Maintaining High Professional Standards for Doctors and Dentists in The Modern NHS – Is it Apt for Contractual Incorporation?

The application of the Framework in Practice. *Lakshmi v The Mid Cheshire Hospitals NHS Trust* [2008] IRLR 596.

Since it implementation in June 2005 the High Court of England and Wales has considered the application of the framework; Maintaining High Professional Standards in the NHS ("MHPS"), for disciplinary and capability matters concerning doctors and dentists in the NHS, on at least 8 occasions.

In the early cases the Court considered the application of existing disciplinary procedure under Health Circular Disciplinary Procedures for Hospital and Community Dental Staff HC (90)9 ("HC(90)9"). In doing so it also considered some aspects of MHPS.

In ***Mezey v South West London and St Georges Mental Health NHS Trust*** **(No1) (2 parts) [2007] IRLR 237** the Court and the Court of Appeal (**[2007] IRLR 244**) considered how suspension, known as exclusion, was to be approached in circumstances where the Trust's disciplinary procedure, which made provision for suspension, was not contractually incorporated. The Trust approached the matter applying HC (90)9. The Court held that it had power to restrain suspension. It also held that while the Trust had a power to suspend it was contractually obliged to adopt and use no less favourable terms than those in MHPS when approaching suspension.

In ***Gryf-Lowczowski v Hinchingbrooke Healthcare NHS Trust*** **[2006] ICR 425** the Court considered whether on the particular terms of the consultants contract HC(90)9 was displaced by the implementation of MHPS. Mr Justice Gray concluded that on a proper construction of the term of the contract it did not incorporate replacement policies that the Trust might from time to time implement. Mr Justice Gray also concluded that there had been no variation of the contract to incorporate MHPS in place of HC(90)9. The contractual

effect of HC(90)9 was also considered on an interim application for an injunction in ***Kircher v Hillingdon Primary Care Trust*** **[2006] Lloyd's Med Rep 215.** Mr Justice Foskett (as he now is) concluded that it formed part of the contract of employment and that as a result it was arguable that the PCT could not terminate the contract without going through the process prescribed by HC(90) 9. He granted an injunction restraining until trial the purported dismissal of the consultant psychiatrist. The dismissal had been imposed on grounds that the working relationship had broken down.

The approach that HC(90)9 had been contractually incorporated as part of the consultants contracts of employment stems from Regulation 3 of the National Health Service (Remuneration and Conditions of Service) Regulations 1991 (SI 1991 No. 481) which imposed the HC(90)9 procedure on Trusts and from the comments of Lord Steyn in ***Skidmore -v- Dartford & Gravesham NHS Trust*** **(2003) IRLR 445 (**House of Lords) at paragraph 13:-

> "*The terms contained in HC(90)9 were imposed upon doctors by reg. 3 of the National Health Service (Remuneration and Conditions of Service) Regulations 1991 (SI 1991/481). It is now part of the employment contract of Mr. Skidmore and of the Employment Contracts of almost all NHS hospital doctors*".

Following ***Gryf-Lowczowski*** and ***Kircher*** arguments raged as to whether HC(90)9 survived the implementation of MHPS, that circular having been withdrawn by a direction of the Secretary of State for Health on 11 February 2005 and the NHS Trusts having been directed to implement and apply MHPS by 1 June 2005. In ***Nageh v Southend University Hospital*** **[2007] EWHC 3375** the Trust successfully argued that it was to be construed as having employed Dr Nageh, a consultant cardiologist on a consultant's contract which incorporated MHPS rather than HC(90)9 because to do otherwise would have been outside the power of

the Trust and so ultra vires. Dr Nageh was employed on 1 August 2005 after the Trust should have implemented MHPS. However, its internal policy still referred to HC(90)9 applying leading Dr Nageh to argue that she remained contractually entitled to the procedure under HC(90)9. Despite that reference Mrs Justice Swift held that the Trust could not act otherwise than in accordance with MHPS and, given that it was an interim application, it was likely that Dr Nageh would fail at trial in her assertions that her contract continued to incorporate HC(90)9. At a permission hearing in an appeal by Dr Nageth to the Court of Appeal, doubt about the finding was expressed by Lord Justice Buxton. However the appeal was compromised.

Subsequently to 1 June 2005 most if not all Trusts altered the disciplinary policies that applied to medical staff to apply MHPS in place of HC(90)9. Most seem to have done so by agreeing the application of MHPS to all doctors' contracts through the Local Negotiating Committee, made up of medical staff and Trust representatives. That was the case in ***Lakshmi v Mid Cheshire Hospitals NHS Trust*** **[2008] IRLR 956**.

Dr Lakshmi, a consultant physician, was found by the Trust to have falsely completed at least 46 Cremation Act forms asserting that she had seen and examined the bodies of the deceased when she had not done so. There was also evidence that she had falsely completed some entries that she had spoken to the treating doctor when she had in fact not done so. She was made subject of an internal disciplinary procedure under MHPS. There was no issue that MHPS applied. However, an issue arose as to whether it had been contractually incorporated and if so what remedy Dr Lakshmi was entitled to if there had been a breach of the procedure, in not adjourning the internal procedure to await the outcome of a police investigation into the same matter.

The Trust's version of MHPS contained a clause (3.7) which provided that "*Where an employer's investigation establishes a suspected criminal action in the UK or abroad, this must be reported to the police. The trust investigation should only proceed in respect of those aspects of the case which are not directly related to the police investigation underway. The*

employer must consult the police to establish whether an investigation into any other matters would impede their investigation. In cases of fraud, the Counter Fraud & Security Management Service must be contacted."

Initially and after some investigation[1], as a consequence of the police investigation, the internal investigation and disciplinary proceedings were not pursued. They were stayed or put on hold. However, in June 2007 when the matter had been investigated by the police and they had referred their findings to the CPS, the Trust decided that in light of the delay it should in fact pursue the investigation and the disciplinary proceedings. It informed both the Police and Dr Lakshmi that it would do so. The Police did not object to the Trust continuing its investigation but did object to the matter being heard by a disciplinary tribunal. Dr Lakshmi refused to answer questions put to her in interview. The Judge found that there was in fact no objective reason for her to maintain her silence. In November 2007 Dr Lakshmi was informed that the matter would be put before a disciplinary tribunal. She objected and threatened an injunction. However, she did not seek one. She asked for the disciplinary hearing to be adjourned to await the outcome of the CPS's decision. She referred to Clause 3.7. The Police also protested and asked for the hearing to be adjourned to await the decision of the CPS. On 15 November 2007 the disciplinary tribunal rejected the request for an adjournment and proceeded to consider the matter. Dr Lakshmi took a limited part in the hearing through her representative. She was found guilty of the conduct alleged and dismissed. In early December 2007 the police wrote to Dr Lakshmi informing her that the CPS had decided not to prosecute her in respect of the matters.

The Judge, deputy high court judge Simeon Maskrey QC, found that there was no objectively good reason for the Trust to refuse to adjourn the proceedings for a short period to await the decision of the CPS.

Having been dismissed Dr Lakshmi issued proceedings against the Trust. She sought declarations that the disciplinary hearing was a nullity; that her dismissal was a nullity; that she remained

[1] As a result of which the investigation was almost complete. All that was missing was an account from Dr Lakshmi and 2 other doctors who were the subject of the investigation.

employed by the Trust; and that if any disciplinary proceedings were to be continued they must be in accordance with the disciplinary procedures specified in the contract of employment. In addition she sought specific performance of her contract and an injunction enjoining the Trust from pursuing any disciplinary proceedings otherwise than accordance with the disciplinary procedures. Dr Lakshmi also sought damages for breach of contract.

In turn the Trust asserted that the disciplinary procedure did not give rise to any contractual rights and obligations; alternatively, that the particular paragraphs relied on by Dr Lakshmi were not apt for incorporation as contractual terms; the Trust had complied with the disciplinary procedure and if there were any contractual breaches of procedure, they did not render the dismissal a nullity. It contended that as a matter of discretion, the Court should not grant any declarations or make any order so as to continue the Dr Lakshmi's employment. It also contended that any damages should be limited to the wages that Dr Lakshmi would have earned in any period of adjournment which should have been at most 6 weeks.

Despite the apparent acceptance in the earlier cases that the terms of MHPS would or could be contractually incorporated the Judge accepted the argument of the Trust, relying on ***Alexander v. Standard Telephones and Cables Ltd (No 2)*** **[1991] IRLR 286,** that the terms were not apt for incorporation. He did so despite a note on the Trust's version of MHPS that it constituted a change of the Terms and Conditions of Service. The principles set out by **Hobhouse J** in ***Alexander*** (at pages 291-2) are as follows

> *The argument between the parties therefore primarily focused upon the character of the relevant provisions of the respective collective agreements.*
>
> *…..even express general words of incorporation do not remove the need to consider whether all the contents of the incorporated document are apt to be terms of the actual contract of employment (National Coal Board v National Union of Mineworkers [1986] IRLR 439).*
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> *Therefore, even in a case which involved wide express words of incorporation the court considered it necessary to look at the content and character of the relevant parts of the collective agreement in order to decide whether or not they were incorporated into the individual contracts of employment.*

The principles to be applied can therefore be summarised. The relevant contract is that between the individual employee and his employer; it is the contractual intention of those two parties which must be ascertained. In so far as that intention is to be found in a written document, that document must be construed on ordinary contractual principles. In so far as there is no such document or that document is not complete or conclusive, their contractual intention has to be ascertained by inference from the other available material including collective agreements. The fact that another document is not itself contractual does not prevent it from being incorporated into the contract if that intention is shown as between the employer and the individual employee. Where a document is expressly incorporated by general words it is still necessary to consider, in conjunction with the words of incorporation, whether any particular part of that document is apt to be a term of the contract; if it is inapt, the correct construction of the contract may be that it is not a term of the contract. Where it is not a case of express incorporation, but a matter of inferring the contractual intent, the character of the document and the relevant part of it and whether it is apt to form part of the individual contract is central to the decision whether or not the inference should be drawn.

The Trust contended that MHPS had not been incorporated in the contract of employment, it was not apt for incorporation and that it was guidance. It also contended that the language of the terms was consistent with it being guidance and that to construe the terms as contractual obligations would give rise to absurd results. For example a strict application of clause 3.7 would mean that in every case referred to the Police there could be no internal investigation and so, applying a different provision in respect of suspension there could be no proper consideration by the Trust of whether there was a case to answer and so a basis for suspension under MHPS.

However, despite having found that the MHPS was not apt for contractual incorporation the Judge went on to accept that the implied term of trust and confidence required the Trust to follow its published policy unless there was good reason for it to depart from it. He did so applying the decision of the Court of Appeal in ***Deadman v Bristol City Council*** **[2007] IRLR 888.** The Judge found that there was a free standing implied term of the contract necessary for the contract of service to be effective, that the Trust would comply with its version of MHPS unless it could establish good reason not to do so. In the alternative he

found that the Trust only complied with its obligation to act in good faith if it complied with its version of MHPS absent a good reason not to do so.

In ***Deadman*** the Court of Appeal (Moore Bick LJ) considered that the employers were under an implied term of trust and confidence and a general duty to take reasonable care to avoid causing physical or mental harm to employee; and that the effect of published procedures should be considered in light of these obligations. It concluded that it will *usually* be a term of the contract of employment that the procedures will be followed unless and until withdrawn *by agreement*.

This is a somewhat surprising approach to the application and effect of the implied term of trust and confidence, which the House of Lords held was a term that "*The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"* see ***Malik v BCCI*** **[1998] AC 20.** The important point is that a breach does not arise and the term is not engaged (in the sense of breach) unless the conduct is calculated and likely to destroy or seriously damage the employment relationship. As the Trust contended in ***Lakshmi*** it should follow that the application of the implied term (or for that matter the general duty of care) did not require that all provisions of such a policy were observed and followed. To impose such a requirement would mean that all failures to follow the policy (which is not in fact contractually incorporated and is guidance) potentially, in the absence of good reason for the departure, amount to breaches of contract. Such an approach significantly extends the scope of the implied term such that minor failures which would not breach the implied term of trust and confidence become a breach of contract. Rather the Trust argued that the approach should be that a failure or failures to observe or follow a published policy may individually or cumulatively, if serious enough, breach the implied term but that there should be no actual requirement to follow the policy.

However, the effect of the decisions in ***Deadman*** and ***Lakshmi*** is that it is an implied term of the contracts of employment of consultants and other medical staff that an NHS Trust should follow MHPS unless there is a good reason to depart from it. What is a good reason will depend on the

circumstances. It might be that it is simply not possible to follow MHPS. It might be that in particular circumstances it is in fact fairer to follow some other course than that prescribed MHPS. Each reason should be considered in their particular circumstances.

Having held that there was no objectively good reason for the Trust to refuse to adjourn the proceedings for a short period to await the decision of the CPS the Judge went on to find that there was no good reason to depart from MHPS and that the Trust acted in breach of contract in refusing the adjournment.

In addition and more generally the Judge also considered the circumstances in which an employee will be granted specific performance of an employment contract and a declaration that a decision to dismiss is of no effect. He also considered whether a breach in the disciplinary procedure fell within the ***Johnson***[2] exclusion zone so that there was no damage and what the contractual measure of damages should be for a breach of the above implied term of contract arising from a failure to properly follow the disciplinary procedure.

He held that specific performance of an employment contract and a declaration that a decision to dismiss is of no effect will only be granted where the court can find that a basis of mutual trust and confidence has survived between the employer and employee and that in any event the grant of such relief is subject to usual principles concerning the grant of equitable and discretionary relief. He held that if the mutual trust and confidence has not survived no such relief will be granted. Further the relief will not be granted where there is good reason not to do so and the Claimant does not come to Court with clean hands, ***Otto Chan v Barts & the London NHS Trust*** **[2007] EWHC 2914 (QB)**, Stanley Burnton J at paragraphs 158-159. The conduct of Dr Lakshmi was such that mutual trust and confidence had not survived and she did not come to court with clean hands because she did not disclose her guilt in respect of the allegation on her application and actively resisted the disclosure of police interviews in which she had admitted her guilt. She was accordingly not granted any declaratory relief.

[2] ***Johnson v Unisys Ltd*** **[2003] AC 518**

The Judge also held that the breach of the disciplinary procedure was an antecedent breach which did not fall within the ***Johnson*** exclusion zone. The exclusion zone applies where there has been a "*failure to act fairly in the steps leading to dismissal but* [that failure does] *not of itself cause the employee financial loss"*, rather *the loss* [arises] *when the employee was dismissed, and it* [arises] *by reason of the dismissal* such that no loss is recoverable from the breach, see ***McCabe v Cornwall CC* [2004] 3 All ER 991**. The Judge also held that the correct measure of damages for a free standing breach of the disciplinary process were damages for salary and benefits lost in any further period that the proceedings would have taken had the procedure been properly followed and the hearing adjourned. In this case he awarded a month's wages, which were in fact extinguished by the Trust's counterclaim for overpayment of wages arising from a failure by Dr Lakshmi to disclose her private practice income (which would have resulted in a reduction in pay under the National terms and conditions to which she was subject).

It is respectfully suggested that the further conclusion of the Judge that no further damages for wrongful dismissal, being the damages to represent what would have been paid to lawfully terminate the contract of employment, were recoverable because they fell within the ***Johnson*** exclusion zone was wrong and was made in error (paragraph 44). Rather the Judge should have concluded that no further damages could be recovered or awarded because on the resumed disciplinary hearing Dr Lakshmi would have been lawfully dismissed for gross misconduct in falsely completing the Cremation Act forms, applying ***Gunton v London Borough of Richmond and Thames* [1980] IRLR 321**.

Conclusion

In the context of the application of MHPS, the most significant finding in and effect of ***Lakshmi*** **(**and ***Deadman)*** is that it is an implied term of the contracts of employment of consultants and other medical staff that an NHS Trust should follow MHPS unless there is a

good reason to depart from it. As above what is a good reason will depend on the circumstances.

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