

# Injunction to prevent a breach of mutual trust and confidence: *Smo v Hywel Dda University Health Board* [2020] EWHC 727 (QB)

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## Summary

1. The Court found in favour of the Claimant, a Consultant Surgeon, to restrain the Defendant from continuing a working relationships investigation into his alleged conduct, competence or behaviour, whilst carrying out disciplinary proceedings in parallel. The Defendant's breached a duty of mutual trust it owed to the Claimant when they decided to embark on a working relationships investigation which was not decided through the exercise of a discretionary power expressly or impliedly conferred on it by the Claimant's contract of employment.

## Issues

2. The issues were as follows:
  - (a) *The construction of the Claimant's contract of employment – Did the express terms of the contract require the Defendant to investigate the matters which are subject of the working relationship investigation under the Upholding Professional Standards in Wales ("UPSW") rather than the Defendant's parallel procedure?*
  - (b) *Breach of mutual trust and confidence – the decision to embark on the working relationships investigation;*
  - (c) *Interim relief to restrain the continuation of the working relationships investigation.*

## Decision (Linden J)

### *Construction of the Claimant's contract of employment*

3. The relevant provision for present purpose was clause 9.2 in the contract of employment, rather than paragraph 189 of the Medical and Dental Staff (Wales) Handbook. In the event of any conflict between the terms of the host contract and terms which it incorporates, the former will prevail, see *Sabah Flour and Feedmills Sdn Bhd v Comfez Ltd* [1998] 2 Lloyds Rep 18 CA.
4. The working relationships investigation related to issues of conduct, competence and behaviour. These issues clearly overlapped with the issues in the UPSW proceedings, and in particular, where they overlapped, they were closely intertwined.
5. The key point was that the relevant contractual provisions did not intend that the employer would prejudice the outcome of the process of addressing, handling issues or concerns in order to decide whether to follow the UPSW. What the Defendant could not do, is continue to accuse the Claimant of serious misconduct under UPSW on the basis that he is at fault whilst, at the same time, sidestepping the procedural safeguards under UPSW by hiving off one of the aspects of the case which continues to be investigated under the Procedure. This is particularly so, given that if the parallel process leads to the dismissal of the practitioner, they will be denied the opportunity to address the allegations against them and to be vindicated.

#### *Breach of Mutual Trust and Confidence*

6. The commencement of the working relationships investigation was not decided upon through the exercise of a discretionary power expressly or impliedly conferred on the Defendant by the Claimant's contract of employment. The Defendant simply decided on a particular course of action. Therefore, the Defendant had not acted rationally or with reasonable or proper cause, particularly when the impact of its approach is calculated or likely to destroy or seriously damage the relationship of confidence and trust between employee and employer. It was a breach of mutual trust and confidence for the Defendant to commence a working relationships investigation in the circumstances in which it did so.

#### *Relief*

7. The Claimant was granted an injunction to restrain the continuation of the working relationships investigation. The Order prevents the investigation of the issues about the Claimant's working relationships by the Defendant other than in the course of current UPSW proceedings. However, it will allow the Defendant to review the position at the end of those proceedings.

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