they do so in the context of the implied term of trust and confidence, or on a narrower basis by reference to an implied term that disciplinary processes will be conducted fairly, without unjustified delay*".
5. Lord Justice Singh cited the case of North West Anglia NHS Trust v Gregg [2019] EWCA Civ 387 in which it was held that there was no free-standing obligation to act fairly which is separate from the term of trust and confidence. However, he went on to say that he was not persuaded that the only way in which procedural fairness in a disciplinary process could be implied was through the implied term of trust and confidence. His concluding comments clearly left open the door for the further development of such an implied term:

I would prefer to leave this important issue of principle open for a future case, in which it may be necessary to decide the point, but it does not appear to me that there would be a legal impediment to such an implied term. As Coulson LJ noted in Gregg, at para. 97, the law has already taken the step of introducing some concepts of public law into the employment contract, so that the employer's decision-making process in a case such as Braganza v BP Shipping Ltd [2015] UKSC 17; [2015] ICR 449 had to be reasonable in the Wednesbury sense: Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948]

1 KB 223. In my view, if the law were to imply a term into the contract of employment that disciplinary processes must be conducted fairly, that would be a short step which builds on Braganza.

Commentary

6. The Court of Appeal have clearly paved the way for the development of an implied term that employers must act fairly in the context of disciplinary proceedings, which is a significant step given that as the law stands, an employee faces a relatively high hurdle in showing that there has been a breach of the implied term of trust and confidence. This could lead to more successful cases in which employees resign during a disciplinary procedure on the basis that the employer has not followed a fair procedure, and thus employers should be alive to the risk that errors in a disciplinary procedure which may not appear to be serious enough to breach the implied term of trust and confidence could nonetheless land them in hot water.

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